

## The Sir James Martin Oration

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When James Martin was sworn in as the fourth Chief Justice of the Colony, his appointment was welcomed as that of the "first Australian Chief Justice"<sup>1</sup>. True, it is, that Martin was born in Ireland, but he had come to the Colony as an infant and he was raised and educated in Australia.

The year before Sir James' death, the controversial British historian, James Froude wrote<sup>2</sup>:

"If Sir James Martin had been Chief Justice of England, he would have passed as among the most distinguished occupants of that high position".

Handsome compliment though it was undoubtedly intended to be, there is that slight hint of patronage about it: a colonial found to measure up against the best of British judges. This would have come as no surprise to Sir James. Throughout his immensely successful life, he had to put up with the snobbishness of men of lesser ability

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<sup>1</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 246.

<sup>2</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 281.

who considered themselves his superior because they had the benefit of having been schooled at the Inns of Court<sup>3</sup>.

Infuriating as these slights must have been, Sir James Martin did not consider himself in any respect wanting. At the time he took up his appointment as Chief Justice of New South Wales, James Martin was the undoubted leader of the Colonial Bar and he knew it. He was a widely read man of rare ability who recognised that he had had the benefit of an excellent education at the forerunner of Sydney Grammar School, William Cape's Sydney College<sup>4</sup>.

At the age of eighteen, Martin's collection of essays, "The Australian Sketchbook", was published<sup>5</sup>. Martin believed, incorrectly, that it was the first literary work by an individual educated in Australia<sup>6</sup>. And he was proud to lay claim to that distinction. Thanks to the National Library's splendid "Trove" website, "The Australian Sketchbook" is online and the quality of the education that James Martin received at William Cape's College is on display. Wordsworth was still alive when Martin was writing; this

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<sup>3</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 29-30.

<sup>4</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 6, 75.

<sup>5</sup> Martin, *The Australian Sketchbook* (1838).

<sup>6</sup> Martin, *The Australian Sketchbook* (1838) at vii. See Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 9.

was the age of the Romantics, when writers and artists were in awe of the power of nature. Martin was imbued with an acute appreciation of the beauty of New South Wales. There is not a hint that he pined for the Motherland. England, Ireland and America could justly boast of their lakes, their mountains, and their rivers, he wrote, but not one among them could surpass the enchanting beauty of Bondi Bay<sup>7</sup>.

As his career flourished, Martin purchased *Clarens*, a Georgian residence in Wylde Street, Potts Point<sup>8</sup>. Under Martin's ownership, *Clarens* featured a splendid library housing his extensive collection of rare and valuable books<sup>9</sup>. But its true glory was its garden, the "most spectacular ... maritime Italianate garden with Classical embellishments ever built in Australia"<sup>10</sup>. It was filled with exotic trees and shrubs imported from around the world<sup>11</sup>. This is where the Lysicrates monument had its first home. Sculptures and ornamental vases adorned terraces leading down to a bathing house

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<sup>7</sup> Martin, *The Australian Sketchbook* (1838) at 180.

<sup>8</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 121.

<sup>9</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 307.

<sup>10</sup> Thorp, *Excavations at HMAS Kuttabul (former Clarens Gardens)*, Archaeological Report (1987) at 11.

<sup>11</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 307.

at the water's edge. The novelist, Anthony Trollope, described the garden at *Clarens*, falling down to the sea, as "like a fairyland"<sup>12</sup>.

The Navy acquired *Clarens* during World War II and, in a rare lapse of taste for the senior service, pulled it down and replaced it with the particularly unlovesome 1960s redbrick edifice that forms part of HMAS Kuttabul<sup>13</sup>. In yet a further insult in recent years, evidencing the Americanisation of our culture, HMAS Kuttabul has affixed a large sign at its entry, reading "Safe Base Charlie". To observe that progress is not always linear does not really capture the loss.

The remarkable career of James Martin was mirrored by that of Sir William Charles Windeyer, his junior by some fourteen years. Windeyer was born in London, and like Martin, he arrived in the Colony as an infant and was educated here. He, too, went to William Cape's College and then to the Kings School. He was in the first cohort of graduates from Sydney University. Windeyer also enjoyed a distinguished career at the Colonial Bar and in politics. He was appointed to the Supreme Court in 1879, at a time when Martin was Chief Justice. The two appear to have been on good terms and more

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<sup>12</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 121.

<sup>13</sup> Thorp, *Excavations at HMAS Kuttabul (former Clarens Gardens)*, Archaeological Report (1987) at 10.

than once collaborated in joint judgments. In attitude, they were, however, very different men.

James Martin was socially conservative. As a member of the Legislative Assembly, he had opposed the introduction of a Matrimonial Causes Bill out of concern that it would import the excesses of the French Revolution; revolutionaries, it appears, were apt to see the marriage tie as of no moment, and Sir James feared for the Colony were it to go down that path<sup>14</sup>.

This was the height of the Victorian era when it was considered that information about birth control, if made available to the public, would have a corrupting influence on society. A man named Thomas Walker was prosecuted in the old Water Police Court in Phillip Street for an offence under the *Obscene Publications Prevention Act 1880* (NSW)<sup>15</sup>, arising out of his possession of diagrams depicting the male and female anatomy<sup>16</sup>. Walker used them to illustrate his public lectures on techniques of birth control. Walker appealed against his conviction to the Supreme Court. His appeal succeeded because the information did not contain a material averment. Nonetheless, Chief Justice Martin made clear his view

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<sup>14</sup> "New South Wales Parliament, Legislative Assembly", *The Sydney Morning Herald* (Sydney, 26 March 1870) 4.

<sup>15</sup> 43 Vict No 24.

<sup>16</sup> *Bremner v Walker* (1885) 6 LR (NSW) 276.

that exhibiting drawings of this kind for gain was a serious offence. It was one thing for a professional man to give lectures on physiology and quite another to make the same information available to the public at large. Contrary to Walker's claim to be doing no harm, Chief Justice Martin considered that he was doing the utmost harm to society<sup>17</sup>. Whether Lady Martin shared her husband's views on this topic is unknown. During their marriage, she gave birth to 16 children. It was not an entirely happy union, and in later years they lived apart<sup>18</sup>.

Sir William Windeyer had the good luck to enjoy a happy domestic life<sup>19</sup>. His wife, Mary, was one of the notable feminists of the late nineteenth century. She was the inaugural President of the New South Wales Womanhood Suffrage League<sup>20</sup>. Sir William supported her in all that she did. His most famous judgment, *Ex parte Collins*<sup>21</sup>, bears the mark of Lady Windeyer's influence. William Collins, a young secularist and free-thinker, was charged with

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<sup>17</sup> *Bremner v Walker* (1885) 6 LR (NSW) 276 at 283.

<sup>18</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 121.

<sup>19</sup> Ritter and Windeyer, *William & Mary Windeyer* (2016) at 230-331.

<sup>20</sup> Ritter and Windeyer, *William & Mary Windeyer* (2016) at 230-231.

<sup>21</sup> (1888) 9 LR (NSW) 497.

distributing Annie Besant's pamphlets on family planning<sup>22</sup>. He was convicted by the Stipendiary Magistrate and he applied to the Supreme Court for a writ of prohibition to restrain the magistrate and the informant from further proceeding on the conviction. Justice Windeyer's judgment in *Collins* might well take its place next to Simone de Beauvoir's, *The Second Sex*.

Sir William rejected that any natural function of the human body is obscene in itself. There was nothing unholy or unclean about the natural instincts of man; it was the diseased mind of the "unnaturally living ascetic", with his distorted views of religion, that led to God's handiwork becoming the object of shame and disgust<sup>23</sup>. Sir William asked rhetorically wherein lay the immorality in allowing a woman married to a drunken husband to avail herself of the information in the pamphlet to avert the consequences of her husband's brutal insistence on his marital rights. His riposte to the distinction that Chief Justice Martin had drawn in Thomas Walker's case was to say<sup>24</sup>:

"Information cannot be pure, chaste, and legal in morocco at a guinea, but impure, obscene, and indictable in a paper pamphlet at sixpence. ... The time is past

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<sup>22</sup> See Woods, *A History of Criminal Law in New South Wales* (2002) at 391.

<sup>23</sup> *Ex parte Collins* (1888) 9 LR (NSW) 497 at 512.

<sup>24</sup> *Ex parte Collins* (1888) 9 NSWLR 497 at 514-515.

when knowledge can be kept as the exclusive privilege of any caste or class."

Notwithstanding his enlightened social views, when it came to the administration of the criminal law, Sir William Windeyer was unforgiving. It has been suggested that his sensitivity to the situation of women, so often the victims of crime, explains the severity of his sentencing<sup>25</sup>. Another explanation may be an incident that occurred when he was a young Crown Prosecutor. Windeyer and defence counsel, William Dalley, were travelling by Cobb & Co coach to the criminal sittings at Forbes when they were held-up by bushrangers. After taking the passengers valuables, the leader of the gang asked the coach driver "Who's them blokes in the top hats?" The driver explained "the little fellow is the lawyer, Dalley, going to defend your pal. The big bloke's Windeyer, out to hang him!" Dalley's watch and money was returned to him with profuse apologies while the robbers seized Windeyer and heaved him bodily into a waterhole<sup>26</sup>.

As a young man Windeyer had been opposed to the death penalty<sup>27</sup>, however he displayed none of this squeamishness as a judge. He imposed the death sentence on all nine young men, only

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<sup>25</sup> Ritter and Windeyer, *William & Mary Windeyer* (2016) at 176.

<sup>26</sup> Lehane, *William Bede Dalley* (2007) at 11.

<sup>27</sup> Woods, *A History of Criminal Law in New South Wales* (2002) at 334 fn 27.

one of whom was aged over 20, following their conviction for the rape of a 16-year-old girl at Waterloo. It was a shocking crime that has come to be known as the Mount Rennie outrage. Nonetheless, Justice Windeyer's conduct at the trial was not a model by today's standards; the jury were made to sit for exorbitant periods and the summing-up is said to have left no doubt that all should be convicted<sup>28</sup>.

By contrast, Sir James Martin enjoyed a reputation for patience, fairness and compassion in the administration of criminal justice. He was not in sympathy with the death penalty<sup>29</sup>. At the height of his career at the Bar, he had devoted his considerable energy to urging clemency on behalf of Henry Manns, a young man, who had been convicted of participating in the Eugowra Gold Escort Robbery. Frank Gardiner was the ring-leader of the gang and he had succeeded in fleeing the jurisdiction. It offended Martin's sense of justice that Manns, who was the less morally culpable, should be hanged<sup>30</sup>.

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<sup>28</sup> Gilling, *Frenzy: The Story of the Mount Rennie Outrage* (2012) at 117, 121-122.

<sup>29</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 279-80.

<sup>30</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 185.

On one occasion after he had become the Chief Justice, Sir James was asked to intercede on behalf of a prisoner facing capital punishment. He felt unable to do so in light of his position. But his views on the matter are revealed in a private letter that he wrote to Sir Henry Parkes<sup>31</sup>:

"We do not punish for revenge but to deter and reform. Of course, where we execute, reform is out of the question."

These were not new ideas for Sir James. From his youth he had a belief in the capacity of individuals for reform. In one essay in *The Australian Sketchbook* he sought to depict an exemplar of the good and moral life. The portrait was of a former convict who, under Governor Macarthur's enlightened treatment, had received a grant of land and, having become a landowner, had led a productive, law abiding and contented existence<sup>32</sup>.

Against this background, it is perhaps ironic that it was during Sir James Martin's term as Chief Justice that for the first, and only, time, New South Wales experimented with a scheme of mandatory minimum sentencing for all statutory offences, depriving the sentencing judge of discretion.

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<sup>31</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 279.

<sup>32</sup> Martin, *The Australian Sketchbook* (1838) at 122-123.

Criminal sentencing then, as now, was the aspect of the Supreme Court's work that attracted the most public attention. The *Sydney Morning Herald* had led a campaign attacking the courts for their lenient and inconsistent sentences<sup>33</sup>. Ultimately, this led to the establishment of a Law Reform Commission which produced a draft of what was to become the *Criminal Law Amendment Act 1883* (NSW)<sup>34</sup> ("the Act"), on which the criminal law of New South Wales remains largely based<sup>35</sup>. As enacted, the Act allocated each offence into one of five categories, each category having a mandatory minimum sentence<sup>36</sup>.

In the second reading speech for the Act, Mr Buchanan urged<sup>37</sup>:

"The curse of the country had been the practice of judges in inflicting light sentences. If it were thought advisable to flog a man, or to inflict any severe punishment for any offence, no discretion ought to be allowed to the judges. ... Mr Justice Windeyer seemed to be the only judge who had a proper conception of his duty in this respect... "

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<sup>33</sup> Woods, *A History of Criminal Law in New South Wales* (2002) at 247, 249.

<sup>34</sup> 46 Vict No 17.

<sup>35</sup> See Woods, *A History of Criminal Law in New South Wales* (2002) at 424.

<sup>36</sup> See Woods, *A History of Criminal Law in New South Wales* (2002) at 357.

<sup>37</sup> Woods, *A History of Criminal Law in New South Wales* (2002) at 334.

The Act became law on 26 April 1883.

The injustice of removing judicial discretion in sentencing quickly became apparent. Within six months of the Act coming into operation, the leader writer of the *Sydney Morning Herald* was singing from a different song sheet. In September 1883, the paper drew attention to the case of Ada Cox, who had been sentenced to 12 months' imprisonment for obtaining 2 shillings under false pretences<sup>38</sup>. The following month, the *Sydney Morning Herald* took up the case of a man sentenced to three years' imprisonment for killing a calf that had been eating his horses' feed. The leader writer observed, "we have had only a short experience of the working of the new system, but it has been long enough to indicate the need for change"<sup>39</sup>. A week later, a public meeting was held in Grafton, at which the townspeople demanded the reversal of mandatory minimum punishments imposed on locals by Mr Justice Windeyer<sup>40</sup>.

The experiment in mandatory minimum sentencing was short-lived. Parliament enacted the *Sentences Mitigation Act 1884*

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<sup>38</sup> See Woods, *A History of Criminal Law in New South Wales* (2002) at 358.

<sup>39</sup> Woods, *A History of Criminal Law in New South Wales* (2002) at 359.

<sup>40</sup> Woods, *A History of Criminal Law in New South Wales* (2002) at 359.

(NSW)<sup>41</sup>, which came into force on 22 May 1884. Mandatory minimum sentencing had been the law in New South Wales for a year and three weeks before the experiment was abandoned.

The potential for mandatory minimum sentences to work unjust results in individual cases may be thought obvious. A just system of criminal punishments recognises that the sentence should fit both the offence and the offender. As the High Court explained in a seminal judgment some years ago, sentencing calls for a judgment of experience and discernment, it is not a purely logical exercise. The "troublesome nature" of the discretion reflects the difficulty of giving weight to each of the various, overlapping purposes of punishment: the protection of society; deterrence of the offender and of those who might be tempted to offend; retribution and reform. As the Court aptly put it, they are guideposts to the appropriate sentence but they are guideposts that sometimes point in different directions<sup>42</sup>.

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<sup>41</sup> 47 Vict No 18.

<sup>42</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 474, 476 per Mason CJ, Brennan, Dawson and Toohey JJ.

The analysis is one with which Sir James Martin would have concurred. As he once explained the objects of the criminal law to a jury<sup>43</sup>:

"The law does not strike criminals for the sake of punishment alone. It does nothing vindictively. It rather compassionates prisoners when they fall under its powers, and it punishes them solely in order to deter others from the commission of crime."

John and Patricia Azarias have done New South Wales a service, not only in rescuing the Lysicrates monument from decay, but in bringing back into focus the life of Sir James Martin. On any view a remarkable Australian; a man of his time but an estimably humane one.

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<sup>43</sup> Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales* (2005) at 185.