IN DURANCE VILE

SOME ASPECTS OF PUNISHMENT IN NEW SOUTH WALES

> In the day-to-day job of dealing with the criminal there may be little opportunity and even less inclination to sight social objectives and to align correctional methods. It is far simpler to receive without challenge the traditional philosophies and to employ the well-established techniques. When called upon, one may speak piously of "the protection of society" or "individualized rehabilitation", but these are bones without flesh.[1]

Deterrent Sentences in New South Wales

In 1960, his Honour Mr. Justice McClemens noted that once in a while a criminal case causes great controversy.[2] Seven years later, so great was the controversy caused by his judgment in *R.* v. *Cuthbert*[3] that the suggestion was reported in some (less responsible) sections of the press that his Honour should be removed from judicial office. The subsequent appeal from this decision to the Court of Criminal Appeal highlighted some of the major issues of sentencing policy and practice.

The accused in *R.* v. *Cuthbert* was a seventeen-year-old youth who, accompanied by five other youths, left a discotheque shortly before midnight with the avowed purpose of picking fights with long-haired youths in the Sydney city area. When the party sighted one Raymond Dixon, a slightly built adolescent whose hair was long, the youths converged on him and attacked him, knocking Dixon to the ground. It was alleged that the accused then jumped on the head of the fallen youth, and fled after again kicking him violently on the head. These injuries resulted in the death of the youth Dixon.

Upon trial of the accused, the Crown accepted a plea of guilty of manslaughter, although the original indictment had been for a charge of murder. McClemens, J. imposed a sentence of imprisonment with hard labour for three years, but suspended this sentence upon the accused entering into a recognizance conditional upon good behaviour for three years. There was immediately considerable public criticism against the leniency of this sentence, and the Attorney-General appealed on the ground that the sentence was inadequate.[4]

The Court of Criminal Appeal found that the sentence imposed by the trial judge appeared to be out of reasonable proportion to the crime, and substituted in lieu thereof a sentence of penal servitude for five years. In doing so, Herron, C.J. (with whom Sugerman and Walsh, JJ.A. agreed)

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[1] P. W. Tappan, *Contemporary Correction* (1951) 3.

[2] "Judicial Problems in a Growing State" (1960) 3 *Sydney L.R.* 221 at 227.

[3] (1967) 86 W.N. (Pt. 1) (N.S.W.) 273 (Court of Criminal Appeal). The judgment of McClemens, J. at first instance has not been reported. See also R. P. Roulston, "Sentencing a Juvenile for Manslaughter" (1968) *Aust. & N.Z. J. of Criminology* 147.

[4] The appeal was brought under the Criminal Appeal Act, 1912, s.5D (as amended), which empowers the Attorney-General to appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any court of quarter sessions, and the Court of Criminal Appeal is given a discretion to vary the sentence and to impose such sentence as may seem proper.

reiterated some of the principles which have been applied by the Court in determining the appropriate punishment for an offender.

In the first place, it was said that while the function of the criminal law and the purposes of punishment cannot be found in any single explanation, ". . . all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime".[5] Hence the Chief Justice found that the prevalence of crime of a certain class is a valid criterion when punishment is to be assessed, and concluded that a sentence of imprisonment would be necessary to protect society from crime of the sort involved in that case.[6]

The appropriate sentence, in the view of the Court, "should be such as having regard to all the proved circumstances of the case, seems at the same time to accord with the general moral sense of the community and to be likely to be a sufficient deterrent both to the prisoner and others".[7]

A review of the available case law reveals that the New South Wales judiciary has tended to concentrate on the deterrent aspects of punishment. Indeed as early as 1887 the Full Court of the New South Wales Supreme Court issued a reminder that, while justice should always be tempered with mercy, the exemplary and deterrent effect of punishment should be held steadily in view.[8] Again, motives of deterrence prevented the Court from interfering with the sentence imposed by the trial judge on an offender found guilty of receiving stolen goods when it was found that this offence was becoming increasingly prevalent.[9]

The theme of deterrence is usually linked with the aim of protecting society from further outrages of the nature currently under review. In the course of its judgment in *R.* v. *Cuthbert,* the Court of Criminal Appeal cited with approval its earlier decision in *R.* v. *Geddes,*[10] a case important for the statement of principle enounced by Jordan, C.J.:

> The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others.[11]

This tendency to emphasise the deterrent value of a sentence is reinforced by an earlier decision of the New Zealand Court of Appeal in *R.* v. *Radich,*[12] which was cited with approval in *R.* v. *Cuthbert.* The following extract from the New Zealand decision, which has frequently been adopted by the New South Wales Court of Criminal Appeal,[13] discusses the purposes for which punishment is imposed:

> . . . 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. . . . The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punish-

[5] *Supra* n.3, at 274.
[6] *Id.* at 278.
[7] *Id.* at 274.
[8] *Re Forbes* (1887) 8 L.R. (N.S.W.) 68 at 77.
[9] *R.* v. *Ragen* (1916) 33 W.N. (N.S.W.) 106.
[10] (1936) 36 S.R. (N.S.W.) 554.
[11] *Id.* at 555.
[12] (1954) N.Z.L.R. 86.
[13] E.g., in all the cases cited *infra* nn. 18-19, 21-23, 26.

> ment. 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.[14]

It will be noticed that considerable emphasis is placed on the concept of deterrence, which is generally defined in terms of the preventive effect which the fear of actual or threatened punishment of offenders has upon potential offenders,[15] this effect being considered to operate both on the offender receiving the punishment and on the community in general.

In dealing with the deterrent effect of a punishment, an important distinction to be made is between general and individual deterrence. General deterrence is the effect of the punishment and its example on the community as a whole, whereas individual deterrence deals with the effect on the individual punished. This distinction has been recognised and acted upon by the courts, but, as will be seen from the following examples, the way in which the distinction works in practice highlights the need to reconsider the value of deterrent sentences.

The courts are aware of this fundamental distinction, as is illustrated by *R.* v. *Goodrich*.[16] The accused, a man of good character and standing, had been convicted of carnal knowledge of his stepdaughter. Street, C.J. substituted a sentence of imprisonment with hard labour for the good behaviour bond imposed by the Court below. Although the learned Chief Justice felt that the accused had little need of a reformatory sentence, and considered that the retributive element of punishment had been satisfied, he nevertheless continued:

> But there must not be overlooked the deterrent aspect, and it would be a bad day for this community if the idea became prevalent that things of this nature could happen without some serious punishment being visited upon the offender. The accused himself will probably be deterred from ever again falling in this way, but he is not the one to be considered alone in this regard. He has committed a most serious crime . . . and I think that the Court should give effect to that third factor which must always be taken into account and impose a sentence on this particular accused. It is to deter others, as much as to punish him, that I think the Court should act in this case.[17]

A further illustration of the imposition of a sentence designed to deter the community generally was that awarded in *R.* v. *Simpson*,[18] a manslaughter decision. The Court observed that the prisoner was a man of the highest character and was unlikely to offend in a similar manner again, and accordingly there was no need for a sentence which would deter him from committing a similar crime. However, general deterrence had to be considered, and so the sentence was increased because "it is necessary that this act of killing should be marked by a sentence which will make it clear to others that matrimonial unfaithfulness will afford no justification for the taking of life".[19]

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[14] (1954) N.Z.L.R. at 87.
[15] J. C. Ball, "The Deterrence Concept in Criminology and Law" (1955-56) 46 *J. Criminal Law, Criminology and Police Science* 347.
[16] (1953) 70 W.N. (N.S.W.) 42.
[17] *Id.* at 43.
[18] (1959) 76 W.N. (N.S.W.) 589.
[19] *Id.* at 593.

A similar concern with general deterrence in New South Wales sentencing practice is to be observed in respect of a very wide range of offences.[20] Motives of general deterrence have influenced the Court of Criminal Appeal in sentencing a scoutmaster convicted of indecent assault against boys;[21] when reviewing the sentences imposed on youths who inflicted fatal injuries on a bystander who sought to pacify them when they assaulted a companion;[22] and when considering the appropriate sentence for those who attempted to rob a railway station, and who in doing so attacked the station master.[23] In the latter case Herron, J. (as he then was) thought that the trial judge had been concerned over much with the reformation of the prisoner himself, and expressed the belief that ". . . the average youth who is minded to indulge in armed robbery would laugh at the law if he thought that on being caught he was liable to be sentenced to twelve months imprisonment only".[24] Further, although attacks on public figures are fortunately rare in Australia, the Court imposed a life sentence on the youth who attempted to murder the leader of the Australian Labour Party. Both Herron, C.J. in the Court below, and the Judges of the Court of Criminal Appeal, found it necessary to impose a heavy sentence to deter other members of the community from committing a like offence.[25]

This review of judicial attitudes might be concluded with a consideration of a recent policy statement by the Court of Criminal Appeal (Herron, C.J., Nagle and Isaacs, JJ.) in *R.* v. *Donaldson*.[26] In a judgment increasing the sentence of an offender convicted on a charge of being an accessory before the fact of robbery while being armed, the Court noted that the maximum penalty for armed robbery had recently been increased from fourteen to twenty years' penal servitude, and saw this as a clear direction to courts by Parliament that such a crime demands heavier punishment than was formerly the case. Their Honours continued:

> 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 emphasises 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.[27]

The emphasis placed by the courts on general deterrence, even at the expense of the reformation of the individual offender, may seem surprising in a time when many writers are advocating the use of sentences which may encourage the offender to abstain from criminal behaviour in the future ". . . by providing him with the social, educational or vocational training which is necessary to enable him to conform to the social pattern from which his delinquency is a departure".[28] Some might argue that this apparent conflict might be satisfactorily resolved by imposing a deterrent sentence, and then treating the prisoner thus detained with methods designed to bring about his rehabilitation. However, it is submitted that this compromise is untenable

[20] The types of offences for which deterrent sentences are given by the courts in New South Wales are similar to those which receive deterrent sentences in England: D. A. Thomas, "Sentencing—The Basic Principles" (1967) *Crim. L.R.* 455 and 503 at 461.

[21] *R.* v. *Smith* (1955) 72 W.N. (N.S.W.) 216.

[22] *R.* v. *Cooke & Woolmington* (1955) 72 W.N. (N.S.W.) 132.

[23] *R.* v. *Herring* (1956) 73 W.N. (N.S.W.) 203. See also *R.* v. *Cook* (1967) 2 N.S.W.R. 667.

[24] (1956) 73 W.N. (N.S.W.) at 206.

[25] *R.* v. *Kocan* (1966) 84 W.N. (Pt. 1) (N.S.W.) 588, esp. at 595 (McClemens, J.) and 597 (Maguire, J.).

[26] (1968) 87 W.N. (Pt. 1) (N.S.W.) 501.

[27] *Id.* at 504.

[28] D. A. Thomas, "Theories of Punishment in the Court of Criminal Appeal" (1964) 27 *Mod. L.R.* 546 at 562.

in theory and unworkable in practice. Deterrence and reformation are so opposed in spirit and purpose as to be irreconcilable; the former is primarily punitive, the latter primarily rehabilitative.

When the courts impose a sentence intended to act as a deterrent to the individual offender, the element of general deterrence is frequently present. The effect of such a sentence is that the offender is being punished, not only for the offence he himself has committed, but also for those that persons unknown may commit in the future. If our society is going to allow such penal practices to continue, surely an inquiry must be made into the value of such sentences, to see if they actually do deter others from crime.

The Value of Deterrent Sentences

Truth is not contingent upon belief, but neither (unfortunately) is belief contingent upon truth; and the writings of scholars criticising the use of deterrents are matched both in volume and sincerity by those who believe deterrent sentences to be effective.

The object of preventing crime by deterring members of the community from committing offences dates back centuries before the appearance of the Classical School of Criminology, in whose writings notions of deterrence can be identified. Shockingly cruel and barbarous punishments have been employed through the centuries,[29] but these extreme measures were not successful, because the petty crimes for which many were imposed continued to flourish. It will be recalled that in nineteenth century England, over two hundred criminal offences were punishable by death.[30]

The object of imprisonment was stated by Lord Chief Justice Cockburn on behalf of the Judges to be ". . . deterrence, through suffering inflicted as a punishment for crime and the fear of a repetition of it".[31] This purpose was in 1863 accepted by the Select Committee of the House of Lords on the Present State of Discipline in Gaols and Houses of Correction.[32]

In the review of the decisions in which the courts of New South Wales have imposed deterrent punishments, it will have been seen that such sentences were considered necessary for a wide variety of offenders guilty of an equally wide range of offences. Similar considerations are observed when members of the Legislature debate proposed amendments to the criminal statutes, especially after a recent increase or reported increase in the number of offences of a particular kind. Both the Legislature and the judiciary are wont to resort to the familiar panacea of greater sentences which, it is supposed, will deter potential criminals and protect society.[33]

The pronounced tendency to rely on deterrence indicates the need for research into the differential effects of deterrent sentences. One of the most significant contributions to this field is that of Professor Johs. Andenaes in a paper discussing the notion of the general prevention of crime—that is, of general as distinct from individual deterrence.[34] According to Professor

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[29] See generally Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (3 vols., 1948-1956).

[30] Sir Lionel Fox, *The English Prison and Borstal System* (1952) 22.

[31] Cited *id.* 48.

[32] *Id.* 46.

[33] This can arise from "a confusion of penal sanctions as general expressions of hostility to crime on the one hand, and severe punishments as deterrents of specific persons who might be contemplating prohibited acts on the other hand": E. H. Sutherland and D. R. Cressey, *Principles of Criminology* (7 ed. 1966) 344. Recent N.S.W. legislation increasing the statutory penalties for certain offences includes the Crimes (Amendment) Act, 1966 (property offences), and the Police Offences, Vagrancy and Crimes (Amendment) Act, 1967. See also the analysis by Duncan Chappell, "Sentencing—An Unrewarding and Painful Task" (1968) *Aust. & N.Z.J. of Criminology* 167 at 176 ff.

[34] "General Prevention—Illusion or Reality?" (1952-53) 43 *J. Criminal Law, Criminology and Police Science* 176.

Andenaes a punishment may have three sorts of general preventive effects: *first*, there is the *direct deterrent effect* when the risk of discovery and punishment outweighs the temptation to commit crime; *secondly*, there is *a strengthening of moral inhibitions*, in that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates inhibitions against committing crime; and *thirdly*, there is *a stimulation of habitual law-abiding conduct*, because unconscious inhibitions against crime can also be aroused as a matter of habit, reinforced by fear, respect for authority or social imitation. Inhibition and habit will apply when a person need not fear detection or punishment, or does not know of the legal prohibition, and hence are of greater value to the lawmaker than mere deterrence.[35]

Taking first groups of police regulations, such as traffic ordinances, building codes, trade regulations and the like, it will be observed that as far as these crimes are concerned there are very few moral or social inhibitions acting to prevent a breach of the law. Accordingly, when determining appropriate punishments for infractions of such laws, deterrent considerations are relevant, because there may be no other forces acting on the individual to maintain his obedience.[36] So, too, with what Professor Andenaes calls "economic offences", such as unlawful foreign exchange transactions and other crimes against economic regulations. (Customs and tax evasions may also be included in this group, for the attitude of the offender is similar). Here again there will usually be no strong moral inhibition against violation of such laws, and consequently deterrent punishments should be imposed to outweigh the advantages of a breach of the law.[37]

By contrast quite apart from the penal code, there are strong moral and social inhibitions against crimes in relation to property and offences against the person, and these inhibitions may be strong enough to prevent most people from committing such crimes. At the same time there are large numbers of people on the moral borderline who pay little heed to the social reaction to their crime, and for these people deterrent sentences may be relevant.[38]

Although it is difficult to generalise in the field of moral offences, Professor Andenaes is sceptical about the general preventive validity of the threat of punishment for such crimes. Many offenders may be suffering from deviant psychological conditions which are less responsive to the threat of punishment, and in any case the mere anticipation of discovery provides a powerful deterrent.[39]

Professor Andenaes does recognise that the nature and magnitude of the punishment will influence its deterrent effect, but adds an important qualification, and one which should be considered by the courts before condemning a man to waste years within the confines of a penitentiary:

> Magnitude of punishment should mean more for crimes usually committed after careful consideration pro and con (e.g. tax evasion or smuggling of foreign currencies) than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion). Another point is the moral condemnation attached to the deed. If this is strong, the magnitude of punishment is of minor importance.[40]

Although a serious crime must be answered with a more severe punishment than the reaction for a minor offence, it is here a question of the

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[35] *Id.* 179, 180.
[36] *Id.* 182.
[37] *Id.* 185. It is essential, however, that such regulations be enforceable.
[38] *Id.* 186.
[39] *Id.* 188.
[40] *Id.* 192. *Cf.* Tappan, *op. cit. supra* n.1 at 9.

relative severity of the punishment rather than of its absolute magnitude for "the same mark can be expressed on a scale from 1 to 2 as on a scale from 1 to 6 or on one from 1 to 100."[41]

A subsequent investigation into the factors upon which the deterrent effect of a punishment will depend was carried out by John C. Ball.[42] In his paper, he lists six variable factors:[43]

(i) The social structure and value system under consideration. Although a certain penalty may deter would-be offenders in one society, it may be completely ineffective in another.

(ii) The particular population in question. It is important to consider persons who have broken a particular law, and those who have not but may at some future time.

(iii) The type of law being upheld. Thus, laws prohibiting behaviour which is not regulated by group sentiment may not be as effective as laws which enforce strong moral standards.[44]

(iv) The form and magnitude of the prescribed penalty. (But note that it is the relative and not the absolute severity that is important.)

(v) The certainty of apprehension and punishment.

(vi) The individual's knowledge of the law as well as the prescribed punishment, and his definition of the situation relative to these factors.

The above discussions consist of largely theoretical considerations. It is worthwhile, then, to consider any empirical data which might be available as to the deterrent effects of punishment. In the main, such research as has been undertaken is centred around two particular punishments which have both been popularly believed to be effective deterrents: these are capital punishment and corporal punishment.

Comparisons have been made between those states of the United States of America which have abolished the death sentence and those which have retained it, but the conclusion seems to be that any significant difference is not between states which execute offenders and those which do not, but between the different sections of the country regardless of whether the states have the death penalty or not.[45] The English Royal Commission on Capital Punishment (1949-1953) agreed with Dr. Thorsten Sellin that "both death-penalty states and abolition states show rates which suggest that these rates are conditioned by other factors than the death-penalty", and the evidence could not be said to establish that the abolition of capital punishment led to an increase in the homicide rate or that the re-introduction of the death penalty caused it to fall.[46]

It can be validly asserted that there is no evidence that capital punishment is a superior deterrent to imprisonment.[47] Here, then, is one supposedly effective deterrent which may not have the effect its supporters claim.

The reintroduction of corporal punishment is occasionally demanded after a particularly disturbing crime has received the attention of the press. Although such calls are often motivated by feelings of revenge, the advocates

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[41] Andenaes, *supra* n.34, at 193.
[42] *Supra* n.15.
[43] *Id.* at 348.
[44] *Id.* 350.
[45] Sutherland and Cressey, *op. cit. supra* n.33, at 347.
[46] Cited by Sir Ernest Gowers, *A Life for a Life* (1956) 101-02. See also Sutherland and Cressey, *op. cit. supra* n.33, at 350.
[47] For a recent contribution to the research in this field, see R. N. Barber and P. R. Wilson, "Deterrent Aspect of Capital Punishment and its Effect on Conviction Rates: The Queensland Experience" (1968) *Aust. & N.Z. J. of Criminology* 100.

of corporal punishment contend that it will be a deterrent.[48]

A certain amount of statistical evidence has been compiled in England as to the effectiveness of corporal punishment as a deterrent. A report was issued in 1938 by a Departmental Committee on Corporal Punishment,[49] and in 1960 the Home Secretary issued a further report on the subject.[50] Both reports presumed that the imposition of such a sentence could only be justified as a deterrent measure.

The researches of the 1938 Committee and the subsequent analyses of the Home Office did not find any evidence to suggest that corporal punishment was particularly effective as an individual deterrent. A study of offenders convicted of robbery with violence revealed that well over half of those who had been whipped committed further serious crimes at a later date, whereas the proportion of offenders who had not been whipped and who later recidivated was only forty-four per cent. In other words, those prisoners who had received a flogging were more likely to be reconvicted.

After the Cadogan Committee's recommendation that corporal punishment be no longer used was given effect to by the Criminal Justice Act, 1948, not only was there no increase in robbery with violence, but after the lash was finally taken from the hands of the scourger a marked decline in this offence was noticed. This would suggest that corporal punishment could scarcely have been called a general deterrent.[51]

The implications of these studies of capital punishment and corporal punishment cannot be ignored. For many years the courts and the public had regarded these measures as effective deterrents, and yet when such punishments have received the scrutiny of objective research, they have not been found to have any significant deterrent value. It is not suggested that these findings would consistently apply to any other form of punishment, but at least those who are empowered to confine a man within a penal institution should be aware of the folly of assuming in the absence of empirical data that any given punishment will dissuade others from indulging in prohibited conduct.

The courts today still impose deterrent sentences in order that society may be protected. Indeed, as was seen in *R.* v. *Cuthbert*,[52] the protection of society has been so elevated in New South Wales that it is now the single heading under which the function of the criminal law and the purposes of punishment may all be reduced.

The general purpose of "the protection of society", admirable though it undoubtedly seems, can nevertheless be an elusive concept, and can lead to abuses.[53] It is submitted that one such abuse is the justification of deterrent sentences by reference to the welfare of society. It is surely imprudent simply to assume that deterrent sentences will protect our communities. Would it be too idealistic to ask whether the offender himself is receiving justice from the hands of the law?

It is not within the scope of this comment to analyse the various formulations of the concept of justice, but it might be difficult to bring within even the most rudimentary notions of justice and fairness a penal philosophy such as ours which permits a man to be penalized not for his own errors but for those which his fellows might otherwise be tempted to make. C. S.

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[48] In N.S.W. whipping is retained for prison offences and certain indictable offences, but this punishment has not been used for over sixty years.

[49] Cadogan Committee Report, *Cmnd.* 5684.

[50] Report of the Advisory Council on the Treatment of Offenders, *Cmnd.* 1213.

[51] "Whipping as a Penal Sanction: Its Consideration in a Recent Case", (1968) *Aust. & N.Z. J. of Criminology* 10, contains an interesting account of the practical aspects of the issue.

[52] *Supra* n.3, at 274.

[53] Tappan, *op. cit. supra* n.1, at 5.

Lewis stated the issue well when he observed that there is "no sense in talking about a 'just deterrent'. . . . We demand of a deterrent not whether it is just but whether it will deter".[54]

The use of deterrent sentences to protect society cannot be accepted without reservation, and the all-important qualification is the requirement of justice. The truth of this proposition may be demonstrated by example. The City of Sydney is currently concerned about the amount of rubbish littering the streets, and it has been suggested that large fines be imposed on persons who offend in this regard. Suppose that, instead of a fine, the untidy commuter received a compulsory sentence of imprisonment for six months; the results would be seen in the immediate reduction in the amount of litter in the streets. Of course, such a measure would never be adopted because it would be plainly unjust to inflict a sentence so disproportionate to the offence. Already within New South Wales, some magistrates have relied on the provisions of s. 556A of the Crimes Act,[55] to avoid disqualifying a driver charged with driving under the influence, if to the magistrate this would seem to be an excessively harsh penalty.

The desire to protect society is not the sole purpose of punishment. There are many answers to the question "Why do we punish?", as the courts have recognised. Any given case before the court may indicate a special purpose for which a punishment might be imposed, and in selecting that purpose there should be an awareness that the aims and objectives of the criminal law are not one but many. If judges were to adopt this approach more frequently, it might appear to them that deterrence is not as important an element in punishment as has previously been supposed.

Penal Progress

It is submitted that a change in the judicial emphasis on deterrent punishments would be a mark of progress in the field of penology, but, in order for the judges to make an informed decision, research must be undertaken so that empirical data may be obtained and evaluated as to the effect of the penal law and its enforcement on the conduct of the individual citizen.[56]

Statistics of crime need to be compiled, and these would be particularly useful to ascertain the state of crime in the community, and to investigate the efficiency of the administration of the criminal law.[57] Recognising this need, the New South Wales Government is currently establishing a Bureau of Crime Statistics and Research to make an extensive study of crime and punishment in that State.[58]

It is essential, too, that research be undertaken to determine the effectiveness of the various penal sanctions which a judge might choose.[59] This data should then be made available to members of the judiciary to assist them in the difficult task of selecting the proper sentence. In England considerable progress has been made in this field by the publication in 1964 of the booklet *The Sentence of the Court*, produced by the Home Office and giving

[54] "The Humanitarian Theory of Punishment", 6 *Res Jud.* 224 at 225.

[55] The section permits a court of summary jurisdiction to release or to discharge conditionally any person charged before it, when the court considers it inexpedient (with regard to the person's character, age, health, antecedents, or to the trivial nature of the offence or to extenuating circumstances) to inflict punishment, even though the charge has been proved.

[56] Andenaes, *supra* n.34, at 197. As to sentencing problems generally, see Chappell, *supra* n.33.

[57] G. J. Hawkins and D. Chappell, "The Need for Criminology in Australia" (1967) 40 *A.L.J.* 307 at 310.

[58] *Sydney Morning Herald*, 24th March, 1968.

[59] *Supra* n.57, at 312.

details of the nature, aim and effectiveness of each form of sentence.[60] A significant advance in New South Wales has been the convening by the Chief Justice, Sir Leslie Herron, of a judicial seminar to discuss aspects of sentencing policy and practice. The seminar was conducted with the assistance of the University of Sydney Institute of Criminology. A similar seminar has been held in Tasmania.

A very important factor in the effectiveness of the criminal law is the adequacy of the alternatives available to the court passing sentence. All persons connected with the penal administration should be aware of the advances in the treatment of offenders in other criminal jurisdictions, and should be prepared to adopt those measures which might reasonably be anticipated to be successful.[61]

The suggestion has been made that the actual methods traditionally used for determining the appropriate treatment for offenders are quite inadequate.[62] Professor Glanville Williams claims that "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".[63] It is accordingly proposed that in view of the far-reaching importance of a sentence both for the offender himself and for society, a court passing sentence should be required to give its reasons for imposing the particular punishment. Four main grounds for this procedure have been advanced by D. A. Thomas:

(a) it would accord with the principles of natural justice;
(b) if courts formulated and stated reasons for a sentence, this would lead to a rationalization of sentencing;
(c) greater consistency in sentencing policy would result; and
(d) failure to do so might deprive a party affected of a possible right to challenge the decision.[64]

The Chief Justice of New South Wales, Sir Leslie Herron, expressed the view in *R.* v. *Cuthbert* that the sentence of the Court should accord with the general moral sense of the community.[65] It is true that in general the punishments imposed by the courts must bear some relation to public opinion. It would be no exaggeration to assert that, even in our present society, if the administration of the law was grossly out of proportion to public sentiment, members of the public might take the matter into their own hands. His Honour Mr. Justice Barry of the Victorian Supreme Court considered that the first requirement of a sound body of law is that

> . . . it should correspond with the actual feelings and demands of the community, whether right or wrong, provided those feelings and demands are not such as to imperil law itself. Whether or not it should be so, there is a strong general desire that the person who commits a grave offence should suffer, and however philosophers may debate the question, the ordinary citizen expects the law to allay, by the imposition of

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[60] London, H.M.S.O.

[61] Advances are being made not only in the range of available sentences, but also in the treatment of offenders who have been assigned to a penal institution. A welcome announcement was made by the N.S.W. Government in May 1968 that a system of work-release would be adopted in this State. This is a treatment which permits the prisoner to work in outside employment during the day, and then to return to a special prison building at night and on weekends: *Sydney Morning Herald*, 29th May, 1968.

[62] E.g., by Felix Frankfurter, Foreword to S. and E. Glueck, *After-Conduct of Discharged Offenders* (1946).

[63] "The Courts and Persistent Offenders" (1963) *Crim. L.R.* 730 at 733. See also the comments by Rupert Cross, "Paradoxes in Prison Sentences" (1965) 81 *L.Q.R.* 205 at 213.

[64] "Sentencing—The Case for Reasoned Decisions" (1963) *Crim. L.R.* 243.

[65] *Supra* n.3, at 274.

> punishment, the feelings of insecurity which most serious criminal offences arouse in citizens who are affected by them or learn about them.[66]

The persistently punitive attitude of the public to the criminal is one of the factors which hamper progress in the field of penology.[67] Dr. H. J. Schneider attributes the difficulty in setting in motion empirical criminological treatment research principally to the fact that "the public—influenced by the predominantly hostile stereotype of the criminal in the mass communication media—wants punishment as retribution and not treatment of the offender by therapeutic help and psychological guidance".[68]

An illustration of this was *R.* v. *Cuthbert* itself. The suspended sentence imposed by McClemens, J. was, as later events proved, quite out of harmony with public opinion. There was an immediate outcry against the leniency of the sentence, and this was fanned by the press which featured emotional interviews with the parents of the victim of the attack. The Crown immediately appealed, and the case was very speedily set down for hearing before the Court of Criminal Appeal. The connection of law with public opinion was again seen in the judgment of Herron, C.J., who thought that a proper approach was to ask himself what would be the view of the average right-minded citizen of Sydney of the case.[69]

The courts do not administer justice *in vacuo*, but are the agents of the community for the punishment of transgressors, and the punishment must reflect the values of society. Thus, while it is not suggested here that either of the sentences imposed on the accused Cuthbert could be called "wrong", it is felt that perhaps McClemens, J. imposed that sentence which was most suited to the circumstances, but the Court of Criminal Appeal imposed the sentence that society wanted.

It is evident then that if attempts are made to adopt new and advanced penological methods, there is a serious risk that such action would offend popular notions of justice. So long as the public still thinks in terms of deterrence and severe sentences, a limit is immediately set to innovations in penal administration.[70] The solution almost certainly lies in the education of the public to understand the need for evaluation of our present penal sanctions, and to accept prison reforms. When public opinion is ready to accept the proposed reforms and to co-operate with the courts, we might hope to see the successful and effective administration of the criminal law by a judiciary which commands public confidence.[71]

After the public is helped to understand the new penology, the present conflicts might be resolved. When the punishment approved by the community is that which research has indicated would best fit the crime and the offender, the result would be an effective, yet humane, penal administration.

*W. J. TEARLE**

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[66] "Crime and Punishment" (1956) 30 *A.L.J.* 119 at 122.

[67] G. M. Sykes, "The Dilemmas of Penal Reform—An American View" (1960) 10 *Howard Journal* 194 at 195-96.

[68] "The Treatment of Offenders: Report on the Fifth International Criminological Congress, Montreal, Canada" (1966) 6 *Excerpta Criminologica* 453. The same author there observes that the continuance of the existing situation is more comfortable for politicians, who have to pay heed to public opinion.

[69] *Supra* n.3, at 278. Lord Denning would probably consider this to be a just sentence, according to his definition of justice (*The Road to Justice* (1955) 4) as what "the right-minded members of the community . . . believe to be fair".

[70] Nigel Walker, *Crime and Punishment in Britain* (1965) 140.

[71] Walter Raeburn, "The Bespoke Sentence" (1965) *British J. of Criminology* 266 at 272-74.

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