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SENTENCING TO IMPRISONMENT: PRIMARY DETERRENT OR LAST RESORT?

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THE INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

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Seminar:

SENTENCING TO IMPRISONMENT: PRIMARY DETERRENT OR LAST RESORT?

Chairman

The Honourable Sir John Kerr, K.C.M.G.,
Chief Justice of New South Wales

SYDNEY, 10th May, 1973.

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INTRODUCTION

As Professor Rupert Cross has put it, we have entered into an "era of penological pessimism." But is pessimism necessarily a bad thing? Does not pessimism at least assume the realization that there is a goal which we have not reached or cannot reach?

But what are those goals which we have not reached or cannot reach? In 1971 the Institute of Criminology held a seminar which focused on the contributions that Correctional Services can make toward a concept of social defence. The late Sir Leslie Herron set the tone of the seminar in his opening address:

> "And so we must look for a more sophisticated approach by endeavouring to ascertain the criminogenic factors in society, and endeavour to protect the community from crime by moulding public opinion and other policies of prevention, not punishment."

I would humbly submit that a "social defence" approach toward correctional services in general, and prisons in particular, either proves too much or proves too little. It proves too much in that almost all governmental programmes can be classified as for social defence. Education has been seen as a social defence mechanism for years, but to lump prisons together with the more readily acceptable social defence machinery such as courts, education, police, and even churches, is to assume that all these institutions are involved with the same people and working in the same milieu. But a social defence approach can also be said to prove too little. "Social defence" implies that the functions of correctional services are monolithic. It allows for easy generalization and easy classification of all prisoners as "social deviants", equally dangerous, equally obnoxious, and equally deserving of the same "social defence measures." So in order to home in more directly on the purpose of imprisonment in our society, the Institute of Criminology convened a seminar on whether sentencing to imprisonment is to be regarded as a primary deterrent or a last resort.

All participants in the seminar spoke at least briefly on the issue of evaluating prison as a deterrent. Mr Justice Jacobs began the evening by noting that in his opinion –

> "... the deterrent is the integral part of the whole approach of the legislature to sentencing. If you lose faith in it as a deterrent, in effect you lose faith in the system of sanctions, so therefore it is not a debatable matter from a law point of view – it can't be.
>
> "One can never prove how great a deterrent imprisonment is... but, as I have attempted to say, I think that is incidental to the real problem."

Mr McGeechan pointed out that one of the aims of the Department of Corrective Services is crime prevention, and to achieve this objective further research programmes must be developed.

But, as Mr Lewer so poignantly pointed out, for the lower courts imprisonment is not the usual punishment.

Finally, Judge Staunton neatly directed the inquiry by asking: Does imprisonment deter? Is there a basis for believing that it does?

It would seem that we are now on our way – but with these questions we pay the price of our inquiry. We just do not know the differential effectiveness of various types of threats. Our personal, anecdotal evidence is that, of course prison deters. But does it deter only those who do not need to be deterred? Our statistical data, admittedly very sketchy, casts doubts on the prison as a more effective deterrent than other alternatives. The result – penological pessimism stemming either from the fact that we have grave doubts about the differential effectiveness of prisons, or that we fear we may never be able to determine the work of prisons as a deterrent, or that we realize that the proven effectiveness of prison may be irrelevant to their continued existence.

The basic question concerning the effectiveness of prisons as a deterrent has been asked, but in making the inquiry other problems are laid bare. What type of evidence must we have to conclude that prison is or is not an effective deterrent as compared with alternative sanctions? How conclusive must that evidence be? Will we ever be in a situation to come to any firm conclusions without judges allocating defendants randomly to various programmes? From a natural justice standpoint, can judges ever act in this way? On whose side do we now err – that of the public or of the individual?

These questions are as yet unanswered. To paraphrase Robert Frost, we still have many miles to go before we sleep.

R. L. MISNER

SENTENCING TO IMPRISONMENT – PRIMARY DETERRENT OR LAST RESORT?

The Honourable Mr Justice K. S. Jacobs,
The President of the Board of Appeal,
Supreme Court, Sydney.

The title of this seminar is a good one because it reflects the complexities which surround so much thinking on the subject of sentence to imprisonment. A primary deterrent or a last resort? First, what is meant by a primary deterrent and secondly, why would the sentence be one or the other? Why should it be either? Can it be both? These are the questions which arise in one's mind when the subject is considered and for that reason apparent defects of the title may be the strength of the seminar, if one can break through some of the ambiguities in general thinking on the subject of sentencing to imprisonment.

First, then, what is meant by a primary deterrent? Does it mean that the purpose of a sentence of imprisonment is primarily deterrent? Or does it mean that the sentence of imprisonment should be the sentence primarily to be imposed so that it will be a deterrent, general or specific? If the latter be the meaning, why relate the sentence of imprisonment, regarded as the primary sentence, only to the purpose of deterrent and not to the other purposes of imprisonment? On the other hand, why regard the sentence of imprisonment as the deterrent in preference to other deterrents?

All this reflects the confusion we cannot help but feel about the purpose of punishment in modern times and the respective roles of the Courts and the experts on reform of anti-social conduct. I can do little more than attempt some analysis of the problem and the expression of some views both of a legal and a social kind.

I realise as I write that I do so as a lawyer in society, as a judge. There may be all kinds of philosophies of punishment, theoretical or pragmatic, based on moral norms or wholly lacking such a base. But a lawyer primarily looks to the relationship between the law, of which the sentence to imprisonment is presently part, and society which imposes the law. He, particularly as a judge, is one whose primary obligation is to sustain and support society and to ensure to all so far as he can, justice under the law. He is not primarily cast in the role of reformer or sociologist. He must not either wholly or largely substitute his views on the efficacy of various kinds of punishment for the administration of the system of punishments ordained by law.

As a judge it is in this society essential to regard the sentence of imprisonment for serious crime as a primary form of punishment and to assume that it has a deterrent effect. As a social thinker one may argue that society is wrong in its attitude towards crime and punishment, that

imprisonment is useless as a deterrent or otherwise. The confusion between the two roles may in my view lead to confusion in the so-called principles of sentencing both on the part of judges and on the part of those who criticise judges. If the sociologist criticises the judge for his attitude towards a sentence of imprisonment he is more correctly criticising the attitude of society as part of which the judge acts. If, on the other hand, the judge is restive under the law which he is administering he is tempted to assume the mantle of the sociologist and to substitute his own views on the crime and the effect of punishment thereof for the view of the State and of society.

The sentencing judge is not and is not intended to be a penologist; his inadequacy in that role would be a gross reflection on the adequacy of society to cope with problems of crime and punishment.

Upon this basis I would approach the subject.

In my view both in law and in society generally at the present time imprisonment is the primary punishment in the higher Courts and it is the sentence primarily to be imposed unless mitigating factors exist. It will remain so until a new sanction is evolved. The number of mitigating factors is so great that they may at times appear to take over the main role and to leave the sentence of imprisonment in a subordinate role as a last resort; but this cannot be so because the sentence of imprisonment for serious crime is the primary ordained punishment and scales of punishment are the sanctions, the complement of the act being declared criminally illegal. For every crime there must be a complementary punishment and except in the case of minor offences which represent a different subject matter the punishment in modern times is imprisonment.

Primarily society will always look at the sanction for a crime from its own point of view and not from the point of view of the criminal even if he be regarded as one of society's victims. There has never been, and I venture to say that there never will be, a society which does not lay down a scheme of forbidden acts for which there are sanctions which will be imposed for breach either at the instigation of the injured party or those representing him or at the instigation of the social group itself. There is a difference between asking the question "Why in any society is this done?" and asking the question "With what sophisticated aim should this now be done?" The replacement of the primitive generality with a sophisticated aim depends largely on a philosophy of liberal positivism, a belief that mankind is moving all the time from a more to a less primitive way of life. But admitting always that the aim of thinking men must be this move from the more to the less primitive, is it realistic to believe that the age old system of sanctions for forbidden acts will ever change simply because there is sought to be attached to the sanctions the further aim of rehabilitation?

Sanctions for forbidden conduct exist in my opinion not even with a conscious primary aim of deterring members of the social group from such conduct, still less in order to further any aim of rehabilitation. This is so

even though an effect is that such members are more or less deterred and offenders achieve some degree of rehabilitation. As to deterrence the express sanction may not be the strongest factor actually inhibiting the forbidden conduct; the instinct of a social creature to conform may generally in the community be a much stronger inhibitor. But this reflection is a negative one; it only assumes importance if deterrence is regarded as a primary aim; it loses its importance if the expression of the sanction is regarded as the inevitable complement of the forbidding of the act. If the social inhibition is strong enough, forbidding of the act will follow with its consequent sanction of punishment. A crime without an expressed sanction is a social absurdity. If there is no sanction then that means that there is no crime. The sanction is the measure of the social inhibition. If there is no sanction it means that the social inhibition is not at a degree where the forbidden conduct is regarded as a crime.

The sentence of imprisonment is the modern sanction. It may be so much criticised for its faults that one is inclined to overlook its virtues. Its great virtue, if it is looked at as the sanction in a context where some sanction is inevitable as the complement of the crime, is that it provides probably the greatest flexibility in the measuring of the social inhibition so that the sanction may be proportionate to that social inhibition. It is worth spending a moment thinking of some of the kinds of sanctions previously imposed by both primitive and highly civilised and cultured communities:

Death after torture
Death by burning
Death by boiling
Death by stoning
Death by quick execution
Cutting off of limbs or other parts of the body
Maiming
Slavery
Transportation
Torture, including whipping
Branding

Such punishments are mostly corporally irretrievable and are within a small gradation in flexibility. The modern system of imprisonment had, still has, the great advantage that the sanction can be closely measured to the crime. Let us not overlook the essential humanity of this compared with other systems of criminal sanctions. I therefore say that the sentence of imprisonment must be regarded as the primary punishment for serious offences in our society and will remain so until a new system of sanctions is devised, or until our society becomes so sophisticated that even a system of sanctions has become unnecessary. That will indeed be a brave new world, unfortunately well after 1984.

Now the members of the society may justify the sanction on various

grounds – deterrence, rehabilitation and so on – but the sanction must remain however it is justified. Imprisonment therefore is not primarily a deterrent but it will in the foreseeable future always be regarded by society as having that effect. It is however the primary punishment and if it is desired to lay stress on the deterrent aspect then it may be described as the primary deterrent.

But now I would ask these questions. If a judge reaches the conclusion that a sentence of imprisonment is not a deterrent does he substitute for the primary punishment a sentence or punishment tailored to fit the social view which he has reached? If a judge believes that a sentence of imprisonment is a deterrent but finds that the number of offences is increasing despite sentences of imprisonment does he push the sentence up and up until the statutory limit is reached in pursuit of the ever elusive deterrence?

To answer either question in the affirmative is on the views which I seek to express an error. What I have sought to express is firstly, that sentencing to imprisonment cannot socially be regarded as the last resort and, secondly, that there is no harm in the reference to deterrent effect provided it does not lead to the expression in sentencing of two tendencies which I would describe as sentencing fallacies. Either tendency may be attractive unless the sentencer realises the extent of the limitations under which he suffers when he imposes a sentence. He cannot really hope to reform either the individual before him, or society, or any class within society. He is there to impose society's sanction for breach of its more serious rules but at the same time to temper that imposition with the mercy which society is prepared to extend to some of its transgressing members in certain circumstances. The sentencing judge, by realising the limits of his capacities to change men or society, avoids the two tendencies which I have called sentencing fallacies. He does not seek to avoid the sentence of imprisonment. He is not unduly concerned at proof, if it does exist, that imprisonment is no more deterrent than other forms of punishment. He does not for that reason alone refrain from imposing an appropriate sentence of imprisonment. But, further, he does not fall into the error of believing that because of a belief that a sentence of imprisonment is a deterrent, a longer sentence of imprisonment will therefore be a greater deterrent. A judge would err if he were to think "I have imposed sentences of five, six, seven and then eight years imprisonment for similar offences; they are still just as common so I shall increase the sentence to ten or twelve or more years until I succeed in deterrence."

The error in each approach would be to act upon an assumption of the ineffectiveness or effectiveness of imprisonment as a deterrent as though the truth of either of these assumptions lay at the base of the sentencer's function. The sentencing judge has a maximum sentence prescribed by law. It is his duty to impose sentences of imprisonment by assessing the seriousness of the particular criminal conduct relative to the least and the

most serious conduct comprised within the particular act prohibited by the statute, by having regard to the maximum penalty and by applying to that assessment proper particular factors which would increase the sentence or, more commonly, mitigate the sentence. In other words, I firmly believe that the only chance of consistency in a sentencing judge, and between different sentencing judges, is a recognition of a kind of tariff, not a rigid tariff but a scale which operates as a starting point from which the particular sentence in the individual case can be assessed. The tendency to regard a tariff as an acceptable feature of punishment with individual treatment as a follow on is typical of an acceptance of a retributive theory. The view that rehabilitation is the primary goal necessitates a virtual discarding of the tariff idea.

It must be recognised however that the tariff idea may not be useful across the range of a particular crime e.g. manslaughter. There are so many different kinds. The difficulty lies in the categorisation of so many different offences under the one word.

If a sentencing judge were to act upon the belief that a sentence of imprisonment is a deterrent rather than a sanction imposed with many objectives he would be led to ignore the scale in pursuit of a primary aim of deterrence. On the other hand a lack of belief in the deterrent effect of imprisonment could be reflected in a reluctance to impose that penalty. A primary instead of a secondary approach of individualisation can lead to great variation in sentencing patterns as a result of the influence of an uncontrollable variety of personal factors. Unless there is some kind of tariff there is little meaning in many of the humane principles such as that a sentence may never be increased by pleading not guilty but may be reduced by a plea of guilty. If the sentence is regarded as individual to the offender there is little or no mean against which increase or reduction can be judged.

Though proof that imprisonment on any scientific sociological analysis does not appear to be particularly successful as a deterrent is of marginal importance in the fabric of law and society, it may be a very important conclusion in determining how offenders should be treated after sentence. Since this is a seminar on criminology it is necessary to go further than to say that imprisonment is the primary punishment which by law is the complement of the crime. It is necessary to consider whether there is a better system and, if so, whether it is practicable to institute a better system. Better for what? Deterrence? Rehabilitation? Here one approaches the other view of what may be meant by the title of this seminar. Is it meant to raise the question whether either as the law now stands or as it ought to be the sentence of imprisonment should be a last resort? If this be so the subject is hardly different from the old dichotomy – to treat or to punish. It may be taken to raise the question whether imprisonment has been found to be incompatible with rehabilitation.

The system of imprisonment, as the primary system of sanctions, can only be tolerated in a modern civilized community if it continues to have that humanity which contrasted it with the previously existing systems of sanctions. Unless our society has ceased to be motivated by those principles of humanity which guided the reforms of the nineteenth century compared with the preceding centuries, then sooner or later society's feeling of guilt at its inhumanity will lead to the replacement of the system of imprisonment. Since there must be a system of sanctions our society might determine that a reversion to capital punishment or a turn to a modern form of slavery would be more humane. Possibly some system of rehabilitation may be evolved which is acceptable to society as a sanction. However when discussing future patterns it must be borne in mind that society will probably always demand a recognisable sanction and that penological patterns must be related to that demand. That is the difficulty in the following analysis:

(1) The aim of punishment is reduction of crime.
(2) No form of punishment is more or less effective than any other in reduction of crime – the so-called interchangeability of sentences.
(3) Therefore, the sentence of imprisonment, being expensive, should be discarded.

But with what do we replace it in the social sense? If, however, imprisonment is less effective than fine or release a very serious question arises. A failure to reduce the crime rate through sentencing to imprisonment may have to be accepted. However, positive increase in the crime rate through such sentencing would be a definite contra indication, whatever the aim of the sentence of imprisonment may be, and it would prove that the sentence of imprisonment was wholly failing to provide a system of sanctions. Moreover, imprisonment should be avoided in certain categories of cases not because it is not the primary punishment but because it is believed that it (a) may not be humane, and (b) may give rise to social problems greater than the crime being punished, e.g. contamination of the offender.

This brings me to the proposition that, though the sentence of imprisonment is the primary deterrent for more serious crime, using that phrase in the sense to which I have referred earlier, it does not follow that the actual serving of the whole or any major part of that sentence in actual incarceration is a necessary condition of the deterrent. It is here that the various concepts of the suspended sentence and the release on probation become very important. It has always appeared to me that the general release on probation – the bond in its common law form or in its form of the wholly suspended sentence – is more an act of mercy than anything else. The concept of probation must be more directly related to recognisable rewards and punishments. In such a scheme it is in my view

important that the judge be entrusted with a choice not only in mercy but also as the instrument of any social policy of reformation or rehabilitation.

I would express the conclusion that the modern concept of parole in New South Wales under the Parole of Prisoners Act can meet many of the desired requirements provided that the sentence is regarded as the reflection of the community's disapproval and the release on parole as a controlled attempt at rehabilitation and saving of expense to the State. The role of the judge is to fix the non-parole period primarily in furtherance of the purpose of rehabilitation and not deterrence. The sentence of imprisonment itself performs primarily the task of deterrence and parole despite the sentence becomes an understandable concept. The reason emerges why a minimum period of six months as a non-parole period is required in the Parole of Prisoners Act. The sentence of imprisonment rather than the serving of the whole or even a substantial part of the sentence in actual imprisonment can be recognised as the primary deterrent. I say no more on this large and interesting and rewarding topic of modern sentencing and penal procedures.

Lastly, I wish to say that, as I have written down my thoughts on this subject, I have become more and more aware that what I have written is related to sentencing in the higher courts for more serious kinds of crime and has doubtful applicability in any approach to the future of sentencing in the magistrates' courts. A sentence of imprisonment of short term should in my view be truly a last resort. Though it may be a deterrent its disadvantages to the prisoner and to the community are outweighed by any such advantage. The sanction which the community requires can be met by another form of punishment, particularly by a fine. Other alternatives are compulsory attendance at special centres, perhaps even some form of community work. Whatever be the alternatives I think that the prison should be so much the last resort that there should never be a sentence of imprisonment of less than one year or possible two years and the sentence of imprisonment should only be able to be imposed in very special circumstances, perhaps as an extended sentence only, for purposes of attempted rehabilitation with a fixed non-parole period of six months. It should perhaps only be imposed on special committal for its consideration by Quarter Sessions or, in the future, the District Court. I suggest this, not through any lack of confidence in the magistrates but in order to make it clear that imprisonment is not one of the sentences to be imposed in the lower Courts. I take this view partly because I think that for minor offences there should be much more exploration and development of alternatives to imprisonment, something which can be done without upset to the concept of community sanction which I have attempted earlier to elaborate; but especially I take this view because of the huge cost involved in the present system, a cost which will grow by leaps and bounds as population rises and petty crime also rises in larger and larger urban complexes. I refer not only to the cost of imprisonment itself but also to the cost of reception and discharge. I would incorporate the tables which are marked Appendix 1 and Appendix 2.

It will be seen how large a percentage of prisoners were admitted and discharged on short term sentences – no less than 77% in 1971–1972. It will further be seen from Appendix 2 that at the end of that same year 22.5% of males in prison under sentence were serving sentences under one year and 35% of such males were serving sentences under two years. Cost alone would seem to indicate that sentences to imprisonment in the case of such short periods may have to become a last resort.

APPENDIX 1

RESEARCH AND STATISTICS DIVISION

11TH APRIL, 1973

Prisoners received from Court under Sentence during 1971–1972

(These are total receptions and not distinct persons)

	Male	Female	Total	% of Total Receptions
From Lower Courts In default of fines	4887	583	5470	43.64%
Other	4028	184	4212	33.60%
From higher Courts In default of fines	1	0	1	0.01%
Other	1814	38	1852	22.75%
TOTAL	10,740	805	12,535	100.00%

77.24% are received from Lower Courts, 22.76% are received from Higher Courts and of Total Receptions from the lower Courts i.e., 9682, 56% are in default of fines.

Source: Extracted and calculated from computer printouts – Commonwealth Bureau of Census and Statistics.

APPENDIX 2

Males and Females in Gaol under sentence

on 30.6.70, 30.6.71 and 30.6.72 – Sentences

	1969–70				1970–71				1971–72			
	Males		Females		Males		Females		Males		Females	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1 day to 7 days	20	0.60	1	1.20	15	0.44	—	—	7	0.20	1	1.67
8 days & under 1 month	57	1.70	11	13.25	46	1.35	5	6.85	63	1.77	8	13.33
1 month & under 3 months	114	3.41	11	13.25	116	3.41	14	19.17	120	3.37	2	3.33
3 months & under 6 months	230	6.87	23	27.72	234	6.88	10	13.70	228	6.41	5	8.33
6 months & under 1 year	336	10.04	12	14.46	337	9.91	11	15.07	383	10.76	10	16.66
1 year & under 2 years	458	13.69	12	14.46	473	13.91	9	12.33	440	12.37	6	10.00
2 years & under 5 years	1151	34.40	8	9.64	1137	33.45	15	20.55	1163	32.69	18	30.00
5 years & under 10 years	547	16.35	2	2.41	549	16.15	5	6.85	612	17.20	3	5.00
10 years & over	204	6.10	—	—	225	6.62	—	—	252	7.08	1	1.67
Life	140	4.18	3	3.61	130	3.82	3	4.11	136	3.82	4	6.67
Governor's Pleasure	22	0.66	—	—	20	0.59	1	1.37	17	0.48	1	1.67
Other*	67	2.00	—	—	118	3.47	—	—	137	3.85	1	1.67
	3346	100.00	83	100.00	3400	100.00	73	100.00	3558	100.00	60	100.00

* Includes, Balance of Authority, Licence and Parole.

A MANAGEMENT PLAN FOR THE DEPARTMENT OF CORRECTIVE SERVICES

Mr W. R. McGeechan, A.A.S.A., A.C.I.S.,
Commissioner of Corrective Services for N.S.W.

The officers and agencies of the Department of Corrective Services are committed to the care, direction, control and management of the individual offender.

Generally accepted sentencing aims

A general view on such aims, acceptable to a democratic society, should crystallize as:

1. demonstrating society's non-acceptance of the criminal act;
2. reducing the frequency and incidence of behaviour prohibited by the criminal code;
3. the more carefully focussing of punishment as to cause a minimum of suffering, whether to offenders or to others;
4. ensuring that offenders are exposed to the opportunity to reform;
5. expiating offences but without attracting unofficial retaliation or inhumane suffering on the offender, or without increasing the incidence of offences;
6. not exceeding the limit that is appropriate to the culpability of the offence;
7. not applying to someone against his will unless he has intentionally done something prohibited; and
8. protecting offenders and charged non-convicted offenders against unofficial and informal retribution.

These aims are not ranked in any particular sense of order or degree of importance.

Policy Statement

The philosophy for the Department of Corrective Services is to develop within a contemporary social defence plan, an agency with particular emphasis on individual diagnostic techniques.

The essential characteristics of an effective social defence system are:

crime prevention; and
community attitudes
supporting respect for the law.

The aims of this policy contrast with earlier penological doctrines and conventions focussing, as they did, on retribution with a strong element of physical punishment either directly induced or, alternatively, by denial or deprivation.

The aims of the policy will be achieved through constantly refined programmes of supervised liberty, custody, and conditional liberty.

Some limited evidence in terms of social acceptance exists supporting the policy plan to move from physically oriented concepts, e.g., the rapid rate of growth in the areas of supervised and conditional liberty, in an increasing number of diversified forms.

Not all areas of future endeavour need have as a commencing point the legal fact of a conviction.

Major functions

The care, direction control and management of offenders by:

1. supervision and control of persons both in the community and the secured environment;
2. determination and implementation of treatment programmes for persons in supervised liberty, conditional liberty and detention;
3. training staff to meet future needs;
4. making research-supported management decisions;
5. assessment, development and utilisation of offenders' potential in educational and other areas, while conceding that offenders are not by right entitled to an expensive academic education.

Major objectives of aims

1. to assist in maintaining and developing social order;
2. to apply appropriate empirical-founded corrective and remedial measures to individual offenders;
3. to strive for stronger community support and understanding with particular emphasis in areas of supervision and to assist in avoiding the phenomena of the economic survival crime;
4. to optimise efforts in levels of supervised and conditional liberty;
5. to minimize existing and developing differences between the areas of custody, conditional liberty and supervised liberty, in function and aesthetics by integrating the management and functions of these areas as part of an overall programme: thus

offering to the community a cohesive and unified programme for law enforcement and crime control.

Strategies to achieve objectives

1. making use of intensive educational techniques to impart knowledge to and develop appropriate attitudes in offenders, equipping them in a remedial sense with the means for survival in a free, competitive community;

2. planning the long-term programmes to deal with the problems arising out of conflicts between different cultures;

3. maintain campaigns to stimulate and maintain public interest in innovations considered essential in attaining the ideals and objectives of corrective services through supervised liberty, custody, conditional liberty and after-care;

4. educating society to tolerate corrective innovations and to accept the risk factor which accompanies more liberal and incidental modern corrective programmes;

5. seeking community support and approval for the increased costs of providing modern corrective services;

6. establishing research programmes designed to assist in identifying effective measures in problem areas;

7. providing comprehensive training for staff at all levels, to equip them with the skills to innovate and implement validated corrective and remedial programmes;

8. implementing appropriate treatment programmes to encourage attitude change in persons under supervision or in custody;

9. introducing new and/or more efficient methodology to achieve the longer-run benefits of crime alleviation and prevention.

Controls and evaluation

1. developing and setting up control systems, e.g., planning and review committees, to aid in the achievement of policy aims and objectives;

2. preparation of profiles and forecasts plus the designing of projects to assist in long-range planning and developments;

3. the development of research and statistical methods to ensure that follow-up and feed-back action occurs for the purpose of modifying strategies to achieve the objectives of the Department.

SENTENCING TO IMPRISONMENT: THE LOWER COURTS

Mr Walter Lewer,
Deputy Chairman,
Bench of Stipendiary Magistrates, N.S.W.

What is sentencing to Prison?

First of all we must agree that a sentence to imprisonment is something done by one human to another, face to face. It is carried into operation by other humans most of whom are in closer contact with the prisoner than was the sentencer. This it is salutary to remember. We do all kinds of things to take human contact out of the business. The sentencer sits remote and elevated, and in the higher courts he is set apart from ordinary mortals by a style of dress altogether remote (by about two centuries) from every day living. The prisoner is set apart by being immured in a dock. Docks in the older courts are quite frightening affairs, surrounded by symbolic ironwork, often with spikes. In some, access is by trapdoor from a nether region below the courtroom.

Contrast is to be found in the newer of the Courts of Petty Sessions, which have no docks. The benches are high enough only to permit the magistrate to see and hear all that is going on, certainly not to give him an air of remoteness. Magistrates and members of the judicial committee of the Privy Council manage to perform their duties in their ordinary street clothes and seem to come to no harm by that. Save only in the case of buildings round the fifty year old mark, lower courts have managed to dispense with canopies, curtains, elaborate coats of arms and an abundance of dark-panelled wood. Colours in the court-room are generally bright and tension-reducing, while the coat of arms is merely a small plaque fixed to the wall. Unrepresented defendants are usually called up close to the bench on the nearer side of the bar table and when occasion demands they are given a chair there. Those represented by solicitors or counsel sit behind them close to the bar table. Only very rarely a man known to be of violent disposition or to be prone to making attempts to escape may be discreetly manacled. In my experience violent behaviour in the court room is almost unknown. Such incidents as come to memory are almost equally divided between defendants attempting to injure their own persons and attacking someone else.

In this partial abandonment of formality in court buildings for lower courts the English practice has been followed. Whatever inferences may be drawn from the contrast between lower and higher courts in this respect, it is clear that there is more opportunity for rapport between sentencer and sentenced in the Court of Petty Sessions. The importance of inter-personal communication within the operation of public justice has not so far received much attention. That this is a serious omission may be inferred from the attention given to it in studies of other organized human activity.

Argyle's "The Psychology of Interpersonal Behaviour" (Pelican) is a useful and compendious introduction to the complexities of the problems here arising. Not to put too fine a point on the matter, you may think it important that the sentenced may know and understand what the sentencer is doing with and to him and why.

The title of this seminar, while it is obviously a question, appears to confuse the "is" and the "ought" of the matter. What the "is" may be is a matter of great difficulty, if not altogether beyond our present knowledge. Perhaps we may do rather better with the "ought", for if knowledge is scanty, theory abounds. The factors which a sentencer ought to consider are prescribed by law. Whether one may spell out from legal principles that a sentence to imprisonment is either a prime deterrent or a last resort is unclear. Rather one may think that those who have framed the law regard it as a deterrent but its primacy is less easily determinable.

For all common law felonies and misdemeanours imprisonment is the sentence. Generally the same may be said of statutory felonies. For the majority of other statutory offences fines are prescribed with imprisonment as an alternative in a very considerable number. In a much smaller number, imprisonment only is prescribed. By virtue of section 4 of the Justices Act, 1902–1973, where the statutes creating the offences do not otherwise provide, the great majority of statutory offences (as opposed to felonies) are tried in Petty Sessions. Again speaking generally, the lower court has a wider range in choice in sentencing than courts dealing exclusively or mostly with felonies. Because of the existence of various devices, statutory and otherwise, all courts may have recourse to sentences other than imprisonment (for most offences) such as various kinds of recognizance as well as fines. (Treason, piracy and murder seem to be exceptions.)

The number of summary offences created by the legislature is almost beyond the power of human endurance to count. What is sometimes forgot is that not only have they been created directly but also by delegation in a multitude of regulations, ordinances and by-laws. Almost without exception infractions of these are punishable by fine; nevertheless, because of the effect of section 82 of the Justices Act they must receive consideration in this context.

The preoccupation of the legislature with imprisonment may briefly be illustrated by considering a few statutes. The Crimes Act (at present under review) contains about 71 sections which define a vast number of offences (including attempts) for which the summary conviction of an offender may result in his being sentenced to imprisonment for periods up to 12 months. The Companies Act 1961–1972 contains 385 sections. Of these over 150 define summary offences and sixteen of them provide for sentences of imprisonment. A more modern statute, the Summary Offences Act, 1970, contains 39 sections which define a considerably greater number of offences. Of these sections, 26 prescribe sentences of imprisonment, on summary conviction, ranging from three to twelve months.

It is a reasonable inference that the legislature supposes a sentence to imprisonment to be a deterrent. What is thought there about the nature of it? The Crimes Prevention Act, 1916, read now, appears to be directed at those who would further criminal activity by encouraging it, and the general penalty is six months' imprisonment. Summary courts have exclusive jurisdiction. In speaking of the Bill for the Act, the Premier, W. A. Holman, said, "In recommending the Bill to the House, I repeat that it creates no new offence, creates no new crime, forbids no action which up to now has been a free action . . . All it does is to substitute one method for another – a merciful and swift method of procedure for an elaborate and severe one. Honourable members will admit that the penalties have their most repressive effect, not when they are made heavy, but when they are reasonably certain. It is the possibility of escape at a jury trial and the extreme difficulty that is felt in convincing a jury that they should convict a man who three or four months before is reported to have used a few heated words in the course of an excited address, which tends to make the law as it stands a dead letter".

In the same speech he said: "Offenders of this type know they have little fear of a trial and prosecution on those lines. Under this new method we shall take such a man into the police court next day. He will get any delays necessary in the interests of justice; but without undue preliminary delay we can take him direct to the police court and summarily deal with him, and he may be sentenced".[1] (This has a curiously contemporary ring.)

Why legislatures should repose so much faith in the efficacy of imprisonment as the sanction by which their wills may be secured is not easy of solution. One might think that fines and forfeitures of the offenders' property would have more appeal. They are older and they do enrich the Treasury. Perhaps it is because of its novelty in terms of the continuity of law. As a punishment *per se* it appears to be a substitute for hanging and exile or transportation. Whatever else it may be it is most certainly expensive. On the other hand people believe in it. Gauge this by recalling how often one hears in ordinary conversation expressions like "there should be a law about it" and "he should be in gaol" when disapproved conduct and people are under discussion.

In fairness it must be noticed that in more recent times the legislature has set up a Parole Service and a Probation Service, giving clear indication of an intention to do more than punish simpliciter for infringements of its commands. The existence of these resources makes it more difficult to determine priority for imprisonment. It is tritely said that "Parliament must be taken to know the Law", signifying that the legislature knows what the courts have declared the Common Law to be up to the time of consideration of whatever is on foot. We must then try to discover what the courts think about imprisonment. Before doing so it is well to remember that Justice Oliver Wendell Holmes once remarked that it was not so much what courts said as what they did that was important. Some

equally cynical writer on legal philosophy has said that the law is what the courts say it is. This last is so wryly true that one may think he has come to agree with the anonymous writer of Ecclesiastes: "Of making many books there is no end; and much study is a weariness of the flesh" (12:12).

What the Courts have said about imprisonment is not difficult of discovery. On the other hand, the elucidation of principles is no easy matter for those who sit in the lowest courts. This is because of the appeal structure in New South Wales. Briefly, it is because the Court of Quarter Sessions Appeals to which most appeals on sentence are taken from magistrates is itself an inferior court. Its proceedings are not a true appeal but a rehearing and its reasonings, although doubtless published to those before it, are not published to the magistrate from whom the appeal was taken. The Court of Criminal Appeal is almost exclusively concerned with appeals from the sentences of Supreme Court Judges and Chairmen of Quarter Sessions. In exercising its power of review of sentence under section 6(3) of the Criminal Appeal Act, 1912, there is an unfettered judicial discretion as to what course it should take. It is not required to consider whether the trial judge proceeded upon any wrong principle, only whether in its discretion the sentence imposed was too severe.[2] Although from time to time the Court of Criminal Appeal does make statements of principle of general application they are not so readily applicable in summary courts for two reasons. First, the length of sentences able to be imposed in these courts is comparatively short, e.g. simple larceny dealt with summarily carries a maximum punishment of twelve months' imprisonment as against five years in Quarter Sessions. Second, with few exceptions, the crimes dealt with are less serious or perhaps, more correctly, are ranked by law as being less serious.

With this qualification in mind some points may be noticed. In *R. v. Lymbery* (not yet reported) 16th February, 1973, the Chief Justice, delivering the judgment of the Court said: "These facts have been recited, the total sentence of fourteen years is not one that I think can be interfered with. It is the sort of case in which, as I see it myself, retribution is a very significant feature. The community simply does not tolerate this sort of conduct and it expects retribution. The system provides for retribution to be a very strong and dominant element in punishment in appropriate cases and, undoubtedly, it was that sort of consideration which led the trial Judge to impose the sentences". His Honour went on to say: "The next point . . . is to decide what should be done about the non-parole period. The young man in question is 22 years of age. He had no previous crimes of violence. He had crimes of dishonesty which were quite numerous. Normally in my own view, a relatively low non-parole period is appropriate in the case of young men who, it is hoped, if the parole system is to be of much use at all, are the very people who ought to have an opportunity to be reclaimed from the prospects of recidivism, and who ought to have the opportunity to come good under the direction and guidance of the parole system". This was an appeal against sentence by a

man sentenced to seven years each upon a charge of robbery while armed and attempted rape, the sentences to be accumulative. The offences were particularly atrocious.

Where the offender is young, the offence is against property and there are no aggravating circumstances, the court will generally substitute a bond for a sentence of imprisonment. See *R. v. Holmes* (not reported) 9th February, 1973. (I have chosen these two unreported authorities only because they are very recent. Their recency is the only discernible novelty I can see.)

In *R. v. Donaldson*[3] the Court, which consisted of *Herron* C.J., *Nagle* and *Isaacs* J.J. took note of the increase by Parliament of the punishment for robbery while armed, from 14 to 20 years, saying: "This direction stems, we have no doubt, from a recognition by Parliament of the prevalence of armed robberies of the very type now under consideration and emphasizes that Parliament has indicated that one of the principal elements in punishment for such crimes is the deterrent aspect. Courts must henceforth cease to be weakly merciful and inflict such heavy and substantial punishment as will deter the actual criminals and those who may contemplate like crimes".

One seems to discern here some influence from the judgment of the New Zealand Court of Appeal in *R. v. Radich.*[4] There it was said: "... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment .... If a Court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment".

One could forgive a layman for thinking that the members of that Court were hedging their bets. On what is appropriate Dr Glanville Williams has a word:

> "Briefly, the attitude of the Courts has always been that there is in *gremio judicis* a moral scale which enables the judge to pronounce what quantum of punishment is justly appropriate to what offence. This is the punishment that fits the crime".[5]

Among other things *R. v. Cuthbert* (1967) 86 W.N. (Pt 1) 272 makes it plain that Court must have regard to the public conscience. The meaning of this I take to be that majority public attitudes or community attitudes are entitled to some weight. The propriety of this can hardly be open to

doubt. The community places much reliance upon its system of public justice and, as well, pays for it. Nonetheless community attitudes are not always easy to uncover. Organs of news dissemination are not always reliable nor do they necessarily cater for the more informed minds. The loudest clamour does not always come from the majority – hence the significance of the cliche "the silent majority".

Of the criminal courts the President's Commission on Law Enforcement and the Administration of Justice had this to say:

> "The criminal court is the central, crucial institution in the criminal justice system. It is the part of the system that is the most venerable, the most formally organized and the most elaborately circumscribed by law and tradition. It is the institution around which the rest of the system has developed and to which the rest of the system is in large measure responsible. . . .
>
> "Society asks much of the criminal court. The court is expected to meet society's demand that serious offenders be convicted and punished, and at the same time it is expected to insure that the innocent and the unfortunate are not oppressed. It is expected to control the application of force against the individual by the State, and it is expected to find which of two conflicting versions of events is the truth. And so the court is not merely an operating agency but one that has a vital educational and symbolic significance. It is expected to articulate the community's most deeply held, most cherished views about the relationship of the individual and society."[6]

The notion of the court's *educational* significance is of special interest. There may be some danger of getting in the situation of a cat chasing its tail. Inflicting a sentence necessarily involves a choice or compromise of competing interests. Probably the classic utterance on this is that of Justice Cardozo:

> "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the Legislator gets it, from experience and study and reflection, in brief, from life itself."[7]

From this brief sketch it appears that Parliament, the superior courts and the public may well be taken to think that a sentence to imprisonment is a deterrent and probably a primary deterrent. They appear to think it more a later, than a last, resort, but clearly not in all cases. What do criminals think of it? There is material available, not all scientific and not all reliable. Someone has said that professional criminals regard a sentence to imprisonment very much in the same way that a professional footballer would regard a broken leg. On 26th March last "Time" magazine ran a feature on crime and it was noted that the President had called for stiffer

sentencing and, for some crimes, the death penalty. The writer wrote of the Fortune Society, a New York based self-help group of former convicts, that being distressed that politicians never asked ex-cons what deterred and what did not, they reported in their monthly newsletter:

> "Those of us who were small-time pushers, thieves, stick-up artists, recall that we were too busy fighting to survive on the streets to be deterred by legislation. When we were committing crimes, we did not think about getting caught."

The average Stipendiary Magistrate is well aware of the foregoing and a great deal more. What does he do about it? One hopes he does his best to apply the law so far as he can discover it and within the time he has available to him. What nearly everyone except magistrates overlooks is that for the current year there will be tried in Courts of Petty Sessions rather more than half a million criminal cases. This appears to represent more than 97% of the criminal litigation undertaken in the State. Getting on towards 200,000 civil cases exist to be dealt with so you may understand that your average magistrate doesn't really have time for the consideration of the more recondite problems of judicial punishment. How then does he get by? I think the real answer is that, whether he admits it or not, he works for the most part to a tariff of his own devising as to quantum, but in principle, commonly extending some kind of recognizance, with or without probation, to most first offenders, then fines and, as a last resort, imprisonment. One of his troubles is that for an unhappily large number of property offenders the last resort doesn't work as an effective deterrent. His problems here are exacerbated because habitual criminals of the more petty kind are well aware that the sentence in Petty Sessions is 12 months as against 5 to 10 years in Quarter Sessions, and there is no power in Petty Sessions to make a declaration under the Habitual Criminals Act. These gentlemen, therefore, make every exertion to be dealt with summarily.

Again a not inconsiderable number of offenders do not trouble themselves to come to court and are dealt with in their absence. To make sense of this situation almost demands some kind of tariff system.

Tariff systems, sensibly applied, have much to commend them. Nigel Walker, in an address to magistrates some little time ago, thought it was probably the best and fairest system. Much support for tariffs can be found in the reasonings of the various Courts of Criminal Appeal in Australia. (See *R. v. Petersen* (1963) Q.W.N. 25; *R. v. Williams* (1965) Qd. R.86; *R. v. Williams* 34 S.R. 153 and *R. v. Cuthbert (supra)* at p. 274).

Notwithstanding that a tariff may serve well enough for what has been called "routine" sentencing the lower courts are confronted with much the same kind of problems as occur in higher courts. For instance, making or having explosives without lawful excuse is a summary offence punishable with six months imprisonment. Distributing and selling harmful drugs, when

dealt with summarily, incurs a maximum of two years' imprisonment. The possession of sub-machine guns, hand grenades and certain other firearms, in some circumstances, may be visited with a summary punishment of two years' imprisonment. I mention these offences because in present times they arouse interest. It is likely that a magistrate dealing with an offender of this kind would consider a fairly stiff sentence of imprisonment in the hope that it may be a primary deterrent.

Similarly, having an eye to the disgracefully large number of humans being killed and maimed on the State's roads by the unlawful driving of motor vehicles, the six months' imprisonment provided for by the Motor Traffic Act for driving dangerously, driving with the proscribed concentration of alcohol in the blood and driving while disqualified, will not be far from the magisterial mind. It seems often to be forgot that the difference between one of these three charges and that of manslaughter or culpable driving mostly is fortune.

For some years now lower courts in larger centres have had available to them facilities for obtaining pre-sentence reports not only from Probation Officers but also from Medical Officers and Psychiatrists. These facilities are used wherever appropriate and certainly not only in relation to first offenders. Without doubt by reason of this, and often by formal post-graduate training, magistrates have become aware of the existence of an uncomfortably large group of recidivists who present sometimes as thieves, sometimes as false pretenders, or vagrants or just street nuisances. What could be done to secure treatment for what might be thought to be their basic affliction, be it alcoholism, some kind of mental illness or deficiency or inadequacy of personality was and is being done with astonishingly small result. These people are sent to prison not for deterrence, for they are not in any way deterred by it (often the reverse) nor as a last resort, that having happened much earlier in their lives. To borrow a current American term they are being warehoused. By this two objects are achieved. First, they are incapacitated from offending during the term. Second, their bodily health is improved by being in a milieu usually materially better than that from which they have been taken. Mental hospitals will not keep them unless they demonstrate motivation, and no blame can be attached to the Health authorities for this because these offenders usually persist, while in hospital, with the same kind of behaviour which brought them under notice and, of course, they take up beds and other resources which might be employed in other ways with better hope of success.

I understand this class of offender to constitute the majority of those sentenced to imprisonment by the lower courts. There is nothing else to do with them – nowhere else for them to go. How many successive bonds may a dedicated shoplifter receive? Of what use is it to give a bond to a persistent vagrant who is palpably sick?

It appears that the Department of Corrective Services is meeting this unhappy situation as best it can. Soon we may hope for an open type

prison for vagrant and like persons. It possesses at the complex at Malabar excellent facilities for restoring alcoholics to the best that can be hoped for in physical health. It is to be hoped that the long promised psychiatric unit will soon be achieved, although one may doubt whether psychiatry has much to offer the "skid row" type of offender of whom I am speaking.

There is, in the lower courts, a further sentence to imprisonment, which is indirect and definitely one of last resort, although not, I think, in the sense intended in this seminar. Early in this century the recovery of fines by distress was abolished and section 82 of the Justices Act came to be in its present form except that the period of imprisonment to be served in default of payment has more recently been adjusted to one day for each five dollars. In the year 1971–2 this resulted in 5470 receptions into prison in N.S.W. The statistics do not show how many were released before the full term of the default was up by payment of the balance of the fine. In the same year 4212 persons were received into prison as a result of sentences to imprisonment by lower courts. The like figure from higher courts is 2853. When the difference in number of persons dealt with is taken into consideration it may be thought that the lower courts do not have excessive recourse to imprisonment, either as a deterrent or as a last resort. Nonetheless it is disquieting to see that of prison receptions for the year under consideration, fine defaulters from Petty Sessions comprised nearly 44%.

Of those persons who served the defaults for fines, about 2250 had been fined for being found drunk in a public place. This is about 60% of the whole. Let it be said that when this figure was brought to the attention of the Chairman and myself some months ago we thought it unacceptable. The futility of fining penniless drunkards is so apparent that simply pointing it out to the magistrates concerned has brought about a sharp diminution of the number of receptions. The 1972–3 figure will, in this regard, be very different. It may be thought curious that this has gone on for generations and been unremarked. Indeed in 1970 the legislature increased the penalty for this offence from $4 to $10.

Twenty-three per cent of this kind of reception was accounted for by those who had not paid their fines for traffic offences. It is not unfair to suppose that the freedom of a considerable number of these people was bought for them by friends and relatives who were later, one hopes, repaid. Also significant is that between 100,000 and 200,000 traffic offenders do not trouble themselves to answer the summonses they receive and their cases are dealt with under the provisions of section 75 of the Justices Act. It follows that the magistrate has no method of discovering anything about the defendant's means and, as we have seen, applies what he thinks to be appropriate from the tariff. The problem is not peculiar to N.S.W. It has caused difficulty in England and in other States of the Commonwealth.

Again, it is not unknown for wily truckdrivers who have amassed some hundreds of dollars worth of commitment warrants to surrender themselves for the execution of the warrants and "eat out" the fines in three weeks or so. This may make more sense if it be realised that the offences which caused them to be fined may have made them handsome profits (overloading and failing to pay highway taxes). Prostitutes sometimes do the like.

About 479 receptions were as a result of unpaid fines for offences against good order, as the Statistician calls them, or as we would say, for street offences. Broadly they consist of using unseemly words, indecent and offensive behaviour. Most of them would have been committed by "skid row" types of offenders who are commonly stimulated by gatherings of people into utterances and behaviour of the grossest kind. Notoriously they are not sensitive about relieving themselves in public places. The legislation makes available for these offences a sentence of imprisonment of three months, and technically, it might be proper to pass a short sentence of imprisonment rather than impose a fine which obviously will not be paid. Magistrates are, however, reluctant to sentence to imprisonment for these offences.

I do not propose to say anything about the propriety of imprisonment being the sanction for the payment of fines. In the overwhelmingly vast majority of cases fines are paid. Perhaps more would be if it were possible to have more regard to the means of offenders and their foreseeable capability to pay. (See *R. v. Churchill* No. 2 (1967) 1 Q.B. 190 and *R. v. Lewis* (1965) Crim. L.R. 121. Cf the Home Office Study mentioned in Nigel Walker's "Sentencing in a Rational Society" which appeared to indicate that the fine as a criminal sanction was as effective as any other, but severe fines were more so.)

Summary and conclusion

Not enough is known to permit an answer to the question posed by the seminar's title. It appears that the law, the courts, the community and the legislature are ambivalent.

From the statistics it appears that magistrates may regard a sentence to imprisonment more as a last resort because they resort to it directly in no more than 0.8% of cases. I have no statistics to show in what percentage of their cases it is available.

Clearly everybody thinks imprisonment is a deterrent and retribution is much favoured in the community. Research ought to be devised and directed to sorting out the "is" and the "ought" of the matter. At present it seems to me the best answer is "it depends".

Acknowledgment

I am indebted to Mrs M. Dewdney the Research Officer of the Department of Corrective Services for most of the statistics used in this paper.

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INTRODUCTORY REMARKS

Professor Shatwell:

Ladies and gentlemen: this afternoon is a very sad occasion. Ordinarily I should have spoken rather differently in welcoming His Excellency the Administrator of New South Wales as Chairman, but it is a very sad occasion in which he takes the chair. He will, I am proud to say, be assuming office as Chairman of the Advisory Committee but on this particular occasion the late Sir Leslie Herron was going to be Chairman, and I feel that I cannot let this occasion pass without paying a very great tribute to Sir Leslie.

I think that if this Institute has had any success or done anything useful it has been largely because of the unflagging interest and support which he has given us at all times. At a time when he was Chief Justice and Lieutenant Governor of New South Wales, when the demands on his time were very heavy, his unfailing support for the activities of the Institute continued. Anybody who has been associated with those activities and has known Sir Leslie through his work with the Institute will have realised something that came out with great force at the memorial service and in all the media – that in addition to being a great judge and a great administrator Sir Leslie was also a very great human being and a very great friend.

I will now ask His Excellency to take over the proceedings.

Sir John Kerr:

Ladies and gentlemen: I would like to associate myself with what has just been said by the Dean. I have spoken about my friend, Sir Leslie Herron, on other occasions and in other places, when some of you may have been present, and I need add nothing to what the Dean has said. It is a great honour to contemplate the possibility of succeeding him in this chair. For the moment I do it on an ad hoc basis, and I am very honoured to be here.

Now, the first paper in this seminar has been prepared by Mr Justice Jacobs, the President of the Court of Appeal, and I invite him now to address you on this paper.

PRESENTATION OF PAPERS

Mr Justice Jacobs:

Your Excellency, ladies and gentlemen:

I would much rather hear what other people have to say about the subject than try to say very much myself beyond the notes that I have circulated as a starting point for the discussion. I purposely made them without specific reference to the mass of writing that there is on the subject and without attempting to discuss other persons' ideas directly. I hope that is the right approach.

I think that it is useful to approach the subject of sentencing from the court's point of view as another one of the myriad problems that the courts face – problems of guilt, problems of damages, problems of children, problems of adoption, problems of custody, and so on. They are all difficult problems, and sentencing is another difficult problem. I think it is fair to say that sentencers try to remain detached from that problem in the same way as they try to remain detached from any problems of law and its application. That is difficult; it is a counsel of perfection whatever the field may be, but it is a primary counsel.

Deterrence is an integral part of the whole approach of the legislature, of the law, to sentencing. If you lose faith in it as a deterrent, in effect you lose faith in the system of sanctions, so therefore it is not a debatable matter from a strictly legal point of view – it can't be.

One can never prove how great a deterrent imprisonment is. There have been many valuable studies made which tend to show that perhaps it does not have as great merit as a deterrent as is hoped for, but, as I have attempted to say, I think that is incidental to the real problem.

The matters to which Mr McGeechan refers show how many and different are the factors to be taken into account in a modern corrective service and show the different types of punishment that are capable of being developed in order to meet the various situations of different persons. But from the point of view of the court as distinct from that of the penologist, I would draw attention to what I have described as fallacies of sentencing. First, that because it is not proved or disproved that deterrence is greatly achieved by imprisonment, therefore imprisonment fails in its purpose and some other form of punishment should be evolved. The difficulty is to think of one. It must not be one that is suitable only to those who can afford it, such as fining. One that has had development is probation in various forms. But these alternatives cannot be a substitute for the scale of punishment values involved in the modern sentence of imprisonment, though they may be suitable in so many individual cases that they may almost obscure the fact that prison is the primary sentence. Therefore I regard it as a fallacious argument to say that because deterrence

is not proved or not obtainable therefore the *raison d'etre* of the sentence of imprisonment is not proven.

The other fallacy which I think is just as important is a conviction that sentence of imprisonment is a deterrent and that heavier sentences of imprisonment will produce greater deterrence. I think that before that could be generally accepted as a principle you would need some proof that this was true in the long run. It stands to reason that severe punishment will have some deterrent effect. How long it has that deterrent effect is the important question. If the intention is to clear up crime in a particular area, then of course severe punishment will to some extent have that effect. But that is of little use, in my personal view, unless it is a lasting effect. All one has done is to upset the punishment range in that particular area to achieve a short term result. And I think it really would need close examination whether such a short term result justifies the upset so that there is a disproportion in punishment in that area or generally over the community for some time for some particular crime. To take a theoretical example, if the punishment for breaking and entering goes up because that crime is prevalent, how do you deal with breaking and entering by armed persons, how do you deal then with armed robbery, and so on?

The same is true of all different offences. If a more dramatic punishment were introduced, e.g., losing one's hand for a robbery, it would have the most dramatic effect, I should think, for quite some little while in reducing the incidence of that particular crime. If the punishment range were increased dramatically by a change in the type of punishment that would undoubtedly have an effect, but for how long? History would tell one that it would not be for long. There was no less crime when capital punishment was in force or there is no reason to think that there was. I don't feel I have said any more than was in the paper. Sentencing is so many times an individual matter, but so many other times (and I know this will provoke great differences of view – I hope it does) it is also a matter of starting with a basic scale. I don't mean that there is a sentence for the crime irrespective of the circumstances of the offence, but I cannot see how one can do other than start with the appropriate punishment for that particular offence other things all being equal. I don't see how one can get uniformity if there is not some such approach, and I am convinced that uniformity, so far as it can be obtained, is one of the great desirables.

I think that is all I would say at the moment, except that I read Mr Lewer's paper with the greatest interest. We didn't exchange notes or have any type of consultation beforehand, but I almost felt that he starts from the point where I left off with my reference to the different circumstances in the lower courts.

Mr McGeechan:

I couldn't help but be impressed with the acknowledgment that His Honour gave to what could best be described as a purely skeletal work for a management concept trying to express an equation for punishment. Perhaps tonight I could amplify this slightly and if from time to time I digress from the scene you could probably accept it as a supplementation and an attempt to justify what has already been said and what will be said in the course of the evening.

The more I looked at the title of this seminar the more I felt that it was an almost impossible brief for an officer from the Department of Corrective Services to speak to, because it suggested an advocacy generally ascribed to the Devil's Advocate – an advocacy with a theme or overtone of punitive aspects. On reflection I recalled that that distinguished judge, the late Aaron Levine, was primarily responsible for the theme of the seminar. On my having at the evening meal table here on one previous occasion challenged his view, he promised me a confrontation on what I had to say about Corrective Services and the aspect of sentencing by judges, not individually but by way of principle. I couldn't help but feel that it was a confrontation between the dove and the hawks. It wasn't a role that I was inviting and I had a feeling that it could only end one way, but of such things history is made.

I feel that democracies will invariably turn to law enforcement agencies to find answers to social problems. It is frequently put to me that there are a great many people in custody who ought not to be there, and of course the question then arises as to whether they are there as a punishment or as a deterrent or because of a social need. I think we demonstrate that they are there because of a social need rather than as a deterrent or as punishment.

I think that the Department of Corrective Services has in future a very different role from that required of the heretofore Department of Prisons. The change was not only in name, but in function, and a recognition of a need in our community for an entirely different agency pursuing a quite different programme rather than a simple punitive programme. I recall the late Judge Aaron Levine rising up in great wrath with me at one stage and saying, "Look here, McGeechan, you are Her Majesty's Gaoler, and don't you forget it". The way he said it impressed me vastly, but he didn't convince me, because although that is perhaps what the function should be that is not the way we are planning it.

The question has been raised by Mr Justice Jacobs as to what measures are available for assessing deterrence and for assessing resorts and punishments. I had my Research Division look for some learned works on this for me and they came back empty handed. There is one recent reference I would like to refer to tonight, and that is to be found in the *Portolesi case* in the Court of Criminal Appeal. What was said was –

Some of the statistical studies placed before us showed, it was submitted, not only that non-institutional treatment is as good as imprisonment in terms of reconviction rates but that fining is positively better than either probation or institutional treatment.

Other parts of the material submitted to us were relied upon as indicating that imprisonment was inferior to community-based treatment so far as the reconviction rate is concerned and that long sentences are more effective, from this point of view, than short ones.

The material relied upon was said to lead to the conclusion that the future of correctional systems lies in greater use of community-based treatment and an abatement of the use of imprisonment.

Now with these principles I am wholeheartedly in accord, but I was speaking from the point of view of measure, and the thing that is intriguing is that in view of the sparsity of statistical research in the criminological and penological areas this should be used in the Court of Criminal Appeal as learned argument for the justification of a particular theme while my own personal experience in the taking of decisions is the absolute absence of reliable statistical data that would allow a logical conclusion to be drawn from a predetermined equation.

In the same reference counsel also submitted arguments calculated to throw doubts on the rehabilitivity of imprisonment and argued that there is very little evidence that prisons rehabilitate anyone at all. It may be that there are some occasional cases of reform within the prison system, but training programmes merely prevent a prisoner from deteriorating in prison, when they have any effect at all. The officers of the Department should bear that in view, because notwithstanding policy statements and demonstrations of intention there is a general view that anything is better than detention. And it may well be so. It may be that any of our programmes are better than detention, but when one says, "Prove it", no one can do this. I am hoping that with the advent of the Bureau of Crime Statistics and Research we will all be better informed in this area of knowledge, so that we can say in precise, viable measurement terms that *this* is better than *that,* but at present the best that we can say is that we don't know.

The next thought that occurs to me is how little is known about the various forms of programme that may fall under the broad word *prison.* It was the non-social-acceptance of the term "Department of Prisons" that was one of the reasons for the change of terminology. Because of this non-acceptance by the community this was something to be feared and abhorred and ignored and, if possible, forgotten. The same view is inherent in my own Service amongst the officers. The word *prison* makes them feel uncomfortable and they do not yet accept the view that a correctional

concept is entirely different from a punitive concept. But what we are able to establish at this point is that some of our programmes are showing good results in the short run, and by "short run" I am talking about 3+ years, which could lengthen into ten and then we would get the trend lines.

Now we are confronted with a dramatic increase not only in the general population but in the crime rate, if we are to believe Dr Vinson's work, and there is a fair indication that this is so. If we look at the graphs we see a climbing population in the Department of Corrective Services and find that we are handling 34/35 thousand people every year. And with the accelerated potential for increase in the crime rate our population will increase at a greater rate than that of the general community.

In the same reference in the report of the *Portolesi case* we find a suggestion that new concepts are being recognized and are perhaps ready for acceptance by the community at large. His Honour, speaking of sentencing and non-parole periods, said:

> Generally speaking, a relatively short non-parole period should be fixed unless there are good reasons for not doing so. This leaves the problem to the parole authorities to determine whether and when after the expiration of that period a prisoner should be released on parole. They will make that decision on the basis of detailed information and investigation. They will make it in the knowledge that if their decision to release on parole fails to achieve its purpose, the prisoner goes back to serve his sentence. They have expert help. The main task of the judge is to fix the maximum sentence. If a relatively short period is fixed for the non-parole period, it does not follow that the prisoner is entitled to have his release on parole speedily granted. It must be a matter of expert consideration and decision in the light of all these circumstances. The parole authorities are just as well able to decide whether a person is unsuitable for parole as they are to decide that he is suitable. They are the best authority to make both types of decision. The fixation of the non-parole period does not operate as an indication that the prisoner should be released at the end of that period.
>
> The judge is ill-equipped to consider whether a prisoner is or will be fit for parole at a particular future time. The Parole Board can come to a reasoned conclusion on this matter, for it, and under the existing system, it alone, has the material, the knowledge and the expertise upon which to form a reasoned conclusion at the relevent time. Whether a man in prison serving a sentence imposed by a judge should serve the balance of his sentence outside the prison under supervision, or whether he should remain incarcerated, is a question which should be decided in the light of all the circumstances as assessed at a point of time during the serving of the sentence, and this should be done by an authority able to look at the whole situation as it exists at the time that decision is being made.

I have drawn on that reference to demonstrate the enormous range of activity and expertise required to give the end advice on one individual.

I need to touch very simply on two or three other points. For the Department of Corrective Services to lay down a management plan and a concept for its own evolution there were two things to be considered – how to improve and how to survive. We have now moved from a class concept into an individual concept, and what I have said is that the Department is vitally concerned with the care, control, management and direction of the *individual.* When I am assured that we have separate places for people who are homosexual and who are not convicted of a homosexual offence, and I am assured that all people of a particular class are in a particular prison, I am conscious that they are speaking of the past rather than the present. People are now classified on a group basis in the rough sorting process and subsequently, by a process of refinement, classified on an individualistic basis, thus meeting both the needs of reality and the needs of the individual. And I feel that what the prison population would accept in 1970 would be very different from what they would have been prepared to accept in 1950. And in 1990, if there is a prison population, what will they accept as the basic standards of treatment? Not, what will society allow them to have, but rather, what will they accept?

Under the heading "Generally accepted sentencing aims" I have attempted to postulate matters that I feel typify the aims of sentencing – they could also be described as the punitive aims. What do people within the Department of Corrective Services, whether operating in the community or in areas of detention, have as their primary aims? I would just like to touch on one or two points. Firstly, why are they there, what is their function, what justifies their very existance?

Pretty obviously, they relate closely to the concepts of punishment, which are invariably about five in number. The first one is society's non-acceptance of the criminal act. It is not acceptable because it is anti-social and as such threatens the peace of the community. The second is aimed at the frequency factor – how often that act occurs. The third is one with which we are vitally concerned in Corrective Services, and that is the more perfect focussing of punishment – a reduction of the emotional and physical toll on innocent third parties, the dependents and relatives of the prisoner – and this is perhaps one of the reasons that we have been able to achieve what we have achieved. I think that this third aim will become, in order of importance, the number one aim – that of the more perfect polarisation of the punishment concept on to the offender as distinct from innocent third parties. It is not idealistic, it has a functional application and can be achieved.

The fourth one is that offenders should be given the *opportunity* to reform. I think rehabilitation and reform have become questionable and are perhaps no longer acceptable. This is unfortunate, because they have a

basic purity and a basic application, but I think they are no longer acceptable in our community because they have been used to death.

The fifth is the classic format for the preservation of peace in a democracy – not to allow unofficial forces to take the law into their own hands and take retaliatory action. The sixth is the classic format of punishment and crime. Seven – the importance of not applying to anyone against his will unless he has intentionally done something prohibited. And the last one is to protect offenders against unofficial and informal retribution. So that a person has the right of protection, and this point was enunciated in the last few days in the Criminal Court by one of the judges.

Now, if you take these eight points you can classify them in three ways. The first is under the heading of a retributionist concept, and it is amazing how many people are wholly and exclusively retributionist in our society. It is amazing the criticism that flows in to my Service on the use of work release programmes and periodic detention. It is staggering to go into a learned academic atmosphere and find retributionists making up 80 per cent of the audience – punishers, floggers, capital punishment advocates.

The second major class would be that of the reformer, who is concerned predominantly with penal reform. And the most extraordinary thing that flows out of this is that most of them appear to be attempting to get into prisons rather than getting people out of prisons. People are advocating that there should be more and more open prisons and greater and greater access, while I thought the principle should be the reverse – to get people out of prison and back into society. But when you say, "Would you be prepared to take a prisoner home for the weekend?" the values change, and they say, "That is not my job. All I want is to come in and bring help."

Professor Cross was, I think, the epitome of the retributionist reformer. In Sydney, not so long ago, he said, "Lock them up, give them what they want, let them have a bed, give them beer, give them sex." This does not seem to have any basic therapeutic correctional value, because if you satisfy the whole of the physiological needs of an individual in a captive environment, what is his motivation to improve and to come back into society? Is it feasible that it could be made too comfortable, and that in effect the offender becomes supported by the State and nurtured and provided with all the basic amenities that the rest of the community have to work for?

Churchill, of course, speaking in his capacity as Home Secretary, said, "I have all the prisons of England in my charge," and then he goes on to say:

> "I did my utmost, consistent with public policy, to introduce some form of variety and indulgence into the life of the inmates, to give to educated minds books to feed on, to give to all periodical entertainment of some sort to look forward to and to look back upon, and to mitigate as far as is reasonable the hard lot which, if

> they have deserved, they must nonetheless endure. Although I loathed the business of one human being inflicting frightful and even capital punishment upon others, I comforted myself on some occasions of responsibility by the reflection that a death sentence was far more merciful than a life sentence."

You would not need to put that to the vote in 1972 in New South Wales to know whether or not the situation was diametrically opposite.

Now the third class. As I said, you can be a retributionist or a reformer, or a convenient welding of both. You can be retributionist up to a point and then say, we will stop the punishment and start reforming. But I think we are finding a new group of people who are concerned with the concept of reducing the incidence of crime. I think it was Nigel Walker who called them *reductivists.* They are concerned with reducing the opportunity for crime, and I think it is a good term and describes in one word what is happening in terms of philosophy for New South Wales Corrective Services. I think we are pursuing not only a social defence concept but a social defence concept concerned with reducing future crime.

The policy statement is probably nothing more than something called social hygiene, and an exercise in abstracts. This is what we have to work in, because we don't have any other positive rules like some of the purer sciences. I have said we have established a policy for the development of a social defence segment, and obviously this will never be highly efficient until we move on an international or global basis, or, at worst, a State basis, where all the people concerned work in a common programme. The Minister of Justice sees a common Ministry of Police and Corrective Services as an appropriate liaison between two essential agencies to ensure a proper integration. It may well be that my officers could do better with offenders if they had them at an earlier age, and of course if the crime is sufficiently extreme they almost invariably do come into Corrective Services. It is a question of degree of the offence. At this point in time we have them in custody as young as 15, most certainly 16, and quite a handful of 17s and 18s. But this particular policy is based on two essentials – crime prevention and community attitudes supporting respect for the law.

Crime prevention is operated within the Department of Corrective Services on five major levels. First, it is essential to identify the problem. I think it was an appalling situation when 1,300 delegates engaged in criminology, penology and the law gathered together at the United Nations Conference in Kyoto did not have a common view of the problem. First, we attempt to diagnose the problem of the individual as an essential in reducing future crime. Societies tend to be somewhat sparse with the application of expert help, and we are no exception. When the society has abundance of money you get an abundance of expert help – social behavioural scientists, including psychiatrists and psychologists, trained social workers, and all the other people who contribute to the end result. We

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spread a policy of general deterrence in our prison community, deterring rather than particularising. In other words, there is infinitely more to gain by a lawful attitude than an aggressively anti-social attitude. We reduce the opportunities for crime, not by stringent physical techniques but by simple persuasion supplemented by appropriate physical techniques. So the reduction of the potential for crime is one of the essentials. We educate and condition, and I am happy to say that we are educating more and I hope we are conditioning more. And lastly, in our scale of crime prevention within Corrective Services, we incarcerate.

Let me make one particular point which is often not understood by the community: that which is described as our softest programme, and which I think is our most enlightened programme, is from the prisoner's standpoint the most difficult programme in which he can be expected to survive – that is the work release programme. He goes to work in the community, he goes back into custody. He goes and makes a contribution at weekends in the National Park. He is allowed to associate with his family once each month, in the family atmosphere. And people describe this as a softened approach, a soft programme! The easiest way to survive a prison sentence, so far as any prisoner is concerned, is to take your sentence quietly and do absolutely nothing – for which you will get full marks for social behaviour, for preserving the peace in the community, and you will be guaranteed a reduced sentence. The establishment will say, what an excellent fellow he is. In the work release programme you are not allowed to make a mistake. You are made to work in the community, you are made to accept responsibilities in the community. It is amazing how many prisoners are there as reluctant guests in that programme, because one would think there would be an endless queue for it. It is not in itself physically punitive, but it is punitive in an educational conditioning sort of way. In the short run we are getting excellent results, in the long run we may get increased recidivism, but I don't think so. I think that this community-oriented programme can be expanded in other forms, but, as Churchill said, compatible with the community's acceptance.

Mr Lewer:

G. W. E. Russell, a politician and essayist who died in 1919, tells us in his *Collections and Recollections* of a newly elected mayor who said that during his year of office he should lay aside all his political prepossessions and be like Caesar's wife – all things to all men. It seems to me that in matters criminological this may very well be said of sentencing to imprisonment. I will not weary you by reading the paper, but it may be left as a voluntary exercise. I will speak of it, but only transiently. This is an opportunity to assail you with afterthoughts and omitted matter.

You may think it important to notice what happens during the actual sentencing to imprisonment. Within the last year or so someone in England has written a monograph on homilies at the time of sentence and their

effect upon the prisoner. He concluded that if the sentences were lenient and the homily was short and comprehensible to him, the prisoner would remember it and even derive some benefit from it, but if the sentence is not lenient the sentencer may as well save his breath.

I would like to see some work done on the value of the ceremony and trappings that surround a criminal trial in a higher court. Consider how it must be to be caged up in a dock, surrounded by strangers, some bewigged and gowned, using terms that are quite incomprehensible, and all in a room of the sombrest description. It would be good to know how much effective communication there is with the prisoner. Probation officers speak of people released on bonds who ask when out of the courtroom, "Well, what happened to me?". You may think there is a case for getting rid of those impertinences to criminal trials which serve no useful purpose and which may impede communication and detract from human dignity.

Perhaps it is not necessary to add anything to what I have said about Parliament's use of this action of imprisonment. The difficulty is that since the abolition of the death penalty and transportation no acceptable substitute for imprisonment has been devised. Various kinds of forfeitures have been put forward. For example, see a fine provocative article by His Honour Mr Justice Else-Mitchell in *The Australian Criminal Justice System.* It may be that these are not considered to be politically viable. Again, many of the persons on whom this kind of punishment might fall are without any worthwhile property to forfeit.

Partial imprisonment is in force here on a limited scale for offenders not previously imprisoned. In other parts of the world it is in wider use. There is much to recommend it for selected classes of offender, but it appears of small utility for career criminals and the more desperate type of offender like violent sociopaths (and I am well aware of the loose use of the word *sociopath*).

I would agree that I have dealt too briefly, and probably unjustly, with the extensive writings of the Courts of Criminal Appeal. Nonetheless, I think it is fair to say that they show a proper concern for community attitudes, community safety, and individualisation of punishment. Full reconciliation of these interests is impossible; at times they appear to be mutually exclusive. One can only respectfully agree that the community is entitled to have its fears and condemnation of some crimes forcefully expressed.

What may be sometimes overlooked is the reinforcing effect sentences have on those who refrain from committing crimes. This is different from deterrence and its effect may be equally obscure; its reality seems much less doubtful. The exact nature of what deters seems not to be understood. It is likely there would be more understanding if we took time to consider what factors make a person susceptible to deterrence. It may be thought fairly

obvious that a prosperous family man doing well in his calling may be deterred from wrongdoing by reflecting upon what he has to lose and the suffering which may be caused to those whom he loves than the man without property and without ties. Nonetheless, we can all bring to mind men in such situations as I have first described who have, by committing crimes, wrecked their own lives and those of their families. Again, there are many men without families or property who live exemplary lives.

The Court of Criminal Appeal in New Zealand which decided the *Radich case* was in no doubt as to the value of realistically stiff sentences for deterring potential criminals, and however right they were, they were by no means wholly wrong. Scandinavians appear to be equally as fond of strong waters as are Australians, they are affluent, and accustomed to driving about in motor vehicles, yet their road death rate per person and per vehicle is lower than ours. They have no inhibitions about random breath tests and their penalties for drink-affected drivers are draconic – so severe that prison is the usual result. Commonly it is weekend prison or prison delayed and served in the offender's annual holiday period. This is an idea you may think we could explore, since in that way the weight of the punishment falls on the offender and not on his family.

A sentence is a judgment, a statement of opinion, in its own way just as significant as a judgment upon a point of law. It is come to in much the same way, i.e., by the selection of the applicable principles and their application to those of the facts deemed to be significant; in other words, a kind of legal syllogism. In *The Province and Function of Law,* pp. 171 et seqq., Julius Stone discusses what he calls "the meaningless reference" and "the concealed multiple reference". His thinking on this he updated in *Legal System and Lawyers' Reasoning,* where there is a general discussion of "Categories of illusory reference" (pp. 241 et seqq.). Where there is the possibility of choice of premises in a valid way there must be a likelihood of differing conclusions. It might be said that a change made by the Appeal Court in a sentence is the substitution of that Court's premise for that of the original sentencer. This, you may think, lends some point to the aphorism of Justice Oliver Wendell Holmes, and perhaps what I have noted from Professor Glanville Williams.

I wonder what criminals think about deterrence. I remember a framed advertisement by a station booking office window where everyone who wanted to buy a ticket was more probably than not impelled to read it. It was put there by one of the less well known religious sects, and its purport was: "Unbelievers, do not think that death is the end. After death there remains eternal punishment for the sinner who is unrepentant". One got the impression that the only repentant sinners were those who belonged to this sect. It was a really terrible sanction, but nonetheless the sect remains little known and its adherents few, and you may ask why. The answer is that the sanction is too remote to have impact. Bentham pointed out that for punishment to have a deterring effect on potential wrongdoers they have to know about it, it has to be close enough to touch them. And this seems

largely what is not happening in our society. What punishments receive publicity relate to sensational crimes or to people who are in the public eye, and of course a sufficient number of offenders remain unconvicted to make the risk seem worthwhile, if they ever think about the risks.

Now, the lower courts. The exact figures for 1972 for our courts were: Charge and summons cases, 596,390; civil cases, 162,523. The problem of the lower courts is bulk. I could not give a State figure for the percentage of sentences to imprisonment by magistrates for crimes where that sentence is available to them, but I am able to give some figures from my court, which is the largest Court of Petty Sessions in the State. These are for 1972, and they relate to four offences where imprisonment is an available sentence. The first is stealing from retail stores, which carries a fine of $100 or 12 months imprisonment. The second offence relates to self prostitution, with a fine of $400 or 6 months imprisonment. The third is vagrancy, which carries 3 months in prison. And finally, driving with the proscribed concentration of alcohol in the blood, for which the punishment is 6 months in prison with hard labour and a fine of $400. There were found in this court of ours 1,224 proved charges of shoplifting and of these people 107 were sentenced to imprisonment, which is 8.74%. Convicted prostitutes numbered 3,264, and of these a mere 42 were sentenced to imprisonment, which is 1.29%. Regrettably we were confronted with, and found guilty, 1,874 vagrants, and for reasons I hope I have made plain 817 were sentenced to imprisonment, i.e. 41.52%. 445 persons were convicted of driving with the proscribed concentration of alcohol, and 4 were sentenced to imprisonment, which is 0.89%.

Now if I have captured your attention with a few figures let me give you one or two more which rather intrigue me. The average case load per year of the Stipendiary Magistrates in Central Court of Petty Sessions is 8,818. The average case load per year of Stipendiary Magistrates throughout New South Wales is 6,900. The latest figures available from the Commonwealth Bureau of Census and Statistics indicate that in 1969 there were made to the higher courts in New South Wales 9,793 committals from magistrates' courts. In that same year there were convicted in the higher courts 3,609 people. In the lower courts for the State in that same year there were convicted 309,297 people. I am not altogether sure what inferences one may draw from that, but all I want to assure you is that the magistrates don't choose their work, Parliament makes them do it.

By way of conclusion, let me add this. In Hood and Sparks' *Key Issues in Criminology* there is a chapter on assessing the effectiveness of punishments and treatments, and on p. 171 they say:

> Even despite considerable progress, our knowledge is still limited and very rudimentary. It amounts, in fact, to a number of broad

> generalisations which, though better than nothing, should be treated as a basis for judicial or administrative decisions only with the greatest of care.

We are still, as Leslie Wilkins has said, "only at the stage where the nature of our ignorance is beginning to be revealed".

Coming closer to home, Ward and Woods in *Law and Order in Australia* say this at p. 106:

> Given a range of publicly acceptable sentences the one in this range which produces the best result for the community as a whole can only finally be determined by scientifically determined experimentation and evaluation.

Now you may think that research is not sufficient and that sentencers themselves must find ways of experimenting to provide material for research. To follow individuals through fingerprint records to see where and how they resiliate has some utility and costs a great deal of money, but we know of them only when they are caught and convicted.

Let me finish by quoting from Stone again, this time from *Human Law and Human Justice*, p. 344:

> It seems correct to say that modern developments in penal theory and practice still leave intact the precept that seriously disapproved action be visited with punishment, even though drastic changes have occurred in the scope of what is seriously disapproved. Punishment must not be disproportionate to the wrong to which it responds, and that punishment which denies a modicum of respect to the dignity of the offender as a human being serves no worthwhile purpose in social life, but on the contrary tends to undermine the sense of common humanity on which finally social life must build.

COMMENTARIES

Mr Justice J. H. McClemens:

Bacon said in his *Essay on Judicature* that an over speaking judge is no well tuned cymbal, and I propose to comment only on one aspect of what Mr Lewer has said and one aspect of what Mr McGeechan has said.

I think the one great reform we need is to end the semantics of the Lower and Higher Courts. We are all part of one judicial system, performing different functions. Sentencing is such an immense area to cover that the cases that Mr Lewer has referred to in the way of the sentencing process are a completely different kettle of fish to the armed robberies with which

Judge Staunton has to deal and the murders and rapes with which I have to deal. One of our problems – one of the benefits of this Institute is that it tends to break them down – is that we are all existing in separate and independent compartments, and sentencing as a problem in respect of vagrancy, prostitution and driving under the influence, and sentencing in relation to armed robbery, are really different things. That is the first comment I wanted to make about what Mr Lewer has said.

I think none of us appreciated fully, certainly I myself did not appreciate until this evening, the incredible amount of work the magistrates do. The case load of each magistrate is 8,818 cases each year and they deal with 500,000 cases in the course of a year.

Now I turn very briefly to Mr McGeechan's notes on "Strategies to achieve Objectives", and the fourth strategy is "Educating society to tolerate corrective innovations and to accept the risk factor which accompanies more liberal and incidental modern corrective programmes". We have seen the difficulties, we have seen the comments in the press, we have seen sometimes the judicial problems that have been created by the introduction of the Parole of Prisoners Act of 1966. This is the case of the need to tolerate corrective innovations. Work release has been referred to by Mr McGeechan. I myself, even for the most serious offences, am strongly in favour, wherever it can be imposed, of the suspended sentence coupled with a heavy fine, but so far as the heavy fine is concerned we ought perhaps to give consideration to the Swedish idea of the day-fine. And the one thing we have really never investigated is, as a sentencing procedure, the making of the offender who is put on a bond provide for his own bond. If you have a lad capable of earning $100 a week and you require him, as a condition of entering into a recognizance to be of good behaviour, to supply $10 a week for three years, at the end of a year he has over $500 with the Clerk of the Peace, at the end of two years, $1,000, and at the end of three years, $1,500. I should imagine that would be a most effective form of sentencing. I tried it once, and what the Court of Criminal Appeal did to me was nobody's business. But I think we have seriously got to think, as Mr McGeechan says, of the toleration of corrective innovations, and I think Mr McGeechan has put his finger right on it when he says "the education of society to tolerate corrective innovations".

Judge P. L. Head:

Any short observations following the paper presented here by the learned President of the Court of Appeal must necessarily be restricted in form and content. There is a risk of superficial treatment by me of a subject which His Honour has developed in terms which invite deep thought and stimulating discussion.

The subject under discussion opens up the whole problem of sentencing an offender, and perhaps I am expected to reflect the viewpoint of one judge who presides at trials and who is subject to review by a superior court, which court would be expected to be concerned mainly with any wrong approach in principle by the sentencing judge.

In expressing the principle to be adopted by the sentencing judge I would, with respect, give emphasis to the President's statement that a judge is "one whose primary obligation is to sustain and support society and to ensure to all, so far as he can, justice under the law".

The interests and the protection of the community embrace wide ranging considerations of whether the offender should be deprived of his liberty, whether he should be penalised by a fine, whether he should be placed under supervision within the community, and whether it is in the community interests to try to educate or guide him.

I think that the growing tendency to emphasize rehabilitation of the individual, as being an obvious factor in the interests of society, should be viewed as a supplement to other considerations rather than as a substitute for them. I am thinking in this connection of such factors in a sentence as deterrence and punishment.

Let me interpolate at this stage the importance in my opinion of treating the problem of sentencing as being different in the case of each offender.

A judge or magistrate is called upon to sentence the individual and no one else. It may well be that prevalence of a particular crime justifies greater emphasis upon the deterrent element in the sentence, but a judge is recreant to his oath if he does not give full attention to the individual criminal as an individual. This rather trite comment upon the obvious is made because so often statistics are quoted as being proof of arguments advanced about sentencing, whereas a prisoner does not become a statistic until after he has been sentenced.

This fact also calls in question the validity of making comparisons of sentences passed on different offenders for the same type of offence, and it points to the danger of striving too hard for apparent consistency in sentences, a consistency which is as elusive as are twin personalities among offenders.

I return to the question of imprisonment as a deterrent. One is thrown back to the ever present but unknown factors as to whether and to what extent a prison sentence operates to deter others. Criminologists tended to point to crime statistics to suggest that a given offence may be on the increase in spite of heavy sentences. But no one can say whether the crime rate would not be very much higher still if sentences, designed in part as deterrents, were not imposed.

Crimes of passion probably excepted, I do not think that a Court can shut its eyes to everyday experience of human nature, and I do not think that a judge should accept the proposition that fear of heavy punishment will not deter. I suggest that such fear is just as effective as a deterrent as is the likelihood of detection.

Many will remember the words to us at a previous seminar of Thorsten Eriksson. He was then in charge of the Swedish Prison System, and he told us that no one in Sweden drives after drinking alcohol because every drunken driver goes to prison. Heavy fines for littering the streets make Singapore one of the cleanest cities in the world. I do not for a moment advocate automatic penalties for crime to the exclusion of the merits of the individual, but I believe that prison sentences can be and are effective as deterrents, and as primary deterrents in the sense used by the President.

Social attitudes and moral sense determine the true basis inhibiting crime. I would assume that the majority of people don't want to break the law; certainly they don't want to engage in major crime, even though they may justify to themselves the commission of traffic offences or tax evasion.

But it is the individual who contemplates serious crime who must be considered as the one to be influenced by the likelihood of receiving a prison sentence if he gives way to his inclinations. If the deterrent element in a prison sentence is to be truly effective it is this type of individual who must be kept in mind. I see no method of reaching him and of deterring him which is more effective than making known the prospect of imprisonment as the almost inevitable consequence of serious crime.

I think of imprisonment not in terms of barbaric torture, but in terms of deprivation of liberty coupled with rigid discipline. If to these factors there can be added incentives and opportunities for rehabilitation so much the better for the individual and so for society generally, but the deterrent element in a prison sentence is considerably reduced if prison is thought to be a not unpleasant interlude from life's responsibilities.

I have previously mentioned that prevalence of a particular crime may justify a greater element of deterrence in the prison sentence of an individual upon conviction for that crime. Critics of this approach, I believe, fail to give sufficient recognition of the basic factors of the interests and protection of the community.

I would therefore suggest that the President's references to the so called "tariff" sentence are open to a different approach. He uses "tariff" as being a scale which operates as a starting point from which the particular sentence in the individual case can be assessed either up or down. I make the point that any emphasis upon the acceptability of adopting such a tariff would be at the expense of proper consideration being given to the

individual prisoner having regard to the circumstances of his particular offence.

D. A. Thomas, a lecturer in law at the London School of Economics and Political Science, in his article in 1967 *Criminal Law Review*, page 503, uses the term "tariff" as "a convenient name for the process by which the length of a sentence of imprisonment, or the amount of a fine, is calculated, where the primary decision is not in favour of an individualized approach".

For myself I would not favour the abandonment of the individualized approach as a primary decision. To sentence the individual is the reason why judges are more favoured than computers for this task. Judges undoubtedly make mistakes. Whether they have done so is a matter for other judges to determine. The responsibility has to be assigned to someone by the community, and judges and magistrates are given this responsibility.

But within the range of sentence as prescribed by law, the discretion of the judge should not, I believe, be restricted by reference to some tariff, the computation of which must be reached by considering previous sentences for the crime in question. As I have earlier indicated, and as I repeat, the individual offender in my view is entitled to be sentenced as an individual in the peculiar circumstances of his crime. If his case in the view of the sentencing Judge justifies a prison sentence which appears to differ significantly from a "tariff" period, or which appears to be much lower or much higher than the average as calculated from other sentences, then that is a matter of little consequence. Such a sentence is subject to the same review on appeal to which every sentence is open, but I see no justification at any stage of treating the prisoner as other than an individual whose case must be considered by reference also to the interests of the community.

If there is any value in an attempt by me to sum up the many aspects raised by the learned President, I would say that he puts forward the proposition that the effect of imprisonment as a primary deterrent cannot wholly be discarded in favour of the rehabilitative element which may be given effect to at less cost to the community, but nevertheless that the parole system can be used to retain the deterrent effect of sentences of imprisonment and still provide for the rehabilitative element.

I do not think it is appropriate for the Courts to tailor their sentences to the depth of the public purse. It may well be that lack of finance has brought about deficiencies and delays in the administration of justice, but the whole complex problem of a parole system is perhaps something with which the learned President has not set out to deal with extensively, and so it should not carry more than this passing reference by me. I would only like to say therefore, that if emphasis on deterrence is to be reflected in a prison sentence then that emphasis can be lost if only a relatively short non-parole period is specified and publicised.

Finally, at risk of over-stepping my part in this seminar, let me add that I do not regard imprisonment simpliciter as a last resort. To postulate this would be to assume that our system has exhausted the adoption of alternative and additional courses appropriate to the individual offender. The judges of my Court extensively use deferred sentence coupled with the common law recognizance with good results in many cases. Such a course is frequently considered to be appropriate to young offenders, to first offenders, or to those in whose future conduct there can be confidence.

I have had the privilege some years ago now of having the Minister of Justice consider a proposal which I made to him that there be set up a special system of custody of young offenders who would otherwise merit short sentences, such custody having the confinement and discipline of a prison, but lacking its associations and stigma, and with emphasis on education, training and rehabilitation. The Minister was not unsympathetic to the proposal, but he referred inter alia to the substantial cost involved. I am not unaware nowadays of the move by the Commissioner of Corrective Services to segregate young offenders where practicable, and to encourage educative and rehabilitative measures, and this, I feel, is something which merits general approval and support.

I conclude therefore by expressing the view, of necessity stated in general terms, that a sentence of imprisonment is a prime deterrent, but should not be regarded as a last resort.

DISCUSSION

Sir John Kerr:

I propose now to throw the whole subject open for discussion. There is one thing I would like to make clear – that I am here tonight in my personal capacity and I am here to learn, and I would invite you to feel entirely free to speak and to be frank about anything and say exactly what you think.

Mr Peters, Department of Corrective Services:

In the Department of Corrective Services it seems that people are not prepared to take risks for fear they may be making a wrong decision – the security must not be breached and a prisoner inadvertently let loose in the community. Surely, given the indication that there are far more criminals out of gaol than inside, we should be prepared to take more risks rather than trusting only gilt-edged, secure prisoners to such programmes as work release, periodic detention, etc.

Mr McGeechan, Commissioner of Corrective Services:

The schedules of the people in the work release programme cover the whole of the criminal calendar and range from murder through rape, thieves

and homosexuals, so when you speak about risk, enterprise, and being bolder in our endeavours, I am not quite sure how we can be bolder in putting people in the work release programme without deliberately causing disaster. Periodic detention is not controlled by Corrective Services and is not an administrative function but a judicial function.

Mrs D. Cameron, Probation and Parole Officer:

Mr Justice McClemens has said that sentencing murderers, rapists, assaults and robbers was one thing and sentencing shoplifters and prostitutes was another. I would like to ask what the difference is.

Mr Justice McClemens:

I think there is a terrific difference between sentencing shoplifters and murderers, and between sentencing prostitutes and rapists; and I think there is a terrific difference between sentencing vagrants and sentencing people who commit offences against the traffic code. First, there is the social seriousness of the offence. I may be wrong in this, but I think the prostitute really doesn't do the social harm that is done by a murderer. In one sense she might be regarded as doing a social service, but the murderer can scarcely be regarded as doing a social service to the person he has killed. The man who breaks into a house where an elderly woman is sleeping and in circumstances of terror and humiliation rapes her is a completely different person from the shoplifter, who might be thought to be a lesser sinner than the shops which put out things on the basis of impulse buying knowing that they will get a proportion of impulse stealing. It is because of this that I believe you have got to, as it were, categorize the seriousness of offences. In this perhaps I am old-fashioned. I understand that some of the more learned criminologists think that this distinction has no basis, but I think there is a great difference between those things which are *mala prohibita* and those which are *mala in se.* In any civilized community the intentional taking of a life must be wrong in itself, and I think that those offences which represent a serious threat to the person or the security of individuals are in a completely different category from those things which are merely administrative offences.

Mr David Williams, Probation and Parole Officer:

Supplementary to Mrs Cameron's question, would Mr Justice McClemens like to comment on whether a greater expertise is required in sentencing on the matters dealt with by a magistrate than the clear cut matters dealt with in Quarter Sessions and in the Criminal Court?

Sir John Kerr:

Perhaps that might be directed also to Mr Lewer.

Mr Lewer, Deputy C.S.M.,:

It has always been one of my dreams that I should be in a position to sentence rapists, murderers and the like, but regrettably I find myself sentencing shoplifters, whores, vagrants and all sorts of undesirable people. But if I can claim expertise I can only say that I try to deal with them with mercy and as fellow human beings. That calls forth all I can offer, and I daren't put it any higher.

Sir John Kerr:

I was intrigued by your figures about vagrants, which seem to be so high – 47% – by comparison with the figures for all the others that you sentence. Might I ask why, and whether we should reform the law? I think Morris and Hawkins wrote about this, didn't they?

Mr Lewer:

I believe Parliament requires us to sentence them because the electorate doesn't like these unhappy people lying in the gutter and wandering round public transport and streets. When we do sentence them we beat them to death with a feather, as it were. If we can, we try to persuade them to go to some institution which will care for them, but regrettably some of them suffer too much from alcoholic dementia, or from simple recalcitrance, or perhaps a love of the open air. Never forget how uptight we European-descended folk get about those who like sleeping in parks and bus shelters, tram shelters and ferry shelters. I should say that the average sentence passed by a city magistrate would be four days' hard labour, and that serves only to feed them up, clean them up, and entitle them to a new suit of clothes (new to them, of course) from whatever welfare agency chooses to care for them, and to set them on their merry way back into the court again, perhaps in one month, two months or three months time. But happily for us some of them are peripatetic, they like to travel, so it might be as much as six months before we see some of them again.

In my view, Sir, with respect, it is an insoluble problem. Perhaps if one day we can educate the public to accept this eccentric behaviour, be more tolerant about public drunkenness and other less desirable kinds of conduct, we won't have to put them in prison. But Parliament requires us to do it. We magistrates feel quite proud that on the occasion of that much-debated piece of legislation, the *Summary Offences Act,* we managed to persuade the Ministers to reduce the maximum sentence for vagrancy from six months to three months. And we practically never use the maximum.

Associate-Professor Hawkins:

The views I hold about vagrancy are set out fairly clearly in *The Honest Politician's Guide to Crime Control.* What Mr Lewer has said is that the law as it stands is what he has to administer, and that as a magistrate he tries to administer it as temperately, as modestly, and with as much humanity as possible. Knowing Walter Lewer I think that is true, and I think it is true of most of his colleagues. What the book says is not that we are extremely critical of the police or of the magistrates; what we say is that we think the criminal law should be withdrawn from this area. We think there are a number of areas of human behaviour which may be a nuisance to the community and may be objectionable, and may well be immoral, and may affront us in one way or another, but we don't think these are proper areas for the criminal law to operate in. And we think that if the effect of the operation of the criminal law is for the most part unhappy, then so far from solving the problems it causes them to become worse. I think it is perfectly true that when you have people administering these laws who are men of humanity and sensitivity they will try as far as is humanly possible to administer them from that point of view. And I think this applies not only to magistrates, but it applies often to members of the police force. So if the responsibility for the mishandling of this rests with anyone at all, it rests not on the law enforcement agencies – who are doing what we tell them to do – it rests on us, and it is up to us to make changes.

Sir John Kerr:

Mr Justice McClemens, will you pick the question up from there?

Mr Justice McClemens:

The suggestion that a greater expertise may be required in sentencing on the matters dealt with by a magistrate is a concept which I reject absolutely, because I don't believe there is a level in courts. The whole of the courts are part of an integrated system, and the integrated system has to keep society going as a going concern. Therefore it is not a question of a greater expertise but of different expertises in different areas. The vagrant and the armed robber are as different as chalk from cheese.

Anatole France once pointed out that it is equally an offence for a millionaire and a vagrant to sleep under a bridge. The fact that we have in Sydney a population of two and three-quarter millions, probably going up to five millions by the turn of the century or shortly thereafter, is going to mean that at the periphery of society you are going to have a bigger proportion of vagrants and others who are unable to fit into the pattern of society. What to do with them I wouldn't know. You can pick them off the streets and put them in hospitals in nice aseptic conditions – and mightn't you be doing them more harm in the long run than by letting them get drunk occasionally and sleep in the park, and then have a fortnight or so in Long Bay to dry out and get some good meals?

But to come back to the question: As Mr Lewer has said, the magistrate seeks to enforce the law within his particular area with mercy to his fellow human being, and he is required to enforce it. The Quarter Sessions judge has to enforce the law within his area with mercy to his fellow human being, and the judge in the Central Criminal Court has to do the same in his area. Therefore it is not a difference of expertise, but an expertise within a different specialty in the same field.

Judge Loveday:

I should like to hear from our prison officers, our social workers, our probation officers, whether they think there is any real value in short sentences. There is a body of opinion amongst some judges, some experienced judges, that short sentences, at least on some occasions, can be very effective both as far as the individual is concerned and as regards general deterrence. I am not persuaded to that view myself, but I should like to hear from some experts in other fields as to whether they believe there is any value. Perhaps some of them have had experience with persons who have been sentenced to short periods of detention.

Sir John Kerr:

Are you willing to say yourself why you are not persuaded about the value of short sentences?

Judge Loveday:

I am persuaded, first of all, that the prospect of a sentence is a very real deterrent to the individual, because in the last year I have given perhaps 500 recognizances or bonds and I have had less than 1% referred to me for breach of the recognizance. The recognizance has been given with the prospect that if they break it they will probably go to gaol. These figures are perhaps misleading – it may be that many of the recognizances are still current, or it may be that the persons have fled interstate and the officers haven't caught up with them yet. But so far as the actual persons who are brought before a court a second time are concerned, the number of recidivists is very small indeed. And this leads me to believe that the prospect of immediate gaol, at least for the period of the recognizance, is a very effective deterrent.

So far as the community in general is concerned, I have very grave doubts about the deterrent effect of any sentence. I have been told by a number of judges that they have in various areas virtually stamped out a particular type of crime by the imposition of sentences of imprisonment – for car stealing, or something of that nature. This hasn't convinced me, mainly because of the reading I have done on the matter, but it is because I am unable to answer this that I ask the question – to see if there is anyone who has had personal experience who could answer it for me.

Mr Howard Purnell, Senior Public Defender:

Can I give two examples of the situation as I see it? Some years ago I was visiting Berrima gaol, and working outside the gaol in the garden was an old fellow who had in fact been incarcerated for 30 years as a murderer. As I understand, he had been offered his release on licence but had refused it because he said he didn't know where to go. Now, on the other side of the coin, we had a lady before the Court of Criminal Appeal some while back on a very substantial offence and although she had a very bad background the court saw fit to give her a bond. She subsequently had a very unhappy history, and after being at large for some time she broke down and came back before the Court of Criminal Appeal. Frankly, I thought her a very bad risk, but the court in its wisdom gave her another bond and I understand that she has now managed to last the three years. So on the one hand you have got the person who has been incarcerated for a great period of time, and of course you have got to have long sentences in certain cases, but what good it does is very difficult to determine (one of my hobby horses is the domestic murder, as one District Court judge reminded me on one occasion); and on the other hand you have this woman who at the moment is going all right, and I would submit that the community interest is much better served by leniency where this can be granted, and by giving them a go.

Professor Shatwell:

I would like to comment on one question raised by Judge Loveday. Admitting that heavy sentences can stamp out a certain form of crime, it sometimes happens that it merely diverts the criminals to other forms of crime. It is well known that in Sydney at present many former safebreakers are now coming before the magistrates for shoplifting, and this is not impulsive shoplifting or being tempted by things on display, but it is a calculated risk. Perhaps we could tack that into a discussion of short sentences.

Mr Peter Einspinner, Technical College:

I am not entirely convinced that a long sentence deters any more than a short one, and I am particularly attracted by Mr Justice McClemens' experiment of imposing a monetary recognizance in instalments repayable to the offender at the end of his bond if he behaves himself. Perhaps we could hear a little more about it, because I think the concept has so much going for it.

Mr Justice McClemens:

This case was very many years ago, and it doesn't really fall within the scope of this seminar because it isn't a question of imprisonment but of a substitute for imprisonment. But I do hope that when next an

amendment of the criminal law comes up for consideration provision is made for bonds on a time payment basis by the person who is given the bond. The young man who can go back to his job in a time of affluent employment, if he is not married and doesn't have to save his money, will probably put it into payments on a motor bike and end up before me in the civil jurisdiction with one leg off. It would be far better to put him in the situation where the terror of gaol, to which he has not yet gone, is still present in his mind, and the fact that he has got $500 or $1,000 in the office of the Clerk of the Peace is a factor that will operate on his mind. You would need much more flexibility than we have got. You would perhaps need more Parole Officers, and you would need a situation in which you didn't bring the man up on his bond just because he couldn't get a job. But I do feel that this is a thing that has prospects, particularly for the young offender of 18, 19 and 20, who has never been to gaol and who needs something to keep him going over the period of maturation. I imagine that one of the problems of the young offender is this problem of maturation and the need to give him a responsibility over that period.

Mr Barry Finch, Probation and Parole Officer:

I would like to comment on Judge Loveday's question regarding short sentences as a deterrent. I have been with the Department for 18 years and have worked as a Probation Officer for some 12 years, and although I am not putting myself up as an expert, I would like to quote the example of a judge who started off with this notion that short sentences would deter people from coming back to court. This was in a parochial city, and the judge found that the same offenders kept coming back before him, and it seemed that one of the main reasons for this was perhaps the disruption caused by sending the person to prison and upsetting his family life in this particular community. This judge is still on the bench today, and his ideas have changed with regard to sentencing – instead of the short sentence he now favours a bond where possible, with a condition attached, and perhaps probation.

Mrs Helen Boyle, Probation and Parole Officer:

I don't really think you can generalize in this. I have talked to lots of prisoners in my years of working in prisons and I think that very much depends on the personality of the prisoner. I would think that the older first offender finds a short, sharp sentence very hard to take. They say that after 6, 8 or 9 months a callous grows over the hurts and they don't hurt quite so much because you learn to live within the system. But those first 6–8 months are the bitter months that really teach you the lesson. For the young offender who has a background of juvenile institutions I am not so sure that the length of the sentence has much effect.

But what I really wanted to speak about was vagrants. One comment on what Mr Lewer has said is that I think there is a big change in

community attitudes to vagrants and that possibly Parliament is lagging behind. In recent years I have noticed that people don't think that vagrancy is such a crime provided the vagrant is not hurting anyone. If he has just decided to be a "dropout" and to sleep on a park bench, then not many people see why he should be imprisoned for that. And one question I would like to ask is: can you explain why and how people in receipt of Commonwealth Social Security pensions can be convicted of either vagrancy or insufficient lawful means of support and sentenced to imprisonment?

Mr Lewer:

This was decided for us by wise old judges in England who sat on the Court of Queen's Bench about 150 years ago. They said that if you are in receipt of charities from the public purse and you waste it in riotous living or in other ways, then when you run out of money you are a vagrant. It doesn't help you that maybe next Thursday week there will be another $15 for you.

Commenting on what Mrs Boyle has said about vagrants, recently I have been assisting in the far North Coast circuit – Murwillumbah, Byron Bay, and those parts – and because of the mild climate and perhaps because of the facility with which cannabis grows there, there are a lot of people who are indubitably vagrants lurking there. And in chatting with shopkeepers, solicitors, bank managers and farmers and other ordinary folk, I found they didn't like it a bit. They thought I was much too soft in my sentences and that hanging wasn't nearly stiff enough. So it seems that opinions vary.

Mr Peter Woods, Education:

There are certain disadvantages from the short sentence if it is designed as a deterrent, from the point of view of either the short sentence in toto or a short non-parole period. The Department may endeavour to ensure that an apprentice can continue with his trade or with the education he was pursuing when he came before the court, and unless arrangements can be made quickly with the Technical College for him to continue with his apprenticeship he may miss out and be put behind with his apprenticeship so that he may not be able to continue when he comes out. So that whether the short sentence or short non-parole period is going to be a deterrent or not is very questionable.

But moving away from that, it is gratifying to see that the Federal Government has moved into the field of looking at the difference of class as far as sentencing is concerned. I think this becomes very real in the differential treatment of people brought before the courts. It does appear in looking at prisoners coming for classification that many of them who have reasonable intelligence have had definite educational deprivation, and many of these come from low socio-economic backgrounds. Is it the opinion of the judges and magistrates that this is a deep social problem?

Sir John Kerr:

Would you direct that to Mr McGeechan too, because after they have passed through the system these gentlemen, deprived as they are, but with reasonably high intelligence, are in his hands.

Mr McGeechan:

A short time ago Howard Purnell said something with a ring of terrible finality about it – that we "send them off", indicating a departure to prison. And I had a feeling as though they were being sent to the moon, as though all was lost, when, as somebody has said, it is really the beginning and not the end.

We do have quite young people in custody who have successfully embarked on a course of study, and the question is now being raised: does the inmate have the right to say, "I would rather not have parole, I am very happy with the situation I find myself in". The question would come up as to whether you, as Commissioner of Corrective Services, have any right to keep these people who are three weeks or a month away from finality in a stage of examinations – a Higher School Certificate, a university course, or something of that sort. The purists suggest you are not allowed to keep them, that they have to take parole. But if the inmate is happy with the arrangements and would prefer to remain for three weeks or a month and not take parole, the Parole Board sees this as a practical correction problem and a measure of achievement.

My officers, particularly those concerned with education, say that they must be given time to perform their role. They say, "Don't set us off on a programme that we know must be unsuccessful because our controls, our influences, our educational persuasiveness will be interrupted." And we do have a great number of young men who elect to remain in custody to complete a given course because they can't have the same opportunity outside. It may be suggested that that is a function for other authorities. It may well be, but as I have said, democracies invariably turn to the criminal codes to find answers to social problems. Notwithstanding Mr Lewer's bland attitude I can't help but feel that people would be better in Irwin House, in the Silverwater complex or on Milson Island, in a supportive detention concept, than taking the somewhat spartan comfort of the tramshed or the golf links after 9 o'clock at night, because I think that society has a slightly warmer heart than that.

Judge Staunton:

Like His Honour, Mr Justice Jacobs, I have had my difficulties with the ambiguities in the title of the seminar, and perhaps I regard this as more a matter of regret than does His Honour. I say that because the belief that there was a need to talk about deterrence in sentencing was shared

with me by the late Judge Levine. He took the matter up with Professor Shatwell who, after waiting for Judge Levine to make the recovery he regrettably never made, then initiated this seminar. I might say that what Judge Levine and I both thought might be examined by this forum was simply: Does imprisonment deter? Is there a basis for believing that it does? And this because of the doubts which have been expressed in some quarters as to the efficacy of imprisonment for this purpose. Therefore, without deserting from the spirit of the inquiry, I would venture to mention the views of some people on this question.

Mr Justice Jacobs says that imprisonment is not primarily a deterrent but it will always in the forseeable future be regarded as having a deterrent effect. With this I agree, not as a judge but as a member of society, and also because I am convinced that some people are deterred from offending because of the risk of being caught and sent to gaol. I believe this applies to the person who has the opportunity of pilfering someone else's property as well as to the citizen who is tempted to drink more than he should before driving. This is a view I find supported by the courts, the police, and leading academics. I will not refer to the well known judgments on this matter, some of which have already been referred to by Mr Lewer. I content myself by adverting to other sources.

I remind the seminar of what was said by Detective Sergeant Knight at the seminar on Armed Robbery held by this Institute in November last year. He said:

> As a detective of many years experience I have had the opportunity of speaking many times with many criminals with long records of all types of offences other than armed robbery, and in all cases they have expressed their unwillingness to participate in this type of offence for one simple reason, that being, in their own words, "because the lagging is too long". They will tell you that they consider the risk is too great for the sentence they know they will receive if convicted. They openly say that they would prefer to commit breaking and entering offences, because the sentence is not nearly so severe. Others will tell you that they will no longer commit breaking and entering offences, and have in fact reverted to stealing from retail stores and delivery vehicles: the risk is less and the sentences imposed for this category of crime are the lightest of all.
>
> I know that many learned people will disagree with me when I say that the longer the sentences that are imposed for a particular offence the stronger is the deterrent to committing them. From my conversations with many criminals I feel that there is no doubt that a long sentence is in fact a very strong deterrent, and it would be very difficult for any person to convince me that this is not so.

This is a view which I can understand and in respect of the crimes of which Mr Knight was speaking I can accept. If it be said that there is no real evidence that long sentences have any effect upon the incidence of particular crimes, then I would refer to the statistics of the Higher Criminal Courts in New South Wales with respect to the number of persons tried for rape in the years 1968, 1969, 1970 and 1971. We all know that the community was horrified at the incidence of pack rape in the years around 1968 and that in that year the Central Criminal Court judges commenced to impose sentences running from 10 years to life imprisonment, with ample publicity being given to the judges' statements on sentencing that offenders could expect to be severely punished in an effort to deter others. The figures of persons tried then and since have been interesting: in 1968, 67 persons; in 1969, 90; in 1970, 39; in 1971, 42. Now, it may be said that this activity was only a craze which, like all fashions, declined in interest, and that its decrease was quite unrelated to what the courts were doing or saying; or that this is too inconclusive, because there may have been as many, or more, offences perpetrated but either not reported or the offenders not apprehended. These sorts of argument are open on any figures, but I think that sentencing judges have observed from time to time in dealing with recidivists that there were substantial gaps between the sentences, during which time the offender may not have been committing crimes because, temporarily at least, his prison experience had acted as a deterrent.

From the leading writers on criminology I would quote but two. First, Professor Andanaes who, in the paper "The Future of the Criminal Law", after referring to trivial offences, said:

> We have at the other end of the scale a range of serious offences which call for severe sanctions on grounds of general deterrence. Further, there will be a need for long custodial sentences for a limited number of dangerous offenders. There will be a need for long sentences as a deterrent for the most serious types of crime.

And then, summing up in the article, Professor Andanaes says:

> I both favour and predict a criminal law which is openly and sincerely penal in outlook and does not try to take refuge behind benevolent rhetoric about treating and rehabilitating deviants, a criminal law that is based primarily upon general deterrence and considerations of justice. This does not, of course, mean a system which considers retribution an end in itself, nor does it necessarily mean a harsh system.

Lastly, I refer to that master of the criminal law, Professor Sir Leon Radzinowicz, who in a recent paper said:

> In a small, single and stable society it may be that there is little

need of the deterrent sanctions of the criminal law. In a complicated, urbanized and changing one where other restraints are loosened and where personal values are uncertain and conflicting, I am certain they are indispensable.

To me at any rate, these expressions of views of judges, experienced police officer, and master of criminology have compelling persuasiveness. They may not be right, but is there evidence that they are wrong?

And so, Your Excellency, I venture to assert that the real question raised by this seminar is, Does imprisonment deter. Because if a gathering of this standing convinces its members that it doesn't, then that would be a powerful argument for the rejection of deterrence as a component in sentencing.

Mr G. D. Woods, Senior Lecturer in Law:

Judge Staunton has raised the key issue of this seminar in a cogent and precise manner. He has referred to Professor Andanaes and Sir Leon Radzinowicz and I think it would be unfortunate if Professor Hawkins were not to give us, at least briefly, his ideas on the issues Judge Staunton has raised.

Sir John Kerr:

Perhaps you would give us yours first, and then he could give us his.

Mr G. D. Woods:

The ambiguity in the title of this seminar involves two things. First, there is the word "primary". Some persons have taken it to mean that imprisonment is of great importance, and I think none of us would dispute that imprisonment is of great importance in the first meaning. To say that it is a prime deterrent in that sense is trite. The other meaning is something that occurs chronologically at a first point in time, and the question is, should it be imposed first off, presumably on first offenders.

The other ambiguity is about the word "deterrence", and here it is important to distinguish between specific deterrence of the individual and general deterrence of the community as a whole.

With regard to specific deterrence, the question is, Is imprisonment a better deterrent than something else? We are not asking whether the person is to go free or be put in prison, but whether he is to be imprisoned or given some other form of treatment or punishment. It is comparative deterrence which is relevant, not absolute deterrence. Studies which have been done in England and America indicate that for the great bulk of offenders it doesn't matter in terms of specific deterrence whether you fine

them, put them in gaol, or do something else to them. Judge Staunton has referred to the evidence of a police officer at the seminar on Armed Robbery. There are many instances in which a criminal's word would not be believed and I don't think any more credence should be given to it in regard to deterrence than in other areas. I would say that there is a lot of evidence that so far as specific deterrence is concerned penalties are to a large extent interchangeable.

With regard to general deterrence, it is not possible to do the same type of studies as with specific deterrence. I think nobody would suggest that the common experience of mankind that people are frightened of being punished doesn't apply with great force in very large areas of the criminal law. No doubt there are people who are deterred from criminal conduct by the threat of imprisonment but, as Mr Purnell pointed out, you have to be selective. The domestic murderer is not going to be deterred by the threat of imprisonment, because that kind of crime is not thought out in advance. It is not one about which the nagged husband is going to say, "I will do it because they are not giving out very heavy sentences for it", or "I won't do it because the lagging is too long". Also, there is some evidence that many people gravely underestimate the likelihood of being caught. But in general it is true to say that we simply don't know how great the general deterrent effect of imprisonment is. Clearly it is not very relevant in domestic murders; equally clearly it is relevant in drunk driving. I think it might be appropriate to ask Gordon Hawkins about methods for determining how efficacious the general effect of imprisonment is.

Associate-Professor Hawkins:

The point with deterrence is this: there are fashions – there are periods of time in which we say deterrence is a lot of nonsense and we can't control crime by imposing deterrent sentences, that people act in passion and are controlled by impulses, and so on; and there are other periods in history in which we place enormous faith in deterrence and tend (and this, I think, is where we go wrong) to adopt monolithic, unilateral attitudes and say that if you want to stop anything, impose heavy sentences, and if it doesn't stop, impose heavier sentences. This is of course an argument which is irrefutable, because whatever anyone does you can always say, "The trouble was the sentences weren't really heavy enough" or "Law enforcement wasn't efficient enough", or "If we had torn their ears off. . . ." It is always possible to concede some unimaginable horror that you could have heaped on the offender which might have worked. And at the other extreme there are people who say that deterrence doesn't work, and point out examples like prohibition. They say, "They introduced prohibition and imposed heavy penalties and tried to stop people drinking, and what happened over the 14 years that the Volsted Act was in force? People drank more. Every year the consumption of alcohol rose. So can you have any faith in deterrence?"

It is always possible to produce examples from one side or the other, examples which seem to demonstrate that heavy penalties have no effect on human behaviour, and examples which seem to suggest that they do. But if we forget about the books and the literature and just examine our own conduct we realise that there are certain areas in which we will be deterred and certain areas in which penalties such as the death penalty are not going to make any difference.

We all know that if you feel a cold coming on the cure is simple, whisky, hot water, lemon and sugar, and if you take this the cold will be cured within about seven days. But if you look up the common cold in the Encyclopaedia Britannica you find that this is a condition which passes within seven days anyway. But we do tend to feel some faith in the cure, stronger than is perhaps justified. This is true to some extent about the use of the deterrent penalty if we find that there is a regression. What happens is that heavier penalties seem to be introduced at a time when that particular crime is at a maximum or when it has been increasing, because the courts are not going to feel it necessary to impose heavier penalties when there are just a few isolated cases. So if we tend to impose heavier penalties at the apex, by the natural movement in figures we will find that there is a decrease.

I am not saying that this is always true. There are cases in which the imposition of heavy sentences, sentences of imprisonment, may well be crucial. How do we know whether they have been or not? We can only know this by comparative studies, by retrospective studies, by doing a lot of research. We have been operating the criminal law for between 150 and 200 years on this faith in deterrence. In every country except Greenland (and they don't have a big crime problem there) the criminal law is based on the notion of deterrence. So it seems to me that it is time we did a little research in this area – does it work; where it works; what is the differential effectiveness of threats. It is not a question of whether prison deters or doesn't deter. The question is, where does it deter? In respect of what offences? In respect of what type of offender? And this is what we are just beginning to do, to ask scientific factual questions, not what you feel or what I feel about offenders. And we are just beginning, after all this time, to try to answer these questions.

Mr Howard Purnell:

I would like to ask a question directed to Mr McGeechan and Professor Hawkins. It may not be realised that in 1972 at Sydney Quarter Sessions there were some 2,200-odd people committed for trial or sentence. Of that number about 100 changed their pleas under s. 51a; about 1,833 pleaded guilty; of the others (some 252) who stood their trial only 96 went at large, i.e. 4% of all the people who were committed for trial or sentence. So if anybody thinks that thieves and felons are going at large due to the mercy of juries or anybody else he would be quite wrong. The question is,

what are you going to do with the natural increase in population and the natural increase in convictions by, say, the turn of the century? Are you able to cope? And how is this going to affect sentencing policy?

Sir John Kerr:

I shall now give the floor to the participants in the panel. First, the President.

Mr Justice Jacobs:

I am quite happy to go first, because I think that the last speakers have raised the problem which I tried to raise: assuming that you find imprisonment is no better as a deterrent than anything else, where do you go from there, and why? Of course it would be a good sociological study to discover finally and conclusively whether it was a deterrent or not, or to find in what particular areas it was proved to be a deterrent – good for driving under the influence in Sweden, no good for mugging in London, and so on. But having done all that, where do you go in a social system? And I go back to what I said in the paper, that you have got to have a scale of punishments to reflect the crimes that society creates, and whether it is imprisonment or not is in a way incidental, but it has to reflect the gravity of the situation.

Somewhere or other I noted down some possible theoretical examples of different approaches. They are extreme of course and absurd – I say that at the outset. Take for instance this: if a person be convicted of murder, the public expression of disapproval of that act will be publicly pronounced and then the convicted person will be handed over to a panel of psychiatrists, and if they advise that he is unlikely to commit that offence again he will be discharged, but if the panel doesn't agree, he will be kept in hospital indefinitely until the panel does so agree. Well, that is something like *Erewhon,* something like Samuel Butler's idea that if you were sick you went to gaol and if you were guilty of some crime you went to hospital. It is not an impossible situation; if you got a very sophisticated society in the next millennium you might find that type of situation existing. A sort of corollary to that would be that if a person is found guilty of an offence he would not be kept in confinement except for the purpose of his cure of a tendency to commit that offence. If he is curable, he will not be released so long as treatment is needed and is likely to be effective. This touches upon the indeterminate sentence. If treatment is no longer needed, then he will be discharged. But if the treatment is found to be ineffective, then he will be put to death in the most humane way possible. This is not impossible as an approach to curing the social ills, meeting the social need, dealing with these people who can't conform.

Another type of approach that one could imagine in society – and which I thought one might have heard a bit more about this evening –

would be the totalitarian concept (we tend to identify them with totalitarian systems) of labour camps, where not only the person himself, but his wife and children, are deported to an area where they can be isolated from the community so that they won't get the opportunity to infect others or damage others, and where they will be required to perform useful work, where they will be looked after, the children educated, and where as long as the man does work he will be treated in that way. It doesn't appeal to us, but it is an alternative way, an alternative to imprisonment.

The use of a long-acting drug, which is not impossible nowadays, is another thought. One good tablet under the skin would probably release its energies for five to ten years, over the whole period of likely aggressiveness of a young man's life. If we could reduce the aggressiveness of those years he would probably never offend again.

Of course there is something wrong, a lot of things wrong, with all these in that whether we like a system of retribution or not we think it is consistent with our principles of society. It would be quite wrong to regard it as the only system in society. There are other systems which were quite well analysed forty years ago in Aldous Huxley's *Brave New World.* There are other ways in which it could be done. As George Orwell pointed out, you can not only make people conform but you can make them like conforming, and then once they have got to that stage you can kill them, as the young man was killed in *1984.*

My point in referring to these extreme alternatives is that if we are wrong in the assumption that there is a deterrent effect in imprisonment, what are we going to put in its place? The fine? Well, then, do we give social services to the family? Because no ordinary man who commits most of the crimes in the community has an extra $10 a week to pay into either the kitty or the Treasury of the State without it affecting the person he is supporting. It is true, of course, that it could apply to the young man who is only paying off his motor bike, but it would be a very specialist form of treatment.

I wouldn't agree, with all respect, with Judge Staunton that there is any proof that there is any real effectiveness in deterrence generally. I would agree with Professor Hawkins and Mr Woods that that has to be regarded as in the not proven stage. But although it is a subject that should be pursued by scientific, sociological inquiry (because if the truth can be discovered it must be discovered) we needn't be unduly disturbed at this stage provided we don't do the opposite and with total faith in deterrence begin increasing sentences out of proportion to a proper correlation of the gravity of different offences. There must be proper regard for the humanity of the situation. The humanity that destroyed the death sentence mustn't be lost.

I would refer to the examples of littering in Singapore and driving under the influence in Sweden. Those crimes are of a kind where, if the community expresses a punishment that reflects the seriousness of the offence, it is that reflection within the community as much as the actual deterrent in the strict sense which results in the falling off of the crime. If a crime which might otherwise be socially acceptable is shown by severe penalties not to be so, then the severe penalties will have a deterrent effect. But such examples are of little weight when one is considering the deterrent effect of imprisonment generally.

I just want to say one word on my references to scales of punishment. I do not mean by that that the actual sentence imposed will obviously reflect a scale. All I mean is that the actual crime must be fitted into the scale between nothing and the maximum laid down by the legislature as an integral part of the sentencing procedure. It is simply not correct, in my view, to say that the whole matter is vague and amorphous so that every factor is mixed up in an indeterminate and indefinable way which results in a sentence at the end of the process. Central must be the fixing of a period appropriate to the gravity of the particular crime. To that must be added something in certain cases but, as I said, more commonly taken from it in mitigating circumstances. That is what I would understand by a tariff or scale, not anything like an automatic fixing of a sentence simply because of the nature of the crime or the gravity of the particular crime.

Mr McGeechan:

With all respect to Mr Justice Jacobs, some of the things that he has mentioned have been given very careful scrutiny although they may appear to be extreme, and I would like to touch on one or two of these very quickly. The first is the commune concept. It is generally acknowledged that before one may reasonably expect change in the individual the acceptance of a philosophy or concept is necessary. It may be of interest that the commune concept has been examined in three separate years with separate groups here in New South Wales and the suggestion that convicted prisoners working in a particular situation should have family association on a collective basis was unanimously rejected by the prison inmates in a 100% vote on the three separate occasions. This is why when someone mentions the Swedish commune concept it intrigues me as to whether this is not in itself a subtle form of punishment, because to the Australian inmate it would be simply that.

The other thing is the chemical barrier concept. I have seen this in use and I can't imagine a more terrifying and soul-destroying procedure than one in which people without minds of their own are controlled in this chemical situation.

Mr Lewer:

I don't really have much to add, but there were one or two things one could perhaps pick up. Short sentences, I should think, are not very high in their deterrent value except in certain selective cases, but they are useful for cleaning people up and curing them of whatever diseases they may have that are curable, and for this the Corrective Services system is very good indeed and they get little or no credit for the dedicated work they do in helping people whom nobody else will touch.

There is another aspect of sentencing to imprisonment which it is perhaps necessary to mention, and that is that there are a lot of people in the community who are not capable of having a label put on them as to what they are going to do in the future but we can say with certainty that whilst they are in prison they are not upsetting the community, they are not being a danger to it by committing crimes. The Americans call it "warehousing", and I suppose that until we learn a lot more about ourselves we will need to warehouse some people, although whether in mental institutions or prisons one cannot be sure.

Mr Justice McClemens:

I should like to express on your behalf our thanks to His Excellency, as the Chairman of the Advisory Committee of the Institute of Criminology, for coming and presiding tonight. I think it is a great honour to us all that His Excellency is here during the first week in which he has undertaken the onerous, high and responsible duties of Administrator of the State.

The Institute of Criminology has, I think, done thrilling work over the period of its existence. The fact that we can get the stimulation of an evening such as tonight, that its work and its publications go on, and the fact that under the chairmanship of Sir John Kerr it will go on, should be a matter of great satisfaction to us all. Therefore, may I conclude by asking you to carry a vote of thanks to His Excellency for presiding over this seminar.

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