

[MUSIC PLAYING]

**KAREN FOLEY:** Good evening, and welcome back to the Student Hub Live. OK, this session is called More than Courts and Judges, and let me tell you what it's about. The idea that law lives in books and is all about getting case names and dates right is very traditional. So I'm joined by Simon Lee and Lisa Claydon, who are going to dispel the myth with some very interesting perspectives on what law is. And we've been having a wonderful discussion earlier with the students about some of the reasons why they're studying law and why law is so exciting.

Now, you're both academics here, at the Open University Law School. And Lisa, you are teaching on *Public and Criminal Law* module and Simon, you're a professor in law, and you're the director of the Citizenship and Governance Research, here at the OU. So Simon, I wanted to start with you because your postgraduate at Yale Law School a while ago, a few years ago.

[LAUGHTER]

And at the time, the teachers there talked about how the legal realists in the 1930s used to introduce students to law on their very first day at Yale by taking them outside to observe whether motorists observed the law or not. It was quite an untraditional method but possibly acceptable for distance learning here the OU. So there's no talk of courts and judges there. I mean, what was the point of that? And what would be the equivalent, then, if we were to introduce such a measure here at the OU?

**SIMON LEE:** I wasn't there in the 1930s myself-

**KAREN FOLEY:** No, no, no,

[INTERPOSING VOICES]

**SIMON LEE:** -50 years on. And the teachers had been taught by people who formed this fairly famous group in law, called legal realists who, as the name suggests, they felt that what you read in the books isn't the real law, and you need to work out what's happening in society. And an issue for law schools is well, how do we study that? We can get the books, but how do we really know what's going on? So they used to say, well, just go outside. Do you think people obey the law? Do you obey the law? People say, yes. You go outside and you see the traffic whizzing past and they're, by and large, breaking the speed limit. If a police car is there or a

police officer, then they'll probably not break the speed limit.

And so there's a very clear idea they used to say a "bad man" theory of law. Now, you'd say a bad person theory of law. That, even though you're a law student, we know you'd break all the traffic laws if you thought you could get away with it. But actually, there's a good reason for traffic laws to protect other people. So that was quite a salutary lesson. And also, it meant you had to observe. You have to watch, you had to listen and it engaged people.

So I guess the equivalent for us, as you indicate, is it would be great fun, because people are in different locations and they might have different experiences. But here in Milton Keynes, we're famous for roundabouts. So if you go out in a car, anyway, and you're at a roundabout, it's a very interesting question as to what do you do? And is it because of the law? Is it the highway code? Is it because there's a police officer there, or a camera? And do you react differently to something like a speed limit where it says 30 or 40, to a red, green, amber traffic light? And those kinds of questions can then ripple out through your understanding of law and it brings a dose of reality.

**KAREN FOLEY:** So it's not quite so categorical as yes, you have or haven't obeyed or disobeyed the law. It's all about what is happening at the time and possibly about motivations as well.

**SIMON LEE:** Yes, yes. And about the kind of argument you have with the police officer when they stop you and they say, do you know what speed you were driving at? And you begin to say, well, possibly I might have been a few miles per hour over the speed limit, but does that matter? Whereas in class, you're saying, well, that was wrong. That's against the law. This is the law. It's all very clear cut.

**KAREN FOLEY:** So there's this idea, then, that law has to be flexible?

**LISA CLAYDON:** Well, there is an idea that law should be flexible and I'm going to put aside for a moment the idea of precedent and certainty, which is certainly part of the law. But if law isn't flexible and social attitudes change, then the law finds itself out of step with society and it gets into problems because, in Simon's example, the policeman can certainly stop one motorist, but if every motorist going down the street that day isn't obeying the law, then you need a lot of policemen to actually enforce the law. And then, you get into this dangerous situation where the law may actually come into disrepute because people aren't obeying it.

There's other reasons why you'd want it to be flexible, as well. You'd want to be able to be

legally just in a decision when something happened which the law hadn't previously gated for. So you've got problems that emerge with things that we haven't encountered yet. Years ago, it was a snail crawling into a bottle of ginger beer that developed a whole new area of law. But you do need that degree of flexibility and what we call the common law, but people have to understand that this kind of observation of life that goes on is absolutely necessary to make suggestions about where the law might go in the future.

**KAREN FOLEY:** We asked our students whether they thought that laws should be flexible and this is what they had to say. So here, we've got 30 per cent saying never, 30 per cent saying when the prevailing situation requires it- these have changed very recently. So obviously, we've had a lot more votes. And then, sort of unequal numbers if it does not compromise personal integrity and if it does not compromise security or identity. Were these the sorts of responses that you were expecting?

**LISA CLAYDON:** Well, it's such an open question. I think actually almost any response is correct.

**KAREN FOLEY:** Was good.

[LAUGHTER]

**LISA CLAYDON:** I mean, if we think about how pressure groups perhaps have changed the way we think about things, so if we think about lesbian and gay relationships, now. I mean, I'm sufficiently old to remember when society had a very different attitude to lesbian and gay relationships. But it wasn't actually the courts that changed the law. It was parliament. And a lot of that came about because of the work of pressure groups like Stonewall or pressure for change or- those sorts of pressures on the law have to be acknowledged and they are broader than the courts. And the sort of narrow view of the law is having a gavel and bringing it down to making clear decisions. Actually, legal decisions are often quite messy and there are quite a lot of interests. And that's why the law has to be flexible because the bubble is trying to do justice, which is quite an important thing to do.

**KAREN FOLEY:** No, absolutely. I'd like to draw the arguments or the discussion even to this idea of changes over time because you're mentioning how things have sort of changed due to various pressure groups, et cetera. But is there an element of timeliness that is coming into play here in terms of how things are influenced and progressed?

**SIMON LEE:** Yes. And if we take Lisa's example, the partial decriminalisation of homosexual practise

between consenting men in private, we associate really with a report of a royal commission in 1957. And it was only in 1967 that an act was passed, which was a private member's bill. And then it was only later on that the age limits were changed and so on. And eventually, we get to a position of equality with lesbian women, who weren't subject to that criminal law, and to heterosexual men and women. So there's a gradual process over time. And then, more recently, we've had the demand for gay marriage.

So you see over 60 years, those changes. And if you try and introduce law reform perhaps too suddenly, ahead of popular opinion, sometimes it can lead to a huge delay because there's a backlash. Take a different kind of example. Smoking is now prohibited almost everywhere in public places and it's hugely taxed. It's not a criminal offence to smoke, some would say, yet. But a very, very dramatic change in the other direction towards the criminalisation of an activity that previously was accepted as personal choice. And these things are happening over 50 years, maybe a century.

**KAREN FOLEY:** What about the way that we're using technology, for example, to tell whether people are telling the truth or not? I mean, we've seen a lot of changes in terms of the way that we're measuring physiological responses and that area was growing, in fact, I think in terms of how we're sort of measuring psychological approaches to things as well as the physiological ones.

**LISA CLAYDON:** Well, it's really interesting to see where it's used. I mean, it's massively more used in the United States than it is in the UK.

**KAREN FOLEY:** So it's lie detectors, for example?

**LISA CLAYDON:** Yes, lie detection. But it is used in other jurisdictions as well. The courts are very- well, it is not allowed into English courts at the moment, and I think for a good reason. Because we aren't sure how accurate it would be if we did. I mean, there are measures you can use to actually avoid being caught out. The questions are very direct, and all the rest of it. But there are other technologies that are now coming along that will be more like mind-reading technologies where it will be possible to actually see, possibly, whether you have been to a place or recognise things that are relevant to a crime. And possibly deduce from that that you are more likely to have been one of the people who may have been involved. And of course-

**KAREN FOLEY:** Maybe brain imaging, you mean, for recall?

**LISA CLAYDON:** It's not necessarily brain imaging. It's quite simple. It's measuring spikes through the skull cap

that you wear for sort of an EEG. The question is whether the courts will accept that because, in doing justice, they want to be seen to do justice. And that's what we want, is the moment. We want them to do justice. I don't think we really want to believe where us both is unreliable at saying what we've seen as we really are or that we're as unreliable as telling when people are telling the truth. Because we reckon, scientifically, it's about a 50/50 chance that you would know if I was telling you a whooping great lie. But I don't want to believe that I'm that poor and I guess you probably don't want to believe you're that poor. And I think the perception of the courts would be it would be better to be careful about that. But these questions are massive and way beyond the courts, so-

**KAREN FOLEY:** Oh, absolutely, because they all relate to memory in the extent to which we don't have photographic memories. Memory is constructed and active and we have attention that can be averted to certain things at certain times. So there's this whole process of encoding and retrieval and various things that can impact on what is actually then said. So we are all very unreliable witnesses aren't we?

[LAUGHTER]

**SIMON LEE:** Well, absolutely. And we also have, you might say, a collective memory. For instance, the gavel.

**LISA CLAYDON:** Yes.

**KAREN FOLEY:** Yes. OK, I know, I know. Simon has been whinging about this all day.

[LAUGHTER]

**SIMON LEE:** You need to read, on Twitter-

**KAREN FOLEY:** [INAUDIBLE]

**SIMON LEE:** -inappropriate gavels is a Twitter handle. And so gavels don't exist in the English legal system, but it appeals to you as an image of what you think law is like. And you think that I would like to hit that gavel rather than throw it away, and so on.

**KAREN FOLEY:** It's the only time I get to do it.

[LAUGHTER]

- SIMON LEE:** And also, often, people think that a court system is going to have judges dressed in fancy wigs and so on. Whereas we began to see in the Brexit litigation that our Supreme Court dressed much like us, now. And you do need a certain amount of formality in the law because the law is trying to convey authority and mediate between citizens. But you also have to have people having access to that and feeling comfortable in what are meant to be their law courts.
- KAREN FOLEY:** Let me take a quick trip to the Hot Desk because I want to see if there are any questions that we haven't answered before we need to end the session. HJ and Kate?
- KATE:** So everyone's having a really interesting discussion at the moment about the TV licence and whether you pay or not and why you obliges says lots of different things going on there.
- HJ:** Yes, we're just discussing what people think in our obligations and the ways around it and whether, perhaps, we do think it should be flexible about not paying or whether we should pay. But there is some interesting questions as well. Lots of people are excited to know when they will hear from their tutors, and we're also wondering how the law modules take in things like business and corporate law as well. How much of that is in that throughout the degree?
- LISA CLAYDON:** Well, I don't think there's a great deal of business law in our degree at the moment. Partly because most people want to be a solicitor or a barrister. So we have fairly prescribed route through the degree, which I could describe if you like, but it's not frightfully interesting. But I think that you get the opportunity in first year to do quite a wide range of subjects and there are elements that will probably appeal to everyone in there. And then, you will do the fascinating subject of public and crime in your second year.
- SIMON LEE:** In my own studies, a long time ago, in the 1970s, I could choose four subjects. And I chose administrative law- which is very popular today and has grown enormously- Roman law, which there's not a lot of use for, as you might have thought, but it helped me. Helped me understand the legal system is developing over time. Company law, which is why I mention all this, which I did find really helpful in terms of understanding what a business is, what a company is, and how shareholders interact and so on. And then, European law, which at the time, seemed quite a radical thing to do because we'd only just joined what was then the European Community. And again, now people say, well, this is as outdated as my Roman law. But it's not, because there's going to be a long process decoupling from the European Union if that indeed happens. And in any event, we're still going to be dealing with them. So I do understand that students want to learn how the economy and the body politic interact with the

legal system. And we do cover it.

**KAREN FOLEY:** [INAUDIBLE] again, because [INAUDIBLE] a little bit hectic when we were talking about that earlier. OK. We've also had people talking about getting experience going to courts and Katie's going to her magistrates court for a visit and she is hoping to make that regular. And mo hand goes to the Supreme Court. We're going to talk a bit later, in the next session in fact with the Opinion University Law Society, about how to get experience. And this is one of the things with studying law, isn't it? That you need some experience? And often, students are really keen and eager to do that. And we've spoken about a number of ways that you can do that with the pro bono, Open Justice Project, and various other ways that they can engage with Careers Advisory Service to get work experience. What would your advice be in terms of encouraging students to get out there and start experiencing law in action?

**SIMON LEE:** Well, you mentioned some very good ones. I used to teach law in Northern Ireland during the troubles, when there was the violence going on and the courts were very heavily protected. But the students, we encouraged to go and see the courts. And there, on one side of the road was the magistrate's courts. Although, in Northern Ireland, because of the troubles, you had a resident magistrate rather than lay magistrates because they had to be protected. And on the other side, was the Court of Appeal, the high court.

And they are very, very different and how people were in them was very different. And in England, in a magistrate's court, the male defendants will look like me to the extent that they will be wearing a white shirt. Their mum will have put a clean white shirt on them because they think that will impress the lay magistrates. In Northern Ireland, the defendants were just wearing Celtic or Rangers soccer shirts or Gaelic shirts or rugby union shirts, and they were trying to affect a lack of interest in what the state decided.

And so you pick up- back to the traffic- you pick up, you observe what's happening, and you see how the laws are operating. And people use this expression, it's a bear pit. The magistrates' courts were like that, in Northern Ireland at least. And the high court was much more refined, much more legal, it seemed to me. And those things stay with you throughout your law, I think.

**LISA CLAYDON:** Yes. And you can even watch The Supreme Court, of course, on TV. But a lot of people take the opportunity to volunteer, so they go to Citizens Advice or they go wherever there is law going on and there's law going on all over the place. From refugee reception centres to

housing charity, you know. There's lots of law if you go out there and look for it. And often, people are very happy to take people for a couple of hours a week. But I am conscious of the fact that our students are exceptionally busy people anyway.

**KAREN FOLEY:** No, absolutely. I'd like to talk about this idea- I mean, Simon, you've been mentioning changes over time since you began. And the law changes over time, and you would need to keep up to date. I mean, there's lots of things that are very complex right now. I mean things like drones and we were talking about the new scientific insights into how we're telling the truth, et cetera. How do we then get about this idea of applying old law to new problems? Leave the Roman law out of it though, if you may.

[LAUGHTER]

**SIMON LEE:** Not that old. Well, my first week as a law student, as an undergraduate, we looked at murder and manslaughter. And Lisa and I, we'd sit near each other in the law school, and we've been talking about that today- and probably most days- and the same issues are there 40 years on. It's important to understand why there's an issue. So if I kill you, the system will want to know, not just did I do it, but what was my intention? Was I deliberately killing you? Was I reckless about that? Or was I not meaning to? And so on and so forth. And these questions are profound, very, very difficult to answer. Lisa is an expert on them.

But over time, yes it does change. Or to take another way of looking at it, the second week was can you attempt the impossible? And if so, should the legal system punish you for it? So example, one of the examples given is your asked to carry a bag of sugar through an airport. And you do that. And you're told that you'll be given a thousand pounds at the end of it. You're stopped by customs and they say, have you got any drugs on you? It turns out, it is sugar. So are you guilty of any crime? Now, you might say, well, why did you get a thousand pounds for that? I suppose the answer is that the drug barons and mules and others are just seeing is there some route here that's safe or is somebody watching us? But has that person committed an offence or not? It's actually quite a difficult question to answer. Lisa will probably know what the answer is, but-

**LISA CLAYDON:** Oh, no, no. I'm not going to-

[INTERPOSING VOICES]

**SIMON LEE:** -it may change depending on where you are in the world and which decade you're in and what



the court is trying to do or what the law reformers are trying to do.

**LISA CLAYDON:** And we've had a recent example with the bicyclist case, who killed the lady who was crossing the right in front of it of the law's str- well, I think, probably, the court struggling to decide that, in terms of the jury, just how serious this was. Was it manslaughter? Or was it this very arcane offence that really relates to riding a horse or driving a carriage? And courts do find it- I think juries find it very difficult to, when it isn't obviously a deliberate act that's killed somebody, to actually give the most severe verdict they can because they know that could be very serious for the individual involved.

So I think the other thing you've got to remember is that the law is full of life. It's full of us and our opinions and what we do every day. But it's also full of the jury's opinion. And they see the person in court and they hear the arguments and they may not precisely fit cases or- but it's part of the warp and weft of life and it's a really interesting living subject, I think.

**KAREN FOLEY:** Oh, it is. I mean, in the chat, everyone's talking about the legalities around Uber. And again, very, very topical. So we've had lots and lots of things going on, and Gwendolyn's going to the Citizens Advice Bureau to do some volunteering, which is brilliant. Katie is too, and some people are wanting to be judges, et cetera. So there's lots and lots of excitement going on. But I'd like to end because we do, unfortunately, need to get ready for our mood by asking, Simon, if there's anything else you'd like to mention about the first day of law school for students?

**SIMON LEE:** Well, I hope that our students enjoy their first day, week, month, the beginning of their law studies. In different places, I try to make it enjoyable or at least distinctive for students and something that they'll remember forever. So for instance, in Northern Ireland I mentioned before- so 25 years ago- I asked all the students in the first year, first class, first lecture, to write a mini sequel to a novel that they felt everybody else would have read. And here's one I prepared earlier. *To Kill a Mockingbird* by Harper Lee. No relation, by the way. Same surname as me. And I'd read it in America. In fact, I read it at school. And it turned out that everybody in Northern Ireland at the time had to do it for GCSE, so they knew that everybody else knew roughly what it was.

And so I said, write a sequel. Now, part of the game was asking them, then, why did I ask you to do that? And partly, the subject matter was about prejudice and different views of society, which is relevant to Northern Ireland. Partly because it was written by a woman who was herself a law student who people say dropped out of law school. I'd like to say she got a lot out

of law school. But partly the exercise is because when we're developing the law, we're writing a chapter or a sequel to something which somebody else has started. And so we're not completely free, but we try to make the best interpretation we can.

Anyway, I wrote a sequel as a kind of how not to do it for the students. That was published, as well. So most students from Northern Ireland in that period, who studied law, will have their own sequel, my sequel, and the original book. And then two years ago, 25 years after we did that, it emerged that Harper Lee had written the sequel herself, which we didn't know at the time. *Go Set a Watchman*. And so now, they can judge how the original author intended it to be. But that's not to say hers is the best movie. I mean, yours might be, mine might be. Mine turns out to be a bit schmaltzy compared to hers. Hers was quite hard-hitting in some ways. And the lawyer hero in the novel we read as schoolchildren has their flaws in later life. So that's the kind of thing which I would like to think law students will remember forever and learn from.

**KAREN FOLEY:** And luckily, our students don't have to come in and write a sequel.

**SIMON LEE:** No, not even a mini sequel. But just do it for yourself for fun and choose a book that's different or a film or whatever it might be, a TV show, that you think will have meaning. And then, talk about it amongst yourselves in chat rooms and otherwise.

**KAREN FOLEY:** Well, wonderful. Thank you very much, Simon and Lisa. That's been a really interesting session. Unfortunately, we're out of time. But I've really enjoyed that discussion, so thank you very much for coming along.

So for those of you, I'm just conscious we haven't answered the question about your tutor. You will be allocated your tutor in the next week or two. We're going through a very complex process of matching everybody up, so don't worry about that. We're just as eager to get our students as you are to get your tutor. But that will be coming through in the next couple of weeks before your module starts.

OK. Stewart says what is a mooc? Well, you are about to find out. Bear with us while we show you this short video. We're going to wriggle around a bit of furniture and then we're going to introduce you to Jennifer and Georgia from the Open University Law Society who are going to tell us what's involved in a mooc and how to get involved with the law society. But before we do that, we have a short video which is about the human rights to privacy. Join us in three minutes.

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