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"Criminal Law and Lawyers in the 21st Century"

by

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CRIMINAL LAW AND LAWYERS IN THE TWENTY FIRST CENTURY

The Honourable Justice Dean Mildren

I

Throughout history[1], the main catalysts of societal change have been the bi-products of technological advances. In this century, the harnessing of electricity, the internal combustion engine, and the splitting of the atom are each examples of scientific discoveries which contributed towards changing the world forever. Such discoveries do not merely alter the way people live, but have massive effects upon whole communities. People who, a century ago, lived in rural isolation, never travelling more than fifty miles[2] in their whole lives, flocked to the cities to enjoy higher standards of living. World travel has become as common place as a walk down the street. And just as technology has changed the way we live and work in this century, so will it in the next – probably even more so.

What will this mean for criminal law and lawyers? Of one thing we can be certain. There will still be criminal laws and people who break them. But what sort of criminal

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[1] There is considerable debate amongst academics about the utility of footnotes. There are those who argue that it spoils reading the text. Others say that the only really useful information is to be found therein. Personally I like to read other people's footnotes to see if anything I have written has been referred to. When this happens, it is personally very gratifying. As I do not wish to inflate anyone else's ego by referring to the works of other authors, unless they are friends of mine, I have decided to keep them to the bare minimum. For a useful analysis on the validity of footnotes generally, see *Some Notes on Footnotes*, Liz Fisher, (1997) 71 ALJ 245.

[2] i.e. 80 kilometres

laws can we expect to be broken? The twentieth century created a myriad of new crimes. Some were grand crimes – crimes against humanity, for example. Others were new kinds of so-called political crimes: international terrorism, hijacking of aircraft and ransoming hostages to get media coverage. Yet others are the product of new forms of old crimes on the grand scale, such as drug trafficking. Then there are crimes such as stealing electricity, stealing computerised information, unlawfully accessing computerised information, and unlawful trading in forbidden products[3]. What new crimes will the next century bring?

And what of the criminal justice system? Will we still have the presumption of innocence, proof beyond reasonable doubt, and the right to be defended by a lawyer? Will there even be lawyers at all?

It is a common place saying that no-one can see into the future. But, leaving aside highly improbable events, it is possible, by looking at past and present trends, to estimate what the future probably holds for us. What are these trends? First, I suggest technological advances in three main areas: the conquest of space, the creation of artificial intelligence, and in the harnessing of energy. Secondly, I suggest that there will be two main political and social movements. On the one hand, there will be strong growth towards international law and law enforcement. At the same time, there will be a balancing movement towards more localised self-determination. The result will be a

[3] Such as pornographic videos, plutonium, certain types of weapons, etc

weakening of the powers of the sovereign nation state, the strengthening of provincial and state governments and the growth of an international world order based upon the rule of law. Thirdly, I suggest that the average life span of the human species will lengthen; there will be more criminal activity than ever before; there will be new crimes identified and legislated for; the struggle between the criminal elements and organised crime on the one hand, and the state as the protector of society on the other, will reach a critical stage. The state, fortunately, will win, but at a cost. The price will be that of individual liberty.

In the early part of the 20th Century, the new Republic of Australia will admit one, and probably more, new States. One of these new States I will call Amberland. It is through the events I foresee occurring in Amberland that this thesis will be revealed.

II

By the second decade, the population of Amberland had become so lawless as to be almost out of control. Besieged by the drug barons, property crimes and crimes against the person had reached such proportions that the Government of Amberland was at its wit's end. It had tried everything. At first it flirted with a new Sentencing Act, designed primarily to stiffen the Judges' backbones and lengthen prison sentences. When this was seen to be too soft, it introduced mandatory minimum gaol sentences and increased the size of the police force. Then it moved towards Minnesota

minimum and maximum sentencing grids, abolished the right of silence, and created presumptions of guilt which the accused could nevertheless rebut. None of this worked. The gaols were full to overflowing. Following trends in Norway and Denmark, the government legislated to provide that prisoners could serve their sentences when a cell became available. By the second decade, prisoners were having to wait up to five years before they could do their time. The property owners and respectable citizens whom the state promised to protect, were outraged, and demanded the reintroduction of the death penalty. But this was impossible, having been outlawed by the new International Government section of the United Nations, which acted as a de facto world government. The *Amberland News*, the State's electronic newspaper published daily on the Internet, kept the pressure up with more and more heavily slanted articles about how this person or that, who had committed this terrible crime or that, could not serve this sentence or that. What was the government to do? There were rumours going around the capital, Origin, that the *Amberland News* was about to publish a critical editorial. By a most fortunate stroke of luck, the answer came suddenly in a letter to the Editor: transportation to the Moon!

The idea was put immediately into action. The Government asked its Economists if it could be done at a reasonable cost. "Yes", they replied. "It will be cheaper than new prisons which the State cannot afford if it wishes to balance the budget. Private gaols could be tried again, but there are still too many hidden costs and privatisation will not, through competition policy, reduce costs to a reasonable level unless there are

cuts on staff, food and correctional officers." The selling point was that there would be no capital expenditure involved. After water had been discovered on the Moon in 1996, the United States had established an experimental military base there. No longer needed, it was available for lease, and the price was cheap. There was a Russian owned rocket launching facility not far from Origin. A package deal at tourist rates was on offer. If there were to be free settlers as well, not only could the travel costs be reduced, but there was the potential of a new tourist industry, mineral exploration, and who knows what other exciting opportunities.

The Government consulted its Health Department, its Education Department, its Tourism Ministry, its Police and Correctional Services Department, its Department of Mines and Energy and even its Department of First Australians. None saw any objection, until, at the last minute, a Ministerial adviser who happened to be at the Cabinet meeting called to approve the scheme, asked a very awkward question: "What do the lawyers think?" This was a *very* awkward question, because no-one usually asked *them* to *think* about anything – at least not *before* it happened. "Why do we need to ask *them?*", chorused the entire Cabinet. "Because," said the adviser, "what law is to operate there?"

The Attorney-General, who was not himself a lawyer, promised to get advice. At the next Cabinet meeting, he informed all present, that the law of Amberland would apply. "Let an Amberlander go where he will, he will bring with him so much of the

law of Amberland as is appropriate to the nature of his new condition," he said. "But," he added, in almost a whisper, we shall need to send, er, – a judge." "A judge!" roared Cabinet in disbelief. "Yes," he replied meekly, "the new colony will have to have some sort of legal system."

The First Fleet from Amberland arrived at Moon Base One in the year 2016, under the command of Governor Strop, a fine man who had served in the Army and had formerly been the Keeper of the Origin Gaol. On the fleet of 11 ships, were 2000 convicts, both men and women, 500 prison guards, 1000 civil servants who had been made redundant, 200 free settlers and the Judge-Advocate, Mr. Horace Meant. But there were no lawyers, except for a few who were prisoners, and Judge Meant was not having any of those appear before him. At first, His Honour sat without a jury, and tried all cases summarily. This was not a problem for the prisoners, who were charged with prison offences, because they could get advice from the prisoner-lawyers, and knew how to handle themselves. But then, one day, a settler was charged with a serious crime, and demanded a lawyer and the right to trial by jury.

At first, the Government used to fly the Prosecutors and Legal Aid Lawyers to Moon Base One whenever a free citizen was tried, but this was terribly expensive. Also, the lawyers had trouble adapting to space travel and the reduced gravity of the moon. Jumping up to object to leading questions by the prosecutor was particularly hazardous, as one poor chap discovered when he hit his head on the ceiling. Sudden

movement also had disastrous effects upon wigs and gowns. Initially, counsel found it necessary to have a chin strap affixed to their wigs and belts to hold their gowns in place. Eventually a local Rule of Court was passed which replaced the wig with a bonnet of the Judge's own design, lycra body suits replaced the robes, and specially lead filled boots were worn to keep one's feet on the ground. Senior counsel, now called PCs[4], were allowed silk versions of these new accoutrements. Of course, there was a great deal of kudos in being admitted to the Bar of Moon Base One, and soon it became fashionable in Origin, as a means of showing off how clever you were, for Moon Base One Practitioners to wear their Moon Base Gear at home. Not wishing to be outdone, the new fashion soon spread to the whole profession.

Eventually, the Economic Rationalists saw the folly in all of this and suggested that trials could be held by video conferencing. Not only did this avoid the travelling expenses involved, but made more room on the Russian rockets for tourists, geologists and miners. Special court rooms were designed so that three dimensional hollogrammatical images of the lawyers and the expert witnesses appeared in Judge Meant's Court. Witness interview rooms were similarly equipped so that instructions could be taken both at the courthouse and at the gaol.

[4] For "Presidential Counsel"

But even these modifications proved expensive, and once again, the Economists were asked to find ways of cutting costs. They found the answer in the new technology of the age.

III

As early as the first decade of the 21st Century, an amazing discovery had revolutionised society. A computer hacker, working from his home in down-town Origin, whilst attempting to enter NASA'S super-computer in Maryland, Virginia, got a crossed telephone connection and ended up with a scrambled signal which penetrated the inner secrets of the giant computers kept by the University of California's Medical School and the Georgian Government's social security system. The end result was that the hacker found that the secret to the aging process lay in a little known gland of the human brain which, with clock-like precision, triggered sub-atomic particles to pass into the blood stream. These particles controlled the aging process. From this discovery, it was not long before the Swiss devised a mechanism which could slow, and even stop, the gland from functioning. Within months thereafter, Japanese and Taiwanese industrialists had developed a cheap miniaturised device, which, when worn like a wrist watch, effectively stopped the aging process completely.

The discovery of the SAPI[5], as this device came to be called, caused consternation and confusion around the world. The idea of everyone virtually living forever was greeted at first with great joy, but soon the doubting Thomas element amongst the Economic Rationalists, lead by the Governor of the World Bank, started to point out the difficulties. Old Malthian theories were trotted out and elaborated upon in the electronic media. The people began to worry that they may be denied the right to eternal life. Some even drew unfortunate analogies with the great euthanasia debate that happened in Australia at the end of the last century. Religious leaders were particularly upset. There were riots and threats of civil war all over the world as governments pondered what to do, and the people demanded the right to live forever.

The problem was far too big for any national government to handle. It needed an international law that would be acceptable to everybody. And so, the first Great Law Of Sapi came to be passed by the United Nations, under which:

1. the Sapi would be mass-produced and distributed free to all.
2. each Sapi would have an in-built timer which would switch the Sapi off at a predetermined time, called *zero-hour*.
3. each Sapi would have a maximum and minimum life span. The maximum was 500 years, the minimum 50 years. Initially everyone would be given 200 years, called *mean time*.

[5] Stops Aging Process Indefinitely

4. courts could punish people convicted of offences by reducing the years available. In serious cases, the penalty could go down to the minimum time. In very serious cases, the penalty could wipe out all time.

5. on the other hand it was possible to acquire extra time up to the maximum time. This could be acquired by one of three ways:

   (a) by the purchase of units of time (called *tunits*) from the World Bank; these could also be sold and mortgaged on the open market.

   (b) as a reward for good works, bestowed by Governments; and

   (c) illegally.

No sooner had the Great Law of Sapi been introduced than Organised Crime began to see the enormous profits of a black market trade in tunits. Fake copy Sapis made in Hong Kong and Taiwan flooded the market, but these were virtually useless. The real profits came to Organised Crime from the myriad of computer hackers they employed in backyard factories in Third World Countries.

New laws, of course, were needed to control this illicit trade. It was an offence to possess a fake copy Sapi, but this carried only a minor penalty. Possession of illegal

tunits was a major crime. Depending on the number of tunits you got caught with, the penalties could be very harsh – up to 5 tunits you lost a minimum of 50 tunits from your Sapi; more at the Judge's discretion. Between 5 and 20 tunits, the minimum was 100 tunits; and over 20 tunits you were deemed to be a commercial trader, and faced a minimum of 200 tunits. These laws were unpopular. Everyone wanted to extend their lives, and many were prepared to take the risk of getting caught. The profits to Organised Crime were huge, and they could afford to pay their workers, suppliers, and sellers well. By the second decade of the 21st century, 80% of Amberland's prison population was made up of persons convicted of illegal possession of or trading illegally in tunits. It was this phenomenon which had lead to the huge expansion of the prison population, which in turn led to the colony on Moon Base One. And it was this phenomenon which provided the inspiration for another brilliant idea.

IV

The concept was simple enough. Instead of expensive trials, there could be a demerit points system for simple offences. This could all be computerised. Each person on Moon Base One would be required to check his E-mail daily. A summons could be served by E-mail. The defendant could plead guilty by simply entering web-site pgty://www.amb.crt.orgn/-tunit/, and pressing "G". All it needed then was some software to work out the penalty. The defendant could enter his personal details, which could be cross-referenced to his Police File on the data base, and his excuse

(which he could choose by selecting from typical excuses which could be pre-programmed) and the computer would decide the penalty (also pre-programmed depending on which excuse combination he chose and his list of priors).The computer would then impose a penalty from a range of say, between 0.10 to 20 tunits, as well as a fine. The defendant would then hook up his Sapi to the computer, and the transaction would be completed.[6]

At first, the idea was popular, but soon the hackers on Moon Base One worked out which combination of excuses with what combination of priors would warrant the lowest penalty, and when it was worthwhile to risk the double penalties of a contested hearing. Before long, the court lists on Moon Base One were out of control. Of course, Judge Meant asked for an additional judge to help out, but the Economic Rationalists said that this would be too expensive, and another solution had to be found. Clearly something had to be done to clear the lists.

First, an Ordinance was passed by the Governor of Amberland (who had the sole legislative powers relating to Moon Base One) requiring the Judge to deliver all decisions he had reserved upon within three months. If any decision was not given in that time, the Judge's salary would be stopped until he caught up. This worked for a

[6] There were refinements to ensure compliance with the system. Failure to plead guilty resulted in double penalties. E-mail not answered was deemed to be served, and resulted in a stiff default penalty. Failure to hook up your Sapi to the computer was a grave offence.

while, but soon there were a few unscrupulous lawyers who realised how easy it would be to put pressure on the Judge to enter not guilty verdicts, and thereby not have to give reasons, if the case was dragged out by arguing every point of law and of fact to absurdity. The Judge responded with new Rules of Court requiring all submissions to be in writing, and limiting oral argument to 30 minutes for PCs and 20 minutes for juniors. But still the cases built up and the lawyers had a wonderful time. Once again the Economic Rationalists turned to technology for the solution.

Now, by this time, although there was still no such thing as a computer which could think and reason like a human brain[7], computer programming had reached a stage where an enormous number of relatively straightforward decisions could be computer predicted. Indeed, Butterworths and The Law Book Company both sold excellent programs relating to evidentiary problems (as well as a whole host of other legal problems). All it needed was a certain minimum amount of skill to input the nature of the problem with reasonable accuracy and the computer would give you a probability estimate of the likely outcome. For example, if you wanted to know whether a confession would be admissible, being involuntary, you would hook up to the Evidence program, click twice on the "confession" icon, click once on the "voluntariness" icon, and then feed the information which the screen asks you for (e.g.: "Did the police bash the defendant to get him to confess? Y/N?") Once all the information was supplied you pressed Control F7 and you would get an answer like

[7] Computer predictions at the time were that this would not occur before 13th June, 2416.

"Inadmissible to a degree of probability 65% to 80%." All it need was a little more refinement, ie to add a few hundred more boxes to the program and to look for ways to skip from Q6 to Q97 in order to save time, etc. The Economic Rationalists realised that with the help of a few experts in the law of evidence, some well-trained programmers ought to have little trouble in devising a more reliable version. One of the Cabinet Ministers suggested approaching the Law Reform Commission for its ideas first, but when it was pointed out to him that this was a *serious* program of law reform, he knew how silly this would be, and instead the job was given to the wife of another Minister's cousin, who was clearly the best qualified person for the job. Indeed, she was so efficient that the task was completed within 6 months.

Of course, the new Evidence Program was designed with several levels of capability, depending upon how many bytes the user's computer had. The Super De Lux model required a very expensive computer, but Judge Meant already had access to one of these on Moon Base One, on which he kept his entire law library. Next down the line was the Silk Program, which could be made available to PC's pc's only. Then there was a Senior Junior program and finally the Novice Program. Similar programs, with appropriate levels of difficulty, were quickly devised to deal with problems on Criminal Law, Criminal Procedure, Torts, Contracts, Property Law and Equity. This saved enormous court time. Counsel could plan their cross-examinations in advance, and if in doubt, ask the computer which of their questions were likely to be objectionable. Voir dires were reduced to almost nothing. Pleas of guilty grew

dramatically. Of course, the Judge's computer was more powerful, so it was still possible for a Novice's program to give a 55% to 65% probability of the evidence being excluded, whilst the judge's program said if was only 30% to 40%. To cut down on time even further, a law was passed enabling the judge to rely upon the Super De Lux computer's probability prediction as if it were 100%, and without him having to think at all, except where the probability range was within 45% to 55%[8] This worked well, except of course, there were still too many cases where the Judge was required to actually make a decision, and there was no satisfactory program for statutory interpretation. Before the end of the fourth decade, the judge was bogged down again and threatening to resign if he did not get some help.

V

Of course, the solution was self evident, even though it took the Economic Rationalists a long time to come up with the right answer. One day, the head of Treasury found an old copy of the Complete Works of Lewis Carroll in his attic. Thumbing through it, he found a chapter in a book called *Through The Looking Glass*, entitled, *Humpty Dumpty*. Wondering if this has anything to do with a place called Humpty Doo that he had once heard of, he started to read about how Humpty Dumpty had 364 unbirthdays every year. This puzzled him, at first, until he read this:

[8] The judge also had a discretion to think for himself in the ranges of 40% - 45% and 55% - 60%, but this was discouraged.

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

Suddenly the head of Treasury had a marvellous insight. Those terribly expensive lawyers and judges only exist because of words and what they mean. What if we defined exactly what every word meant? He hurried off to Parliamentary Counsel who told him about what Lord Atkin said in *Liversidge v Anderson*[9] and what Windeyer J said in *Cobiac v Liddy*[10]. "Anyway", he sniffed, "we've tried that. We've been giving words all sorts of peculiar meanings for years, and it only made things worse." "Ah, but have you tried defining *every* word in *every* Act and giving to each word only *one* meaning?", croaked the Treasurer.

Although Parliamentary Counsel expressed reservations about this idea, he was forced to concede it had not been tried before. And so it came to pass that a new Program

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[9] [1942] A.C. 206 @ 244, when his Lordship cited the above passage from *Through The Looking Glass* as the only authority to justify the construction that the words "If a man has" could mean "If a man thinks he has".

[10] (1968) 119 C.L.R. 257, @ 270: "... Parliaments can make the words they use bear whatever meaning they wish."

was developed, the "Statutory Interpretation" programs, which contained a dictionary of every word in the English language, with each word having but one meaning. Of course, this meant that a whole lot of new words had to be invented to cater for those words which had many different meanings, and Acts had to be drafted in the most prolix way to cover all of the possibilities that one word used to do for, but nevertheless, now there was almost 100% certainty of meaning every time. Of course, mistakes did happen, and every now and then the result was gibberish, and the judge had to think for himself again, but for a while the system worked pretty well until one day a most peculiar thing happened.

VI

It all began when the Attorney General was giving his second reading speech for a new Uniform Criminal Code Bill, which was being simultaneously introduced in all the State Parliaments as well as the Commonwealth Parliament. This Bill had been worked on by a committee for nearly fifty years and it had finally been accepted by Queensland, which did not like it very much. Because it had been started so long ago, when it was fashionable to use Plain English, several of the Parliamentarians who were not asleep at the time actually thought they understood what it meant. But on member of the opposition was troubled by the expression "past offence" which appeared four times in one section of the Bill. The Attorney General had also wondered about that, as it seemed to him to be a most peculiar notion, and so he had

the answer ready, which he had obtained from Parliamentary Counsel. The answer was very convoluted, and depended upon the application of the Interpretation Act, when read with the definitions of "past" and "offence" to be found in section 4 of the Bill, and in the context of the Bill read as a whole, after applying the *ejusdem generis* rule, the *noscitur a sociis* rule and the mischief rule. At the end of which, the Opposition member was none the wiser, if better informed.

When the Bill became law, it soon happened that an argument came up for decision as to what the expression meant. Counsel appeared for the DPP, the accused and the Society For The Victims Of Crime which had intervened, and all presented their views, none of which were, of course, the same. The sticking point was whether to apply the *ejusdem generis* rule or the *noscitur a sociis* rule, because nobody was quite sure of the difference. In the end, the problem was solved for everybody when someone suggested that the Court should consult the Minister's Second Reading Speech in *Hansard*. Now that sort of thing had been tried before, but it had never been any good, but this time, there it was on everyone's computer screens in blue and white!

Now, at the end of the case, the lawyers threw a party to celebrate how much fun they had had. They told stories about finding wonderful old books like Pearce and Geddes' *Statutory Interpretation*, 4th Edition, in its bright red cover in the bowels of the library, and looking up long forgotten cases like *Cooper Brookes (Wollongong) Pty*

Ltd v Commissioner of Taxation[11]. They regaled each other with accounts of how they had thumbed through everything from *Hale's Pleas of The Crown* to Smith and Hogan's *Criminal Law* looking for ideas. They joked about their computer searches on the Internet for similar cases and useful precedents. They lamented the passing of the good old days, when lawyers even knew a little Latin, when briefs were written on paper, and the authorised reports all had hard covers. As the party went on, they got drunker and started to abuse the Economic Rationalists for changing everything. Until someone said: "Let's fight back. Why don't *we* all become bean counters and take *them* over?"

VII

It remains but to briefly sketch the main events leading to the close of the 21st century. After the discovery of gold on Moon Base One, the population became swollen with thousands of miners, prospectors, merchants, accountants and others all wanting to make a quick buck. Judge Meant was unable to keep up with all the claim jumping cases. The settlers, angry and frustrated, held demonstrations and public rallies. They cried out for democracy and yelled out things like "No taxation without representation." There were daily stories of discontent in the local electronic newspaper. Efforts to put down the leaders of the dissidents by bringing charges against them solved nothing. New leaders appeared. They organised street marches

[11] (1981) 147 CLR 297

and waved placards. They had their own web site on the Net and sent millions of seditious letters by E-mail. Eventually they demanded the resignation of Governor Strop and Judge Meant, and when they refused to do so, put them on a Russian rocket ship and sent them home to Amberland in disgrace. The Amberland government held the usual public enquiry, promised the settlers a seat in the Parliament with no voting rights, appointed a new Governor who would be assisted by a Council Of Advice with 2 elected and 4 appointed members and suggested a program of gradually working to a local Legislative Council. So far as the profession is concerned, most of them became accountants, joined the super firms and then began swallowing up what was left of the small private legal firms and sole practitioners with offers they could not refuse. All that was left of the legal profession were a few government lawyers, the office of the DPP, the legal aid agencies, and a few barristers who practised in what was left of the criminal law. Of course there were few real trials. Police cameras were in all public places busily recording everything that ever happened or was ever said. The right to silence had gone. If the accused failed to confess, he bore the onus of proving his innocence beyond reasonable doubt. Organised Crime was still powerful, but mostly it was the small fish who were caught rather than the leaders. But things, no matter how bad they may appear to have become, were not hopeless, and at the turn of the century we see, for the first time in a hundred years, a criminal lawyer elected to the Amberland Parliament determined to make his mark...