

**PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES,**  
J.V. Roberts, L.J. Stalans, D. Indemaur and M. Hough (Oxford University Press: 2003)

Judges, Crown prosecutors, defence counsel, probation officers, and police officials face increased media attention and political rhetoric in all areas of their work, notably in the field of sentencing. It is therefore necessary that we understand the concept of “penal populism,” how it influences public opinion and, by parity of reasoning, how it is influenced by public opinion. Thankfully, we can look to a single research tool to assist us in our efforts to understand the forces that shape (and distort) public opinion: *Penal Populism and Public Opinion Lessons from Five Countries*<sup>1</sup> provides an in-depth, comprehensive, and compelling examination of the interplay between politicians and voters as it influences the selection of a fit and proper sentence.

The authors, distinguished scholars and researchers who command an impressive wealth of experience and knowledge in the areas of criminology, sentencing, and public opinion, have examined the interplay between sentencing reforms on the one hand, and political and public opinion on the other, in the United States, the United Kingdom, Canada, Australia, and New Zealand. In particular, attention is drawn to the trends that transcend national boundaries and that inform not only political debate, but sentencing and legislative views on sentence reform.

By way of summary, I note that chapter one defines “penal populism” and provides an overview of crime trends and sentencing patterns. Chapter two then provides assistance by underlining the current research on public knowledge and attitudes respecting crime and punishment. These two introductory chapters are followed by a discussion at chapters three and four of the policies affecting sentencing found in each of the five countries studied, with notable emphasis on mandatory sentencing and the theoretical perspectives at play. Subsequently, chapter five delves deeply into the heart of the matter by discussing the fashion by which the media attempt to shape public understandings of sentencing. The next five chapters may be summarized briefly by making reference to the study of the limits of penal populism, especially with regard to the ways in which juvenile sex offenders and drug offenders are sentenced, as opposed to the way in which their sanctions are described by the media and ultimately understood by the public.

I wish to draw particular attention to the discussion of the influence that the media has on the role of judging. For example, the authors suggest that “judges have become harsher [in sentencing] in response either to pressure from prosecutors or perhaps from judicial perception that society favors the imposition of harsher punishment.”<sup>2</sup> Later on, we read that “public misperceptions of crime trends are also important because they are related to public attitudes toward, and confidence in, the judiciary and the sentencing process.”<sup>3</sup> Further, the authors make plain that “it is not surprising that most people have quite negative perceptions of the individuals responsible for sentencing.”<sup>4</sup>

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<sup>1</sup> Julian V. Roberts *et al.*, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2003) [*Penal Populism*].

<sup>2</sup> *Ibid.* at 18.

<sup>3</sup> *Ibid.* at 22.

<sup>4</sup> *Ibid.* at 28.

In light of these remarks, and a host of others,<sup>5</sup> what may be said by a judge involved in the selection of sentences for about 50 percent of the working day? Are we totally immune to public opinion, informed or otherwise? Are we sensitive to it, but only to the extent that it is consonant with appropriate sentencing principles? In my view, the law compels us to be mindful of the community's view, but only to the extent that the community is prepared to be just and fair.

In support of this view, consider *R. v. Mafti*,<sup>6</sup> wherein Lamber J.A. remarked that trial judges are likely to be familiar with the temperament of the community as it relates to a particular crime. His Lordship added, "[t]he sentencing judge brings to the sentencing task both an institutional objectivity and a deep subjective understanding of the case."<sup>7</sup> My concern is a simple one: how do I ensure that I have come to understand fully and fairly the attitude and temperament of the community? For example, what if the offender is a member of a motorcycle gang involved in drug trafficking, or in a violent offence? Is there any member of the community who would not wish the community to be free of such individuals? On the assumption that I can actually take these sentiments into account, the question remains: how do I gauge the pulse of the community? Are my neighbours representative of the community? Must it be limited to the victim impact statement? Do I read the media reports, listen to on-air talk shows, or is there a web site to be consulted? Indeed, in light of the studies discussed in *Penal Populism*, do I deliberately avoid all media reports?

In *R. v. Calderwood*, Finch, J.A., observed that

I think a resident Provincial Court judge is entitled to take judicial notice of recent unlawful conduct in the community, and of the community's attitude towards that conduct. Such local knowledge is a relevant consideration in deciding whether a discharge should be granted, or if not, what sort of sentence would be appropriate.<sup>8</sup>

In addition, in *R. v. Carter*,<sup>9</sup> the British Columbia Court of Appeal sought again to underscore the principle that a trial judge who has presided for some time over criminal matters in the community in question is well-suited to take notice of any causes for concern and how the meting out of sentences may address the issue. As made plain by Ryan, J.A., "[t]hese offences were committed in Kelowna. The trial judge who sentenced these young men sits in the Okanagan. He has an acute understanding of the effect of these crimes upon the community. He heard the submissions and saw the accused. I would not disturb his sentences."<sup>10</sup>

Of interest, Her Ladyship quoted the following passage from Madam Justice Southin's judgment in *R. v. Mulvahill*,<sup>11</sup> as support for the importance of the position of trial judges "who know what crimes are a problem in their own part of the province and who have had

<sup>5</sup> See e.g. *ibid.* at 53-54, 85, 165, 167, 173, 176, 182-84.

<sup>6</sup> (2000), 133 B.C.A.C. 22.

<sup>7</sup> *Ibid.* at para. 5.

<sup>8</sup> (1995), 57 B.C.A.C. 237.

<sup>9</sup> (1995), 61 B.C.A.C. 161 at para. 69.

<sup>10</sup> *Ibid.* at para. 69.

<sup>11</sup> (1991), 5 B.C.A.C. 1.

the opportunity to observe the accused.”<sup>12</sup> However, the question remains: may one trust media reports? In light of the conclusions advanced in *Penal Populism*, it appears that the answer must be a negative one.

Having stated these personal observations, it will be useful to highlight the many useful notes, summaries, outlines of salient information, and tables as well. The book is well-written, carefully edited to avoid needless repetition, includes many references to as yet unpublished materials and articles, and proposes far-reaching, thoughtful, and balanced suggestions to overcome populist justice if it results in injustice. The authors fear, and with good reason, that penal populism may harm the various law reform movements touching upon the field of sentencing by introducing spurious arguments, false assumptions, contradictory submissions, ill-informed and poorly conducted research, methodologically-challenged polls and opinion surveys, and uncoordinated responses to the very real need of protecting the community while assisting offenders to achieve re-integration.

This is an excellent text, and one may profit from a review of any individual chapter and, indeed, from a review of any of the many themes that the authors so ably explore.

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<sup>12</sup> (1991), 5 B.C.A.C. 1 at para. 89.