THE SENTENCE OF THE COURT

POLICE FOUNDATION LECTURE 1997

given by

Lord Bingham of Cornhill
Lord Chief Justice of England

Sponsored by Ernst & Young

The past few years have witnessed a vigorous debate on the sentencing of criminal defendants. The debate has raged in countries as far apart as the United States, Australia and the Netherlands. It has burned with particular brilliancy in this country.[1] The existence of this debate is not something which judges or magistrates should deprecate. The maintenance of peace, order and security is one of the oldest functions of civil society. The imposition of penal sanctions on those who have infringed the rules by which a society has bound itself are a matter of legitimate interest to the members of that society. In modern societies such as ours, this is a task entrusted to judges and magistrates, who act in this capacity as the medium through which society visits such sanctions on transgressors.

So the existence of this debate is a healthy phenomenon in a democratic society. It is, however, desirable that the debate should be reasonably informed, that is, that the participants should have some understanding of the practice and principles involved. It is also desirable that the debate should be based on fact, not fiction; that the debate should be largely concerned with general levels of sentence rather than with individual sentences which may on occasion be aberrant; and that the debate should not be fuelled by tendentious or inaccurate reporting. Perhaps most importantly of all, it is desirable that the debate should be apolitical. There is plenty of room for genuine differences of opinion on these difficult and important questions. But we all have the same aims. It is unfortunate if these matters should become the staple of party political controversy.

It follows from what I have said of the judges' role in society that I do not consider it would be right, even if it were possible, for judges to ignore the opinion of the public. They do not live the lives of hermits; they are in and of the world; and they are inevitably alive to the opinions of their fellow-citizens. The judges are also conscious that the gift of infallibility is not conferred on them, alone among mortals. So when differences of opinion arise on issues of sentencing between the judges and an identifiable body of public opinion, the judges are bound to reflect whether it may be that the public are right and they are wrong. In two instances which occur to me, rape and killing by dangerous driving, I think it is true that public opinion (reinforced in the latter case by legislation) brought home to the judges that they had on occasion failed in their sentences to reflect the seriousness with which society regarded these offences.

Given the temper of our society in the last five years, I do not find it surprising that the prison population should have increased by 50%, reflecting the more ready resort to custody by sentencers and an increase in the length of sentences imposed. The tenor of political rhetoric has strongly favoured the imposition of severe sentences; this rhetoric has been faithfully reflected in certain elements of the media; and judges accused of passing lenient sentences have found themselves routinely castigated in some newspapers. Against this background judges have, understandably, sought to avoid the unwelcome experience of passing sentences which the Attorney General has sought leave to refer to the Court of Appeal as unduly lenient. So we have the extraordinary paradox, that judges and magistrates have been roundly criticised for over-lenient sentencing during a period when they have been sending more defendants to prison for longer periods than at any time in the last 40 years. The increase in the prison population is not explained by any recent increase in sentencing powers, and I have no doubt that it is related to the pressure of public opinion. This is not necessarily wrong in a general sense, if indeed levels of sentence were too low. But judges do well to remember that public and political opinion are volatile. It is but a few years since judges were widely and frequently reproached for imposing sentences of unnecessary severity. They should take care not to be blown hither and thither by every wind of political or penal fashion. And in determining

---

1 See, generally, Rutherford: Transforming Criminal Policy (1996).

sentence in any given case the judge should close his or her ears to public and media clamour concerning that case. As the House of Lords very recently pointed out, there is a distinction

> "between public concern of a general nature with regard to, for example, the prevalence of certain types of offence, and the need that those who commit such offences should be duly punished; and public clamour that a particular offender whose case is under consideration should be singled out for severe punishment."[2]

As another Law Lord added in the same case:

> "Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters."[3]

The purposes of criminal sentencing have traditionally been said to be retribution, deterrence and rehabilitation. To these there may now perhaps be added: incapacitation (i.e. putting it out of the power of the offender to commit further offences) and the maintenance of public confidence. It is obvious that the different sentences available to the courts serve these purposes in very different measures. For example, a sentence of imprisonment is very largely retributive, punitive, although it will prevent the offender committing further offences while imprisoned and may deter others from offending. A sentence of imprisonment is not usually passed with a view to rehabilitating the offender, even if in a minority of cases it has that effect. By contrast, a hospital order made in a case of a mentally disordered offender is purely rehabilitative; there is no element of retribution or deterrence, and the element of incapacitation is largely incidental. A probation order, similarly, is intended to rehabilitate. A combination order, which places an offender under the supervision of a probation officer and also obliges him to perform a number of hours' community service, is intended both to rehabilitate the offender and also to contain a punitive element, protecting the public from harm caused by the offender and preventing the commission by the offender of further offences.

Although easy enough to describe, these purposes of criminal sentencing are less easy to analyse and apply. Retribution is perhaps the most difficult. It is not immediately obvious why the fact that A has caused loss or suffering to B should justify the deliberate causing of loss or suffering to A, when this may be of no advantage to B. Carlyle was in no doubt about the answer:

> "'Revenge' my friends! revenge, and the natural hatred of scoundrels and the ineradicable tendency to .... pay them what they had merited: this is forever more intrinsically a correct, and even a divine, feeling in the mind of every man."[4]

Dr Johnson took a different view:

---

2 Per Lord Goff, R v Secretary of State for the Home Department, ex parte V and T, 12 June 1997 at page 20.

3 Per Lord Steyn, ibid., at page 61.

4 Latter Day Pamphlets (1872), at pages 66-67, quoted by J. Hostettler, The Politics of Punishment (1993), page 131.

> "Since revenge for its own sake cannot be justified, it will follow that the natural justice of punishment, as of every other act of man to man, must depend solely on its utility, and that its only lawful end is some good more than equivalent to the evil which it necessarily produces."[5]

Some have justified the retributive element in sentences by a theory of atonement or expiation, the paying of a debt by the criminal to society. In a sense, however, the theory underlying retribution may be of less importance than the fundamental, if primitive, instinct which it represents. The feeling that anyone who has committed a grave crime should be appropriately punished is one that is too basic and too universal to be ignored. Unless effect were given to it, public confidence in the administration of criminal justice would undoubtedly suffer.

Incapacitation expresses a basic truth that while an offender is confined within a penal institution he cannot commit offences, at any rate offences against any one outside that institution. The downside of course is that in all but a handful of the most extreme cases the period of incapacitation is temporary. The offender will at some point re-enter society. And he may, as a result of his experience in confinement, be an even more dangerous criminal than he had been before. Research findings show that the effect of incapacitation on general levels of crime is very small.[6]

The effect of deterrence may be personal to an offender, by deterring him from re-offending; or it may be more general, by its effect on those other than the defendant who might be deterred from offending by the example of his sentence. But these again are not entirely straightforward concepts. It is often hoped and believed that an offender's first taste of imprisonment may deter him from doing anything which might lead to a repetition of the experience, but plainly this is an effect which tends to diminish each time he is imprisoned. It may perhaps be that general deterrence operates most effectively at an almost unconscious level: we might all be tempted to falsify our tax returns but for a general recognition that such a course could lead to public exposure and humiliation. But it is probably unwise to place excessive reliance on the deterrent effect of sentences. There is cogent and authoritative research which discounts the effect of the death penalty in deterring murder. And it seems quite clear that many crimes are committed on impulse, or by those under the influence of drink or drugs, or by the feckless and the unintelligent, with little or no thought given to the consequences of the action taken.[7] So long as those detected and apprehended represent only a tiny fraction of those who commit crimes, deterrence is likely to remain a somewhat blunt instrument.

Mention of rehabilitation often provokes differing reactions. To the tabloid tendency it tends to be seen as an ineffective way of enabling offenders to escape the punishment they really deserve. To penal reformers it will seem obvious that many offenders now subject to sentences of imprisonment could with advantage undergo courses of treatment in the community designed to address the underlying problems which give rise to their offending.

---

5 Robert Chambers: Vinerian Lectures on the English Law, Part II, Lecture I, attributed to Johnson.

6 Tarling, Analysing Offending: Data, Models and Interpretations (HMSO, 1993).

7 Home Office White Paper, 1990, Crime, Justice and Protecting the Public.

There is an inevitable tension in many cases between the interests of the offender, viewed in isolation, and the perceived need to protect society. But the reformers would of course retort that there is, in the medium or longer term, no better way to protect society than by diverting an offender from a life of crime.

There is surely much force in this argument. I have recently urged that the strongest possible support should be given to agencies, whether public or private, whether national or local, which seek to identify and assist potential delinquents before they are drawn into a destructive cycle of offending. Whether the issue is viewed in human, social or financial terms, this must make sense. The prevalence of drug and alcohol addiction among the young, at ever younger ages, and the undoubted link between these addictions and the commission of crime, make the effective treatment of addiction a high national priority. There are, of course, other schemes with a proven record of success in rehabilitating offenders. Sherborne House, run by the Inner London Probation Service in Bermondsey, is one such. Participants attend the programme for 4½ days per week for 6 hours per day for 10 weeks, and are obliged to admit and face up to the reality of their offending and to appreciate the effect of their crimes on their victims. Those who take part do not, I understand, find this an easy or enjoyable thing to do. Some drop out, unable to do it at all. But for those who can and do bring themselves to do it, it seems clear that the experience is salutary and the risk of re-offending reduced. There is evidence to suggest that community programmes, properly tuned to particular offenders, can reduce re-offending by 10-16% when compared with custody. This is a saving well worth making.

It is obviously desirable that long-term prisoners serving sentences for sexual or violent offences, or offences related to drug or alcohol addiction, should while in prison receive any treatment which can be given to cure, mitigate or control the propensity or the addiction which led to the offending. Courses exist for that purpose in many prisons; they are to be welcomed; and their effect can only be beneficial. But I do not think most knowledgeable observers would make ambitious claims for the rehabilitative effect of imprisonment. The régime in almost any prison is to some extent repressive; the environment is not therapeutic; and if the prison population continues to rise the difficulty of providing rehabilitative treatment to all who might benefit from it is likely to grow even more acute.

The first task of the sentencing judge is to take note of the precise crime for which the defendant falls to be sentenced, whether on his own admission or on conviction. This is blindingly obvious, but it is also fundamental. For the general practice of the criminal law is to focus on the intention and state of mind of the offender and to treat most seriously those crimes where the offender's intention and state of mind are the most vicious. The most obvious illustration is provided by the contrast between sections 18 and 20 of the Offences Against the Person Act 1861. Under both sections it is an offence to wound or cause or inflict grievous bodily harm. But under section 18 the offence is only committed where there is an intent to do grievous bodily harm, and the maximum penalty is imprisonment for life. Under section 20 no intention to cause grievous bodily harm is charged, and the maximum penalty is imprisonment for 5 years. A similar contrast exists in the case of arson. Under one subsection of the Criminal Damage Act 1971 it is an offence to destroy or damage premises by setting fire to them with the intention of destroying or damaging the property or being reckless as to such result. Under another subsection it is an offence recklessly or intentionally to destroy or damage premises by setting fire to them, but with the additional intention of endangering life. While the maximum penalty in each case is the same, the criminality involved in the latter case is quite clearly greater.

There are, however, exceptions to the general rule that the intention or state of mind of the offender governs, as a matter of law, the gravity of the offence. There are some offences of strict liability, where all that need be proved is that the offender intended to do the prohibited

act; these are mostly offences of a regulatory nature, and do not include the most serious offences. But there are other offences of a much more serious nature where the commission of the crime depends not on the offender's intention or state of mind but on the consequences of his conduct: manslaughter and causing death by dangerous driving are the most significant examples.

Two examples will illustrate the sentencing dilemmas which can arise:

1. A stabs B with a knife intending to cause him very serious, disabling injury. By a freak of fortune or a miracle of medical science B escapes serious injury and makes a full recovery.

   C unlawfully punches D on the jaw. He does not intend to cause him serious injury and the blow is not one which would ordinarily cause anything other than trivial bruising. But D accidentally stumbles backwards, falls and hits his head on a marble fireplace, with fatal results.

   On these facts A is guilty of wounding with intent to cause grievous bodily harm. C is guilty of manslaughter. In each case the maximum sentence is life imprisonment. Which of the two is morally the more culpable? Surely A, because his intentions were the more vicious. Which is legally the more culpable? This is much more difficult. C has unlawfully caused the death of another human being, a result for which he must accept responsibility. But it would be very unjust if his sentence did not take account of the fact that this was a result he neither intended nor foresaw.

2. E, deliberately and knowingly, drives his car very dangerously over a long distance. But providentially, and no thanks to him, there is no collision and no damage or injury is caused. He is guilty of dangerous driving. The maximum penalty is two years' imprisonment.

   F also drives dangerously, but much less dangerously than E and over a shorter distance. His dangerous driving causes an accident in which a passenger, or another driver, or a pedestrian or a cyclist, is killed. He is guilty of causing death by dangerous driving, an offence subject (as a result of recent legislation) to a maximum penalty of ten years' imprisonment. Which of the two, E or F, is morally the more culpable? If anything, E, since on the hypothetical facts assumed his driving was more dangerous and more sustained. But in the eyes of the law F is to be treated as the more culpable, since Parliament has made clear its intention, recognised in the decided cases, that the fatal outcome should attract a more severe sentence. This is a legitimate reflection of the public outrage aroused by fatalities of this kind. But the sentencer has to ensure that the penal consequences are not altogether disproportionate to the criminality of the conduct penalised.

Both these dilemmas are, I hope, helpful to explain a recurring source of public concern. Time and again the grieving relatives of a victim unlawfully and tragically killed in circumstances such as I have described inveigh against the injustice of a system which deprives the perpetrator of his liberty for two, three, five or seven years, as the case may be, when their child, or brother or sister, or spouse, has lost his or her life forever. Such feelings are understandable, and must attract sympathy. But they betray a basic misunderstanding. It is not, as the courts have repeatedly pointed out, the function of the sentencing judge to attempt to construct an equation between the value of a human life and a period of months or years in custody. The judge's task is to impose such punishment as is appropriate for the crime committed in all the circumstances. Among those circumstances, the fact that another human being has died

through the criminal conduct of the defendant must loom large. But the court must also pay close regard to the nature and quality of the criminal conduct actually involved.

Having considered the nature and circumstances of the crime the sentencing judge will consider the personal circumstances of the offender. Statute recognises that when imposing a custodial sentence a court may take account of such matters as, in the opinion of the court, are relevant in mitigation of sentence.[8] The matters which may, in a proper case, mitigate the seriousness of an offence or the severity of a sentence are legion. They may, depending on all the facts, include such matters as: uncharacteristic behaviour under the influence of drink or drugs; the voluntary payment of compensation; lapse of time since commission of the offences; the consequences of conviction or sentence; responsibility for dependents; youth or old age; emotional stress; financial need, illness or disability; assistance to the police; provocation. In the generality of cases, however, the two most potent grounds of mitigation are likely to be an early plea of guilty to the charge and a previous good character. An early plea of guilty carries weight partly because it spares the victim the anxiety of awaiting trial and the trauma of giving evidence, partly because it obviates the risk of unjustified acquittal and partly because it reduces the cost and delay of the trial process. But it carries weight also because it does, in many cases, involve a genuine acceptance of responsibility for the crime, which may well be the first step towards rehabilitating the offender. And where an early plea is tendered there is frequently reliable evidence of remorse. A much-respected academic authority, Professor Andrew Ashworth QC, has recently thrown a little cold water on the notion of remorse, and chided the judges for attaching importance to it.[9] I do not agree with the professor. There are in my experience a significant number of cases in which an offender is personally devastated by the consequences of what he has done. In such cases it may be reasonable to hope that the risk of re-offending will be greatly reduced.

Good character is a more variable factor. Sometimes it counts for very little: for example, in the case of couriers bringing drugs into the country, often recruited for the task because of their lack of any previous involvement with the authorities.[10] But usually it weighs in favour of an offender that he has not committed any crime, or any crime of the kind in question, before. This surely accords with common sense. A single transgression gives room to hope that the transgressor may learn his lesson; persistence in wrongdoing shows that he has not learned it. This does not however mean that in the case of repeat offences each sentence need necessarily be more severe than was imposed the time before. There comes a point, at least in the case of minor offences, when any increase would cease to be proportionate to the gravity of the offence. It is not, for example, easy to imagine a court imposing the maximum term of seven years' imprisonment on a casual shoplifter, even if the offence had been committed (as it often has been) on many occasions.

To speak of "the typical offender" is, plainly, to generalise. But research findings confirm what many practitioners from their own experience would assert, that the personal profile of the typical offender can be drawn with considerable accuracy and particularity. He is usually male, and often of low intelligence, and addicted to drugs or alcohol, frequently from an early age. His family history will often include parental conflict and separation; a lack of parental

---

8 Criminal Justice Act 1991, section 28(1)

9 Eve Saville Memorial Lecture, 21 May 1997, Sentencing in the '80s and '90s: The Struggle for power.

10 R v Aramah (1982) 4 Cr.App.R.(S)407.

supervision; harsh or erratic discipline; and evidence of emotional, physical or sexual abuse. At school he will have achieved no qualification of any kind, and will probably have been aggressive and troublesome, often leading to his exclusion or to truancy. The background will be one of poverty, poor housing, instability, association with delinquent peers and unemployment. These considerations do not of course excuse or justify crime. For everyone who offends there are others subject to the same disabilities who do not. We are, in terms of the famous limerick, buses not trams.[11] But these considerations do help to explain the commission of crime, and those who urge the imposition of ever more severe sentences as a solution to the great and growing problem of crime should pause to ask whether they are treating the symptoms rather than the disease.

In recent years greatly increased attention has been paid to the victims of crime. This is welcome. In the past there was a tendency to treat the victim as if he or she had a walk-on part in the criminal process, whereas in truth the role of the victim is central. But there is, again, misunderstanding here. In April of this year the ***Daily Telegraph*** reported that the then Home Secretary proposed to give victims of crime a louder voice in the criminal justice system. "At present", said the report, "when a defendant pleads guilty to a violent offence, the judge may not be informed of the full impact of the crime on the victim". This could lead the uninformed to suppose that it had not in the past been the practice to give the court this information. Such an impression would be quite false. It has always been the practice for prosecutors to tell the court, if it did not emerge in evidence, that the victim of a violent attack had as a result been off work for 6 months, or was permanently disabled, or that the elderly victim of a burglary had been so shaken by the experience as to move house or be frightened of living alone, as the case may be. These are matters directly relevant to the seriousness of the offence, and they should be before the sentencing court. But it would be quite another matter, and plainly contrary to the interests of justice, in my opinion, to accord the victim any significant say in determining the appropriate level of sentence. Victims are, by virtue of their position as such, ill-placed to make that balanced and impartial judgment of a case which is the hallmark of a properly-functioning judicial tribunal. The passing of sentence must be governed by reason and guided by precedent, not coloured by emotion or a desire for revenge.

Since any judicial officer in passing sentence exercises authority conferred by the public for the benefit of the public the sentencer must always have regard to the wider public interest. It is important to maintain public confidence in the justice and effectiveness of the sentencing process. If, for instance, informed public opinion perceives that the sentences which are imposed fail to match the gravity of the crimes committed, then the public will be tempted to take the law into their own hands and resort to private vengeance. This is a form of civic breakdown. As Samuel Johnson wrote,

> "The right of private vengeance ..... is a principle so opposite to quiet, order, and security that every nation may be considered as more civilized and every government as nearer to perfection in proportion as it is more effectually repressed and extinguished".[12]

---

11 "There once was a man who said, 'Damn!'
It is borne in upon me I am
An engine that moves
In predestinate grooves,
I'm not even a bus, I'm a tram'".
Hare, 1905.

12 Robert Chambers, Vinerian Lectures, attributed to Johnson.

"The public security", he added, "is the principal end of public punishment".[13] But he also, in his famous argument against excessive and indiscriminate resort to the capital penalty, pointed to the dangers of undue severity:

> "To equal robbery with murder is to reduce murder to robbery, to confound in common minds the gradations of iniquity, and incite the commission of a greater crime to prevent the detection of a less. If only murder were punished with death, very few robbers would stain their hands in blood; but when by the last act of cruelty no new danger is incurred, and greater security may be obtained, upon what principle shall we bid them forbear?"[14]

Where the law itself requires what is seen as excessive severity, the tendency is to evade the law. Lord Campbell - not, admittedly, the most reliable of biographers - gives an example:

> "[While] [trying a prisoner at the Old Bailey on a charge of stealing in a dwelling house to the value of forty shillings, when this was a capital offence, Lord Mansfield advised the jury to find a gold trinket, the subject of the indictment, to be of less value. The prosecutor exclaimed, with indignation, "Under forty shillings, my Lord! Why, the fashion, alone, cost me more than double the sum". Lord Mansfield calmly observed, "God forbid, gentlemen, we should hang a man for fashion's sake!"".[15]

Difficult and taxing though the task of sentencing often is, there are some fundamental principles.

First, statute requires what common justice in any event dictates, that in the generality of cases a custodial sentence shall be for such term (not exceeding the statutory maximum) as in the opinion of the court is commensurate with the seriousness of the offence or offences and associated offences for which the offender is to be sentenced.[16] In assessing the seriousness of any offence the court is now, once again, permitted to take into account any previous convictions of the offender and any failure of his to respond to previous sentences.[17] But the court may, as already noted, take into account such matters as, in the opinion of the court, are relevant in mitigation of sentence.[18] And in determining what sentence to pass on an offender who has pleaded guilty to an offence a court must take into account the stage in the proceedings at which the defendant indicated his intention to plead guilty (the earlier the indication, the better for the defendant) and the circumstances in which the indication was

---

13 Ibid.

14 Rambler No.114, Capital Punishment.

15 Campbell, Lives of the Chief Justices, vol. II at page 569.

16 Criminal Justice Act 1991, sections 2(2)(a) and 31(2).

17 Ibid., section 29.

18 Ibid., section 28.

given.[19] Despite these rules the sentencer must always, in the case of all serious crimes other than murder, exercise a subjective judgment. At any rate until recently, this was thought to promote the ends of justice. A Home Office White Paper of 1990 declared:

> "It is not the Government's intention that Parliament should bind the courts with strict legislative guidelines. The courts have shown great skill in the way they sentence exceptional cases. The courts will properly continue to have the wide discretion they need if they are to deal justly with the great variety of crimes which come before them. The Government rejects a rigid statutory framework, on the lines of those introduced in the United States, or a system of minimum or mandatory sentences for certain offences. This would make it more difficult to sentence justly in exceptional cases."[20]

The most common ground of appeal against sentence is that the sentence passed was wrong in principle or manifestly excessive, but this is a field in which principles are notoriously hard to identify. The facts of individual cases and the circumstances of individual offenders are so infinitely variable that undue constriction of the sentencer's powers must lead to the imposition of unjust sentences in some cases.

It is, nonetheless, important to acknowledge - and this is my second point - that inconsistency may itself be a form of injustice. It is generally desirable that cases which are broadly similar should be treated similarly and cases which are broadly different should be treated differently. As Aristotle observed, "True equality exists in the treatment of unequal things unequally". To this end the Court of Appeal has, in a series of guideline cases, indicated the brackets within which sentences for given offences should ordinarily be expected to lie. Decisions of this kind apply to a number of offences, including causing death by dangerous driving, public order offences, kidnapping, rape, incest, unlawful sexual intercourse, buggery, living on immoral earnings, theft in breach of trust, robbery, explosive offences, obscene publications and drugs.[21] Even where there are no guideline cases, a wealth of appellate decisions give pointers towards the appropriate level of sentence in a given case. Where there is no guideline case it is normally because the circumstances of a given offence vary so widely that any guidance would be so general as to be meaningless. But the Court of Appeal has been criticised for failing, in recent years, to give guidance in such commonly recurring offences as manslaughter, many kinds of theft and deception, and the government propose in forthcoming legislation to impose a duty on the Court of Appeal to provide guidance on levels of sentence. This is, without doubt, an important function of the Court, developed with great skill and insight under the leadership of Lord Lane. We must seek to rise to the challenge, for while the preservation of discretion in

---

19 Criminal Justice and Public Order Act 1994, S.48.

20 Crime, Justice and Protecting the Public, para 2.16.

21 See, for example, R v Boswell (1984) 6 Cr.App.R.(S) 257; Attorney General's References Nos. 14 & 24 of 1993 (1993) 15 Cr. App.R.(S)640; R v Keys (1986) 8 r.App.R.(S)444; R v Spence & Thomas (1983) 5 Cr.App.R.(S)413; R v Billam (1986) 8 Cr.App.R.(S)48; Attorney-General's Ref.No.1 of 1989 (1989) 11 Cr.App.R.(S)409; R v Taylor (1977) 64 r.App.R.183; R v Willis (1974)60 Cr.App.R.136; R v Farrugia (1979) 69 Cr.App.R.108; R v Barrick (1985) 7 Cr.App.R.(S)142; R v Turner (1975) 61 Cr.App.R.67; R v Daly (1981)3 Cr.App.R.(S)340; R v Byrne (1975)62 Cr.App.R.159; R v Nooy & Schyff (1982)4 Cr.App.R.(S)308; R v Aramah (1982); R v Bilinski (1987)9 Cr.App.R.(S)360.

this field is important there is no room for arbitrariness or whimsy. It is, however, pertinent to observe that in most of the leading cases in which guidance on levels of sentence has been given the effect has been to increase the general level of sentencing. At a time when the prison population is rising sharply this is an effect to be noted. It has also, in practice, proved easier to raise the general level of sentences than to lower it.

Thirdly, it is a cardinal rule enshrined in statute of which we must never lose sight, that an offender willing to serve a community sentence must not be sentenced to imprisonment or detention unless his crime or crimes are so serious that only a sentence of this kind can be justified or the offence is of a violent or sexual nature such that only a sentence of this kind is adequate to protect the public against serious harm caused by him. The rationale of the rule is not far to seek. For the state to deprive a citizen of his liberty is a gross invasion of his ordinary rights as a human being. As already observed, imprisonment is not ordinarily a therapeutic experience; it can have a devastating effect on individuals and families; it can, and with depressing regularity does, lead to suicide; it confronts the offender with great difficulty in obtaining a job and re-establishing his life on release. As the Home Office said in its 1990 White Paper:

> "however much prison staff try to inject a positive purpose into the régime, as they do, prison is a society which requires virtually no sense of personal responsibility from prisoners. Normal social or working habits do not fit. The opportunity to learn from other prisoners is pervasive. For most offenders, imprisonment has to be justified in terms of public protection, denunciation and retribution. Otherwise it can be an expensive way of making bad people worse. The prospects of reforming offenders are usually much better if they stay in the community, provided the public is properly protected."

There are, of course, cases in which sentences of custody are, as it is often put, inevitable. But such sentences are improper save where they truly are necessary.

In the public mind, I think that custody is generally seen as the only truly retributive or punitive sentence. Anyone who commits a crime of any seriousness and is not sentenced to custody is generally perceived to have got away with it. This is very unfortunate, because of the inherent drawbacks of imprisonment, which I have just mentioned; because the efficacy of imprisonment is in many cases open to question; because the cost of imprisoning offenders is very high, and inevitably absorbs resources which would otherwise be available for schools, hospitals and other facilities of more obvious benefit to the public than prisons; and because the prison system is already bursting at the seams. It is the more unfortunate because there exists another sentence - community service - which is intended to punish, and intended to provide an alternative to custody in cases which would otherwise demand a sentence of custody. There will always, of course, be serious offenders, in whose cases nothing but custody would provide adequate punishment for them or adequate protection of the public. But it is highly desirable that the sentence should be one of community service in any case where such a sentence would provide adequate punishment and protection.

To that end, there are, I think, three steps which need to be taken with some urgency. The first is to ensure that a sentence of community service does require, invariably, the performance of the specified number of hours of serious and exacting work. I do not think the work required need (or should) be degrading, humiliating or particularly unpleasant; but it does seem to me important that the unforgiving hour should be filled with sixty minutes' work of rigorous and demanding work, done punctually and to an acceptable standard. I do not doubt that most existing programmes already meet these criteria; but every time a story appears suggesting that these criteria are not met, the credibility of the penalty tends to be seriously weakened.

The second task is to convince sentencers that community service is a serious punishment. Many magistrates and judges are no doubt familiar with the work programmes in their areas, and are already convinced. But there may be some who are sceptical, and tend to see community service as a soft option; to the extent that they do, avoidable sentences of custody are likely to be passed.

The third task, in some ways perhaps the most important of all, is to convince the public that community service is not a soft option. So long as it is perceived to be so, while the present vengeful mood of the public endures, courts will hesitate to make such orders in cases where the interest of the public is engaged. There is, I think, an educative job to be done here, and it is not a job which can be left to the courts. It is not for them to mould or guide public opinion. This is an essentially political task, as was recognised a few years ago when the thrust of governmental argument was, very clearly and explicitly, in favour of community penalties and against resort to custody save where it was truly and obviously necessary.

How, violent and sexual offences apart, do the courts judge whether an offence is so serious that only a custodial sentence can be justified? The answer given by authority is: when the offence is of such a kind that right thinking members of the public, knowing all the facts, would feel that justice had not been done by the passing of any sentence other than a custodial one.[22] This answer has attracted some criticism. Who are these right-thinking members of the public? And how does the judge know what they would think?[23] There is force in these criticisms. It seems inconceivable that a sentencer would attribute to right-thinking members of the public any view he did not himself share. So the formula does little more than reflect the judge's subjective judgment that justice would not be done by the passing of any non-custodial sentence. The Court of Appeal has been criticised for failing to give judges more help in identifying the custodial threshold, and given the importance of doing so it is a task which it would be highly desirable to accomplish if it were possible. I must, however, confess that to my mind the difficulty of accomplishing this task is formidable.

I cannot attempt to summarise these somewhat discursive and far from comprehensive remarks. I am conscious of asking more questions than providing answers. But answers are needed. I recently added my voice to others who have urged the case for a Royal Commission on crime and punishment, or at least a revival of the Advisory Council on the Penal System, disbanded in 1980.[24] I repeat the hope which I then expressed, that the beginning of a new Parliament may be recognised as the ideal moment for such an initiative. The decisions which I have been discussing have a profound effect on people's lives. We owe it to them to ensure that such decisions are as sound as human wisdom, fortified by human experience and human intelligence, can make them.

---

22 R v Bradbourne (1985) 7 Cr.App.R.(S)180; R v Cox (1993) 14 Cr.App.R.(S)479.

23 Professor Andrew Ashworth QC, op. cit.

24 Address to the Prison Reform Trust, 25 June 1997.