The Bentam Club Presidential Address
Wednesday 24 March

'When Judges Fail Justice'

by
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1. It is a privilege and a pleasure for me to be with you this evening. The presidency of the Bentham Club is a particular honour. Its sole duty is to deliver tonight's lecture. In fulfilling this office I hope you will not deal with me as Hazlitt, that astute and acerbic English Romantic essayist, dealt with Bentham.[1] He denounced him for writing in a 'barbarous philosophical jargon, with all the repetitions, parentheses, formalities, uncouth nomenclature and verbiage of law-Latin'. Hazlitt, who could, as they say, 'get on a roll', certainly did so in his critique of Bentham, whom he accused of writing 'a language of his own that darkens knowledge'. His final rebuke to Bentham was the most piquant: 'His works', he said, 'have been translated into French – they ought to be translated into English.' I trust that we will not tonight need the services of a translator.

2. To introduce my theme I want to take you back nearly twenty years, to 3 September 1984. The place is in South Africa – a township 60 km south of Johannesburg. It is called Sharpeville. At the time its name already had ineradicable associations with black resistance to apartheid – and with the brutality of police responses to it. On 21 March 1960, 24 years before, the police gunned down more than sixty unarmed protestors – most of them shot in the back as they fled from the scene.

3. That bloody event intensified political consciousness in the township, which as the decades passed continued to seethe with resistance to apartheid. The day I recount was also bloody. But the blood was not that of protestors – it was blood drawn by them: that of four local councillors, who served in the local authority structures the apartheid government created in the early 1980s to try to legitimate its increasingly precarious rule over the black urban population.

4. One death that day was particularly bloody, and particularly poignant. It was the murder of Mr Kuzwayo Jacob Dlamini, the deputy mayor of the local authority covering Sharpeville. His council had decided on an increase in service levies. The increase was to come into effect on 1 September 1984. The decision enraged residents. Council members were seen to be doing the bidding of, and benefiting from, their apartheid masters, and on Monday 3 September 1984 the whole area erupted in violent rebellion.

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[1] *The Spirit of the Age* (1824/5). I am grateful to Tim Trengove-Jones of the School of Languages and Literature at University of the Witwatersrand for the reference and the quotations.

5. Early in the morning, protestors converged on Dlamini's Sharpeville home, pelting it with stones. Police arrived and tried to persuade him to leave under escort. Poignantly, perhaps bravely, certainly unwisely, Dlamini refused. A short while later he paid a hideous price. The crowd surrounded his house. Armed with a pistol, he shot into them, wounding one. They then shattered his windows and threw petrol bombs inside, causing a conflagration. Dlamini was forced out. Holding his pistol, he tried to escape. But members of the crowd set upon him. One of them dispossessed Dlamini of his firearm. He was then stoned. While insensate from his injuries, he was set alight with petrol. He died a terrible death at the scene, succumbing to head wounds and to petrol burns.

6. Nine months later, eight Sharpeville residents were put on trial for their lives for the murder of Kuzwayo Jacob Dlamini. The murder was horrible, and the State was determined to secure convictions – and death sentences. Their case became an international cause célèbre when the trial judge sentenced six of the accused to death, and when five judges of the Appellate Division of the Supreme Court of South Africa confirmed their convictions and sentences. The international outrage focussed on two particular features of the case:

7. The first was the appeal court's rejection of certain of its own previous pronouncements that required proof for a conviction of murder of a causal connection between the accused's actions and the victim's death. Instead, the appeal court ruled that it is enough for murder if someone with murderous intent engages in overt conduct associating himself with the deadly actions of others. In the case of at least one of the Sharpeville Six, about the causative effect of whose conduct there was reasonable doubt, it was enough to hang.

8. That case involved a young woman called Theresa Ramashamola, accused 4. Her plight was the second focus for the international outcry. The evidence placed her near the events in issue, which she encouraged by shouting, after Dlamini's pistol shot had wounded one of the crowd, that he should be killed. Later, when another woman sought to intercede for the dying man, Theresa slapped her. For this, her sole contribution to the murderous events, she was sentenced to hang. There was no proof, or indeed any suggestion, that her conduct had contributed to the killers' deeds.[2]

9. The verdicts and sentences seemed extraordinarily harsh, and in academic writing[3] and in contributions to the popular press I vehemently attacked the courts' findings. I accused the appeal court of 'widening the

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[2] *S v Safatsa and others* 1988 (1) SA 868 (A) 894F-G ('… it must be accepted without doubt, in my opinion, that no such causal connection can be found to have been proved. This is particularly obvious in the case of accused Nos 2 and 4 …')

[3] 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 2 *South African Journal for Criminal Justice* 243-260.

doctrines of criminal liability in response to evidence of township revolt'. My criticisms were quoted in the London Times and helped, I believe, to bring Lord Scarman and other dignitaries into the debate. This earned me not only a personal attack from the Chief Justice, who labelled criticism of the judgment 'shocking and disgraceful', but a complaint he lodged with the Bar Council, which by a majority of eleven votes to one resolved not to take disciplinary action against me.[4]

10. In helping to fuel international protests against the death sentences, and in later forming part of appellate team for the Six, I did not find it necessary to differentiate between their cases.

11. But as a trained lawyer, I found the conviction of one of the accused especially distressing and outrageous. The evidence against five of those sentenced to hang came from eyewitnesses who placed each of them directly at the murderous scene. By contrast, in the case of accused 3 there was no eyewitness evidence. The case against Oupa Moses Diniso rested on inference alone. He was sentenced to hang by lawyerly logic – and the logic in question seemed to me to be shocking in its patent inadequacy.

12. The murder occurred on 3 September. The police arrested the first accused in the case 67 days later, on 9 November 1984. Within an hour accused 1, in the language prosecutors put to police witnesses to avoid eliciting hearsay evidence, 'made a report' to the police. The report concerned the whereabouts of the firearm taken from the deceased during his mortal struggle. In consequence of this 'report', three policemen set out from their offices with accused 1. He took them to the home of accused 3. On arrival, the police asked accused 3 if he knew about a firearm allegedly in his possession. He immediately answered Yes, and offered to hand it to them. He rummaged in his ceiling, and amidst cardboard boxes and suitcases retrieved a pistol, which he handed to the police. The firearm, a 9mm Star pistol, became exhibit 1 at the trial. It was proved to have belonged to, and to have been licensed in the name of, the murder victim.

13. Accused 3 told the police that he had taken the pistol from a group of children who were involved in the rioting on 3 September 1984 near the home of councillor Dlamini. He denied involvement in the murder.

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[4] The Minister's and the judges' attacks for my part in the campaign to save the Sharpeville Six and other criticisms of apartheid judges is documented by the late Professor Etienne Mureinik, 'Law and Morality in South Africa' (1988) 105 *South African Law Journal* 457. Prakash Diar, the Six's attorney, wrote a moving testimony: *The Sharpeville Six* (McLelland & Stewart, London and Toronto, 1990). The bitter counter-attack by the appeal court judge who wrote the judgment in the Sharpeville Six case is in *S v Mgedezi and others* 1989 (1) SA 687 (A) 702-703. My co-authors and I riposted in 1989 *Annual Survey of South African Law* 598. The Six were released from prison in 1991 as part of a deal between the outgoing apartheid government and the African National Congress.

14. He later changed this story slightly. In a statement to a magistrate twelve days later, he repeated that he obtained the pistol from some children. But he now said this happened on the day after Dlamini's murder, on Tuesday 4 September. The youths were no longer involved in the rioting, but arguing about the weapon, which, one said, they had found in a scrapyard. In court he denied that he told the police that he obtained it on the day of the insurrection.

15. Neither accused 1 or 3 could proffer any explanation for why accused 1 would have been able to direct the police to the location of the deceased's weapon at the home of accused 3.

16. It was on this evidence, and this evidence alone, that accused 3 was sentenced to hang.

17. South African law has taken over from English law a practical maxim, rather grandly dubbed 'the doctrine of recent possession'. It is really a rule of inference to the effect that someone caught with 'hot goods' sufficiently soon after a crime without an innocent explanation may reliably be inferred to have obtained the goods through participation in the crime itself. The South African courts have adopted the maxim, and it has played a useful role in convicting guilty accused where the only reasonable inference from possession is guilt of the crime the goods themselves evidence.[5]

18. But the doctrine of recent possession was clearly inapposite here. Accused 3 was arrested 67 days after the murder. His mere possession of the murdered man's property could not connect him with the crime. There had to be something more.

19. The trial court found this extra inferential material in his own statements and conduct, and in the conduct of accused 1. Accused 1 was identified as one of the active perpetrators of the murder by the deceased's wife, by an independent witness, and by a poignant declaration of the deceased, who in his dying moments rebuked accused 1 by his nickname, 'Ja-Ja'.

20. So the evidence unquestionably placed him there. And because accused 1 took the police to the home of accused 3, where the dead man's firearm was found, the trial court concluded that 'the only inference' was that accused 3 had wrested the weapon from him in his dying moments. Added to this was the fact that accused 3 had changed his story; and, in addition, refused to accept that the pistol produced in court was the one he took from his ceiling. What sealed this apparent logic, in both courts, was that he could give no explanation of how accused 1 knew that he had the firearm.[6]

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[5] *S v Skweyiya* 1984 (4) SA 712 (A) (possession of burgled goods fifteen days after break-in, even without any explanation, insufficient for conclusion of participation in burglary).

[6] The appeal court said it could find 'no warrant for disagreeing' with the trial court:

21. The flaws in this reasoning, nearly twenty years after Mr Dlamini's murder, and nearly seventeen years after the appeal court decision, seem to me as patent now as they did then.

22. In convicting accused 3, the appeal court abandoned its own established principles. In particular there were two. The first required that the inference of guilt be the only reasonable inference from the proved facts. The second reminded judges that accused persons frequently lie about details for a variety of reasons that may be compatible with their innocence. One such reason may be a misguided recourse to falsehood for fear that the truth will not ensure exculpation.

23. On the proved facts accused 3 certainly lied, but his untruths were both trivial and readily explicable. The difference between his initial story about the weapon and what he later said seems insubstantial, and the shift from the day of the murder to the day after more than readily explicable on the basis that he wanted to place some distance between his acquiring it and the murder. Even an innocent person might foolishly try to do that.

24. Why did accused 3 have no explanation for accused 1 bringing the police to his home? Well, why not? Sixty seven days is nine weeks, two full months and seven days; and in a township, as in any area of crowded human habitation there are many sources of information and repetition. That the two accused knew each other and that accused 1 knew where accused 3 lived was scarcely incriminating. It hardly strains the imagination to think that accused 1 could have heard from the youths – to take at face value accused 3's first explanation – that they had handed the dead man's weapon to accused 3.

25. There is a further possibility – one so obvious that, even after nearly twenty years, it still seems remarkable that neither court professed to contemplate it. It is that accused 1, having wrested the weapon from the deceased, handed it to accused 3 for safekeeping, and that – for obvious reasons – neither chose when the game was up to disclose this to the police.[7] What makes this plausible is accused 3's ready response when confronted at his door by the police in the company of accused 1. He acknowledged having the weapon, and readily retrieved it and handed it to

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> 'Having regard to the nature of the lies told by accused 3 in his evidence, and particularly to the explanation he gave to [the police] as to when and where he obtained the pistol, coupled with his professed inability to explain how accused 1 would have known that he had the pistol, I am of the view that the trial court was fully justified in drawing the inference, as being the only reasonable inference, that accused 3 was the person who had dispossessed the deceased of his pistol'.

S v Safatsa 1988 (1) SA 868 (A) 891-892 per Botha JA, Hefer JA, Smalberger JA, Boshoff AJA and MT Steyn AJA concurring).

[7] If this was the 'report' accused 1 made to the police, it would have incriminated accused 3 as an accessory to the murder, which would explain why it was inadmissible. The judges may have suspected that the 'report' was more incriminating – that accused 1 identified accused 3 as at the scene. But that would have been intolerably speculative.

the police, when it is by no means certain that a search would have uncovered it. This suggests that he had nothing to hide – or at least that at that point he did not realise the mortal peril that inferred conclusions would place him in.

26. These possibilities are not only reasonable. They are patent. Yet they were ignored by the trial court and glossed over by the appeal court. The short and incontrovertible point is this. The fact that accused 3 was in possession of the incriminating object, and that accused 1 took the police to his home, by themselves prove no more and no less than that accused 1 knew that accused 3 had the murder victim's firearm. No amount of evasive or untruthful conduct by either accused can add to the inferential weight of that evidence. Beyond it lies only doubt, uncertainty and speculation – in this case, mortally dangerous doubt, uncertainty and speculation.

27. In defiance of the elementary precepts of criminal justice, accused 3 was never given the benefit of that doubt. Instead, he was sentenced to hang. While the Six were on death row in Pretoria Central Prison, I wrote, with what even now seems to me to be a degree of measured understatement, that the conviction of accused 3, and the death sentence passed on Theresa Ramashamola, 'cannot be said to be in accordance with the standards of judicial reason that one is entitled to expect from a judicial system that calls itself civilised'.

28. To me the verdict was an outrageous curvature of the laws of logic and fairness – a miscarriage of justice symptomatic of the extremities apartheid was inflicting on the legal system.

29. It still does. The Sharpeville Six did not die on the gallows. After months of international outcry, the trial judge, on the day before their scheduled execution, had second thoughts. In response to an application to re-open their case, he granted a stay just sixteen hours before they were due to hang. If they had been hanged, a gross miscarriage of justice would surely have occurred. The international outcry saved their lives. It also saved the country from the explosion that was certain to have followed – and, I thought, then and now, it spared the South African judiciary the ignominy their execution would have earned it.

30. What happened? Why did the Sharpeville Six judges overlook or ignore what seemed to be elementary tenets of civilised reasoning? The question is haunting. And it is by no means unique to South Africa.

31. In the case of Ethel and Julius Rosenberg, who were sentenced to death by electrocution for passing atomic secrets to the Russians, the final plea brought on their behalf before the Supreme Court of the United States involved a principle that one of the Justices in the divided decision that

followed described as 'too elemental for citation of authority'.[8] It concerned the benefit of subsequent amelioration. The question before the Court was whether a convict should have the benefit of an ameliorative punishment introduced after the commission of the crime.

32. The Rosenbergs were convicted of conspiracy to commit espionage. The prosecution was brought under the Espionage Act of 1917. This entrusted the decision on the death penalty to the trial judge. Many thought that the presiding judge, Judge Kaufman, was bent on exacting the extreme penalty from them. In sentencing the couple to death, he considered their crime as 'worse than murder', putting the blame for the Korean war on them –

> 'with the resultant casualties exceeding 50 000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country.'[9]

33. That assessment is now recognised as grotesquely exaggerated. Two recent commentators, no apologists for the Rosenbergs or the left-wing activists of the time, state that the punishment 'far exceeded the crimes':

> 'Even most of those who were persuaded that Julius Rosenberg had [spied], believe that his death sentence should never have been issued or carried out. As for Ethel Rosenberg, the material drawn from KGB archives for this book, along with previously available information, suggests that although she knew of her husband's long and productive work for Soviet intelligence, at most she played only a minor supporting role in that work. In a less-pressured legal and political environment, her actions might have led only to a brief jail term, perhaps not even to her arrest.'[10]

34. Even in the perfervid climate of that time it is doubtful that a unanimous jury could have been found to sentence the couple to death; and it is on this point that their last appeal was pinned. The 1946 Atomic Energy Act, which came into effect on 31 July 1946, prescribed that the penalty of death could be imposed for atomic espionage –

> 'only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the United States'.

The overt acts alleged in the indictment were committed in 1944 and 1945, before the 1946 Act came into effect; but the conspiracy to commit espionage with which they were charged was from 1944 until 1950. This meant that the crime of which they were convicted, and for which the death penalty was imposed, occurred within the period of the statute providing an ameliorated punishment.

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[8] *Rosenberg et al v United States* 346 US 273 (1953) 312 (Douglas J, dissenting).

[9] Quoted in part in the dissenting opinion of Justice Douglas at 346 US 312, and available more fully at www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS_SENT.HTM.

[10] Allen Weinstein and Alexander Vassiliev *The Haunted Wood: Soviet Espionage in America – the Stalin Era* (1999) page 342.

35. Despite this, the Supreme Court, in a verdict announced at noon on the day of the Rosenbergs' scheduled execution, voted by six to three not to grant a stay in order to hear full argument on the point. The Rosenbergs were executed that night at 23h00. The Court's reasons were filed 27 days later. Chief Justice Vinson, delivering the main opinion, took the technical view that the 1946 Act 'did not repeal or limit the provisions' of the 1917 Act.[11]

36. Justice Jackson, with whom the other five members of the majority concurred, said that to give the Rosenbergs the benefit of the 1946 penalty provisions would 'open the door to retroactive criminal statutes', which 'would rightly be regarded as a most serious blow to one of the civil liberties protected by our Constitution'. This argument has a particular air of bogus expediency that does not wash well with history. Application of a subsequent ameliorative provision for the benefit of a criminal can hardly invoke the spectre of retroactive enforcement of criminal penalties to the detriment of others.

37. In a third opinion, Justice Clark, with whom the majority again concurred, held that 'Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law'.[12] To his judgment he added a sonorous postscript: 'Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct the course of justice destroys our freedom.'[13]

38. The implication was that 'the course of justice' required the execution of the Rosenbergs, and that a decision against would imperil liberty. These arguments the three dissenters showed up for the tawdry makeweights they were. Justice Black called the Chief Justice's argument that the courts could give effect to either statute 'a strange argument in any case, but … still stranger … in a case which involves matters of life and death'.[14]

39. Justice Frankfurter pointed out that the jury could have found only one conspiracy – and that was the conspiracy averred in the indictment, which lasted from 1944 to 1950. The ameliorating statute accordingly covered it. As for the Court's argument that the government could choose under which statute to prosecute, he said that it needed 'only statement' to be rejected:

> 'Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole

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[11] 346 US at 289.
[12] 346 US at 294.
[13] 346 US at 296.
[14] 346 US at 299.

> conception of impersonality in the criminal law, would be an exercise in self-stultification. …
> These considerations … cut across all the talk about repeal by implication and other empty generalities on statutory construction.'[15]

40. The dissent of Justice Douglas – who had issued the stay the majority vacated – was the most emphatic and the most sombre: ' … [I]t is too elemental for citation of authority that where two penal statutes may apply – one carrying death, the other imprisonment – the court has no choice but to impose the less harsh sentence.'[16]

41. Rebecca West described the execution of the Rosenbergs as 'an act as discreditable to our civilization as the crime it punished'.[17] In that act the Supreme Court of the United States participated by its rejection of an elementary principle of criminal justice. Their deaths, at the height of the McCarthyite furore in the United States, raised and continue to raise haunting questions about the utility of legal principle in times of great national anxiety and preoccupation with threat.

42. This country, the source of so many of the salutary principles of the criminal law applied in Anglophone and common law jurisdictions across the world, itself does not escape the charge that its judges have at crucial times failed justice. The instance I cite concerns a character on any account less engaging than the Rosenbergs or the Sharpeville Six. It is the case of William Joyce, Lord Haw-Haw, who was hanged for treason at Wandsworth Prison on 3 January 1946. Joyce was a fascist and an anti-Semite who when the war broke out left England for Germany, from where between 18 September 1939 and 30 April 1945 he broadcast virulent Nazi propaganda to England. He was captured near the Danish border four weeks after his last broadcast, returned to England and put on trial for treason.

43. His trial was called 'the most spectacular of all the war-crimes trials that were to take place in England'.[18] Joyce's adherence to the Nazi cause was indisputable and was proved with ease. The difficulty was that he was not a British subject. He was born in Brooklyn, New York, in 1906, of an Irish father who emigrated to the United States in 1888 and became a naturalised American. Joyce's mother was English, but she also became American, for when she returned to her native town in Lancashire in 1917, she was required to register as an alien. Joyce was therefore a natural-born American citizen. He never acquired British citizenship.

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[15] 346 US at 306-307.
[16] 346 US at 312.
[17] Quoted in Charles Franklin *World-Famous Trials* p 283.

[18] Frances Selwyn *The Crime of Lord Haw-Haw* (1987) p 191.

44. Joyce's family went to Ireland when he was a boy and then came to England in 1921, when he was fifteen. Twelve years later, in 1933, he applied for a British passport. In doing so he described himself as 'a British subject by birth'. This was false. He also claimed that he had been born in Galway, Ireland. This too was false. But his lies secured Joyce a British passport. He renewed it in 1938 and again in 1939, just one week before the war broke out. It was on this passport that he left the country to adhere to the German cause.

45. The indictment alleged that Joyce committed treason between 18 September 1939 and 2 July 1940 when his passport expired. That Joyce, as an alien, owed the Crown allegiance while he was resident in the realm was undisputed. But no non-subject had ever been tried in England for the crime of treason committed abroad, and indeed there was no reported case of any court in the United Kingdom that had assumed jurisdiction to try an alien for an offence committed abroad.[19] The questions his trial raised were whether a British court could try an alien for a crime committed abroad; and, if it could, whether the fact that Joyce had applied for and obtained a British passport imposed on him a duty of allegiance during its currency even when he was no longer in any British realm.[20]

46. On these questions, the trial judge, Mr Justice Tucker, instructed the jury that Joyce owed allegiance to the British crown through his possession of the passport renewed in his name in August 1939, and that nothing happened thereafter to put an end to the allegiance he owed.[21] Joyce appealed to the Court of Appeal on the grounds that the trial court had wrongly assumed jurisdiction to try him, and that the judge had wrongly instructed the jury that he owed allegiance to the Crown. The Court of Appeal dismissed his appeal in November.

47. But the Attorney-General granted a certificate that his case involved a 'point of law of exceptional public importance'. The House of Lords heard Joyce's appeal in December 1945. A week before Christmas they announced their decision. By a majority of four to one they dismissed the appeal. Only Lord Porter dissented.

48. In reasons furnished four weeks after Joyce was executed, the majority held that a passport, even one falsely obtained by an alien not entitled to it, not only gives rights but imposes duties.[22] The argument on behalf of Joyce that a passport is only a request to a foreign potentate and a command to a British representative to afford the holder assistance, from which no right to protection is derived when the holder is in fact not a

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[19] See the argument of Slade QC on behalf of Joyce reported at [1946] AC 360.
[20] See JW Hall (ed) *The Trial of William Joyce* (1946) p 15. Hall's introduction to his volume is also in John Mortimer *Famous Trials* (originally edited by H & JH Hodge) (19**), pages 346-376.
[21] JW Hall (ed) *The Trial of William Joyce* (1946) p 215 (summing up).
[22] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) 369.

British subject,[23] was rejected. The Crown in issuing a passport, the Lords held, assumed 'an onerous burden', which conferred on the holder substantial privileges. By claiming the protection of the Crown, he thereby pledged the continuance of his fidelity.[24]

49. Lord Porter dissented on the ground that it was for the jury to decide whether the duty of allegiance Joyce owed while in England had continued after he left for Germany. This would depend on whether he retained and used his passport until 18 September 1939, the date of his first broadcast. If he did not, he could not be guilty of treason. There was no evidence that Joyce had kept the passport. Indeed, 'he may have used it only to gain admittance to Germany and may then have discarded it.'[25] A reasonable jury, properly directed, may have considered that Joyce's allegiance had terminated on his departure from England. Pointing in this direction, Lord Porter observed, were the fact that the passport was not found in Joyce's possession 'nor anything further known of it', his statement that he intended becoming naturalised in Germany, and his acceptance of a post from the German state.[26] The judge's ruling was therefore wrong, and the appeal ought to have been upheld.[27]

50. Even leaving aside the pivotal and questionable decision on the point of law, Lord Porter's stand on the necessity for a jury determination of the continuance of Joyce's allegiance seems quite unanswerable.

51. The defensive tone of the speech by the Lord Chancellor, Lord Jowitt, seems to reflect this. It contains an attempt at self-justification:

> 'It is not for his Majesty's judges to create new offences or to extend any penal law and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.'[28]

52. The question for history is whether the conduct of William Joyce was fairly brought within the criminal law of England. Writing almost immediately after the events, JW Hall was openly sceptical. Existing law, he pointed out, suggested that 'the protection of the bearer is the object of a passport, but not that the right to protection springs from the passport'. This, he said, 'seems to have been a novel doctrine in the present case'.[29] That a

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[23] Argument of Slade QC on behalf of Joyce, at [1946] AC 353.
[24] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) 370-371.
[25] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) 380.
[26] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) 381-382.
[27] Rebecca West *The Meaning of Treason* (1949, 1965, Virago edition 1982) surprisingly errs in her assessment of the significance of Lord Porter's dissent, saying that he regarded Tucker J's summing up 'as a misdirection to the jury on a minor technical point' (page 52).
[28] *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) 366.
[29] JW Hall (ed) *The Trial of William Joyce* (1946) p 29.

non-citizen should be hanged for treason by a novel doctrine itself seems to be an affront to justice.

53. Hall also observed, drily, that the reasoning underlying the Lords' decision was 'a legitimate subject of legal discussion':

> '[I]t would be untrue to pretend that it meets with unanimous acceptance among lawyers, many – possibly a majority – of whom thought the appeal would succeed'.[30]

54. He doubted whether Joyce's broadcasts deserved hanging. If fear of a public outcry inhibited a reprieve, he said, 'the first function of a legal system is to substitute the reasoned and dispassionate judgment of the law for the clamour of popular prejudice'. But, he said, there would not have been an outcry –

> 'for very much to my surprise I have found, with a universal reprobation of Joyce's conduct, an almost equally universal feeling, shared by lawyers and laymen, servicemen and civilians, that (with the utmost respect to the eight out of the nine learned judges) the decision was all wrong, and that an unmeritorious case has made bad law. The feeling, and it is, I believe, strong and widespread, is not so much that Joyce, having been convicted, should have been reprieved, but that he should not have been convicted.'[31]

55. The *Manchester Guardian* at the time wished that Joyce had been convicted 'on something more solid than a falsehood'.[32] Writing in 1965, AJP Taylor echoed this. He concluded that Joyce had been 'executed on a trumped-up charge', whose 'tawdry basis' was allegiance through his passport. In substance, Taylor thought, the charge against Joyce was not proved, while 'Technically, [he] was hanged for making a false statement when applying for a passport, the usual penalty for which is a small fine.'[33]

56. Taylor's criticism is overblown. But misgivings have rightly persisted about both Joyce's conviction and his execution, and the suspicion is inescapable that the law was tailored to his case. If he had evaded capture for just a year or two, there seems little doubt that he would have escaped the gallows.[34] Even Rebecca West, who was dismissive of

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[30] Page 33.
[31] Pages 35-36.
[32] Quoted in *The Trial of William Joyce – Notes from the Editors* 'Introduction by Thomas G Barnes' page 14 (attributing another source), and in Frances Selwyn *The Crime of Lord Haw-Haw* (1987) page 212.
[33] Same source, page 13.
[34] Frances Selwyn *The Crime of Lord Haw-Haw* (1987) p 212. Selwyn also observes percipiently (p 222):
'In the story of his downfall there are too many voices hinting at a failure of justice to leave one entirely at ease. It is as if the tenacity of his defender and the fairness of his prosecutor counted for less than some communal and unconscious compulsion of the time.'

other's misgivings about Joyce's verdict, conceded that there was 'some merit behind the public's regret that Joyce had been sentenced to death':

> 'We are all afraid lest the treatment of Joyce had been determined by our emotions and not by our intellects: that we had been corrupted by our Nazi enemies to the extent of calling vengeance by the name of justice.'[35]

57. As a response to the moral issues the Second World War created for judges, the decision of the majority of the House of Lords in *Joyce v DPP* ranks as scarcely more creditable than that in *Liversidge v Anderson*,[36] and the dissent of Lord Porter, though less memorably phrased, as courageous, truthful and unanswerable as that of Lord Atkin.

58. What do these cases tell us about the law? Each involved defendants in peril for their lives during a time of great national trauma:
- *Joyce* in the bleak aftermath of WW2, while Britain was enervated from its struggle, with the spectre of what a Nazi victory would have entailed still fresh;
- *Rosenberg* during the great fear of Communist subversion and attack that held the United States in thrall in the early 1950s; and
- the *Sharpeville Six* at the height of white South Africa's final crisis of governance, as the townships exploded and mob rule seemed to threaten.

59. Each case was decided amidst controversy. And its result was immediately attacked as unjust and incorrect and a misapplication of the law. The flaws in the three decisions were not revealed only by hindsight – and the passing decades have vindicated the dissenters, and with them the contemporary critics.

60. Each could moreover have been decided according to available legal doctrine. These were not cases where the law seemed to have reached its limit, where conflicting rule or principle abounded, where innovation seemed essential, or the uncertain slopes of legal creativity had to be surmounted. None of the cases involved intrinsically difficult, novel or even particularly interesting questions. Nor were they cases decided wrongly because of the absence of adequate advocacy. Each was strenuously argued and the courts in each were enjoined to accept the available doctrine.

61. The cases indeed called for the conservative application of existing legal principle. In the one the House of Lords had available to it the existing law of allegiance governing non-resident aliens; in the second, the Supreme Court an elementary principle of justice concerning subsequent extenuation; in the third, the Appellate Division the basic rules of inferential logic.

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[35] *The Meaning of Treason* (1949, 1965, Virago edition 1982) page 52.
[36] [1941] 3 All ER 338, 1942 AC 206 (HL).

62. Yet in each the judges, or those in the majority, rejected what was accessible to them.

63. What the cases also have in common is that, despite the judges' failure to apply existing legal principles, it has never been suggested that the decisions were the product of untoward influence or political subservience or corrupt adherence to improper or ulterior motive. Decisions can of course be corrupt, and judges can be corrupted. This occurs in the absence of honest commitment to legal principle. The judges of Nazi Germany and of Stalin's Soviet Union were corrupt in this way. It has even been suggested that the decision of the majority of the United States Supreme Court in *Bush v Gore*[37] was bent by partisan political allegiance.

64. But in each of the three cases I have discussed the good faith and conscientiousness of the prevailing judges have never been put in doubt. Wrong they may have been; lacking in rigour and perhaps even in courage; but by their own lights not alien to an honest effort to apply the law.

65. Lords Macmillan and Wright, who found against Joyce, are rated highly amongst the last century's law lords. Most of the justices who held against the Rosenbergs went on, a year later, to decide *Brown v Board of Education*,[38] often cited as a moral high point of judicial determination. And in South Africa, the transition to democracy unexpectedly made me the colleague, in my first years in the Supreme Court of Appeal, of two of the members of the Sharpeville Six bench, with both of whom I sat frequently in appeals.

66. One is a man of compassionate religious conviction whose long appellate career has justly earned him stature. The other, even in retirement, has such a commanding intellect and judicial presence that President Mbeki appointed him last year to head a highly charged inquiry into whether the National Director of Public Prosecutions had been an apartheid spy. His conduct of the investigation gained him national renown and respect.

67. The fact that these cases were decided by judges not overtly or demonstrably swayed by political expedient makes them in some sense more troubling. Corruption for political expedient or financial gain is a fraud upon the law. Its effects, while devastating, are plain. While not always easy to apply, the remedy is not complicated. It has nothing to do with legal principle or its application.

68. But if otherwise conscientious judges fail justice when accused are in peril of their lives, as did the House of Lords, the Supreme Court and the

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[37] * US * (2000); cite Alan Dershowitz * (2001).
[38] 347 US 483 (1954).

Appellate Division, then it raises questions about the utility of law and of legal process at just those times when they are most needed.

69. Why then did the judges fail justice? What the cases seem to have in common is that currently available legal doctrine, if applied, dictated an outcome that seemed unpalatable or even unmerited – in the case of Joyce, his escaping a conviction of treason on what seemed very close to a technicality; in the case of the Rosenbergs, evasion of the electric chair on a lately proffered, formalistic argument of statutory applicability; in the case of the Sharpeville accused, his walking free when suspicion reasonably suggested his involvement in the murder.

70. And in each case it seems that the judges must have flinched from the outcome. It is in this sense that the cases were the converse of those contemplated by the adage 'hard cases make bad law'. That adage forbids the deflection of legal principle for compassionate reasons in order to accommodate cases that appeal to the judge's sympathy.

71. Our cases tonight illustrate the opposite – the deflection of legal principle because the outcome repelled the judges' sympathies. The conventional adage warns against the pursuit of seemingly benign consequences because of damage to legal values. Our cases show the converse – the damage that deflection of principle in order to avoid seemingly malign consequences causes to legal values.

72. Apart from the fact that in two of the cases the consequences were quite fatal for their subjects, the damage the decisions caused to belief in the law and its consistent application was enormous.

73. The reason is obvious. The test of law cannot be its application where consensus exists about a palatable outcome. The true test is when its application yields consequences that are most unpalatable. Our cases tonight warn us that in times of crisis the law, even when its application seems clear, and even when it is administered by honest and well-meaning judges, might offer no safe refuge for those in peril. They suggest that the fabric of legal principle and legal reasoning is often fragile, and its values all too precarious.

74. They also offer more heartening instruction, however, for the best purpose in looking back is to see better ahead. And in looking back it is a grave error to patronise the failings of the past, by thinking that the mistakes we discern in them are too obvious for us to make ourselves. To think so is to miss the point, for history's challenges are cyclical, and its moral confrontation never-ending.

75. For lawyers and judges, this means that cases like Liversidge v Anderson, Joyce v DPP, Rosenberg v US and the Sharpeville Six will recur. And the guise in which they will recur will not be the Nazi menace of the 1930s and 1940s, or the Communist subversion of the 1940s and 1950s, or the threat of mob violence white South Africans created for

themselves in the 1980s. They will find new forms in which to challenge our commitment to legal principle and the rule of law.

76. They already have. For the threat to modern civilisation posed by religious extremists (who come in many forms) offers particularly challenges to the law and its values. The challenge to us as lawyers is not to degrade the principles and the values we hold civilised by failing justice in applying them when we think we find the result of their application least acceptable.

77. In the 27th FA Mann lecture last year,[39] Lord Steyn pointed eloquently to one imminent challenge: the invocation of the courts' jurisdiction over those detained at Guantanamo Bay by the United States government because they are suspected of involvement in the Al Qaeda terrorist network. There will be others. As these challenges present themselves to us, as judges, academics and practitioners, our fidelity to law will be tested by our willingness to accept what may seem to be unpalatable outcomes.

78. There was certainly suspicion that Oupa Moses Diniso was at that terrible scene when Mr Dlamini was murdered in Sharpeville in 1984. But it was never proved. And William Joyce was certainly a Nazi adherent who spattered vile propaganda over England when it was at its most vulnerable. But in doing so he did not commit treason. And the Rosenbergs, it seems increasingly clear, did pass atomic secrets to the Russians. But by established principles of civilised justice they did not deserve to die.

79. Judges failed justice in each of these cases. Their failure teaches us important lessons not only about the fragility of the craft we profess, but about our own fallibility in applying it. But these cases, or their equivalents, will be back. As they already are. They are back in as unattractive, threatening and unpalatable guises as when their first manifestations were decided. The difference is that we have the opportunity to learn from our predecessors' failures. The accretion of wisdom from failed experience is one – and only one – of the marvels of legal reasoning and the proud history of the values that it invokes.

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[39] Lord Steyn, 'Guantanamo Bay: The Legal Black Hole', 27th FA Mann Lecture, 25 November 2003.