

VISTA PUBLIC LECTURE SERIES 2008
SENTENCING IN THE CRIMINAL JUSTICE SYSTEM

23 April 2008

**Justice C D Steytler, President of the
WA Court of Appeal**

The debate over crime and punishment has raged for centuries. Much of what is said today has been said, and contradicted, centuries before.

The debate will continue for centuries to come. It is not, and should not be, the exclusive preserve of judges, lawyers and politicians. It is one in which many sections of the community are able to offer valuable insights. But, like all debates, if the issues are not seen for what they truly are, if the realities are not understood, the debate becomes arid, and nothing will be achieved by it.

What I hope to do is to bring to the debate what, for some at least, might be a different perspective. In trying to do this, I will look afresh at five questions, the answers to some, or all, of which you might think to be obvious. First, what is crime? Second, who are the criminals? Third, why do these people become criminals? Fourth, what are the objectives of punishment? Fifth, how successful are we in achieving these objectives?

It is only once we have answered these questions that we can have an informed, and therefore useful, debate concerning what, in future, might be the best methods of reducing crime.

What is crime?

The nature of crime is not central to my analysis. But I do need to say what I mean when I speak of crime. That allows me to identify the criminals who are central to the present debate, and their reasons for offending.

Before doing this, there is one, essentially philosophical, point that is worth bearing in mind. This is that crime is a subjective concept. There is no natural law, or overriding and eternal concept of morality, that will always answer the questions what should be crimes and how these should be punished.

In 60 CE Tacitus told us what crimes were considered by the Germans to be the most serious. There were four crimes that were punishable by death. These were treachery, desertion, cowardice and sexual perversion. A murderer or thief paid a fine by way of oxen or cattle. Half went to the king. The other half went to the victim's family or the victim, as the case may be. The reason for this more lenient treatment was pragmatic. In a warlike society it was not in the community's interest to maim or kill men who could fight.¹

Some 500 years ago, men guilty of homosexual offences were held in a pillory by the neck and wrists. Sometimes their ears were nailed to the board so that they could not hang their heads. Spectators threw stones and filth at them. Often, they died.² Homosexuality between consenting adults is still a crime punishable by imprisonment in some parts of the world.

Until 1736, witchcraft was a crime. In the seventeenth century it was one of the most common of all crimes. In the time of James I it was a capital offence to 'entertain, employ, feed or reward an evil and wicked spirit or any part of it - skin or bone - for purposes of enchantment or sorcery'. It was also a capital offence to practice witchcraft by which anyone 'should be killed, destroyed, wasted, pined, or lamed'. At a trial in 1655, the Lord Chief Baron, Matthew Hale, from whose judgments we still quote, sentenced two women to death on evidence given by a woman who said that her children 'coughed extremely and brought up crooked pins' and a 'nail with a very broad head'. She produced the nail and some 40 pins.³

Of 10 crimes punishable by Hebraic law with stonings, nine had ceased to be offences in civilised Europe by the early nineteenth century.⁴

In the sixteenth century, an example of male-dominated law-making was that, in Newcastle, 'chiding and scolding women' were led around the streets on a rope, wearing an iron crown over their heads and faces 'with a great gag or tongue of iron forced into the mouth which forced the blood out'. At around the same time, immoral or nagging women were subjected to 'ducking', which sometimes resulted in death.⁵

There are many other historical examples of changing attitudes to crime and morality. What they tell us, in the words of Christopher Hibbert, a noted English historian, is that 'A crime is only a crime when a law, prompted by expediency, religion, morals, prejudice or party feeling, makes it so'.⁶

Why is that important? It seems to me to be so for two reasons. The first is that it is necessary not to lose sight of the fact that crime is a variable concept, depending essentially on the opinions of those who have power and influence. The second is that we have seen, in the twentieth century, a huge increase in the number of activities that have been branded criminal. As the complexity of modern living in an acquisitive society grows, so, too, does the regulation of human behaviour. We are well past the point in which laws are breached daily, even by moral citizens. It would be interesting to know what effect this has on respect for the law and its institutions.

But these are questions for another day. When I speak of crime I will be referring only to those crimes which have traditionally, if variably, been regarded as such and which are the principal objects of community concern. These are essentially crimes of violence, crimes against property and crimes involving drugs.

Who are the criminals?

That brings me to the second question. Who are the criminals? In answering this, we need look only at modern society, although I suspect that not a lot has changed over the years. I have said that I am not speaking of the average corporate offender, who might be recognised by his or her apparel. The typical non-corporate criminal is usually young, male, often of low intelligence, and usually an abuser of alcohol and drugs. His background will ordinarily be one of physical and emotional abuse, a broken home, a lack of supervision, or supervision that involves erratic and harsh discipline. He will have done badly at school and given trouble from an early age. His background will be one of relative poverty and instability. He will sometimes suffer from mental illness. He will have delinquent peers. He will often be unemployed. He will almost always have low self esteem.

Why do people commit crimes?

The characteristics of this typical offender provide us with an obvious insight into why he commits crimes. He does so because of one or more of environmental factors, psychological and psychiatric factors, alcohol and drugs.

Environmental factors

The principal environmental factor will be his immediate family background. That does not refer only to the treatment of him by his parents, or other carers, and his siblings. It encompasses, also, such things as the family's treatment of each other, their degree of poverty and their ability to cope with social problems.

Throughout time, the cultivation in ordinary families of feelings of mutual respect, tolerance, affection, responsibility and self worth has provided the greatest antidote to crime. But with more complex and competitive lives, the growing influence of drugs and alcohol, social pressures, changing values and a

greater divide between rich and poor, this kind of family is becoming much harder to find. There are many families in which there has been a complete breakdown in parental responsibility. There are many other families in which the values that are taught, by conduct if not by words, are essentially selfish and inward looking rather than community oriented.

Other environmental factors might include a lack of effective schooling, peer pressure, unemployment, the influence of mass media (particularly television and films), and community attitudes and alienations.

The influence of lack of effective schooling and of peer pressure is obvious. So, too, is that of unemployment. A large majority of those who are sent to prison are unemployed at the time of receipt. The influence of mass media is a little less obvious. There is some evidence that depictions of violence or pornography have an impact on crime, but there is room for debate to what extent these are causes of crime rather than influences on the form that a particular crime is likely to take.⁷ But what we can be sure of is that mass media, or its attendant advertisers, constantly send liminal and subliminal messages to those to whom they reach out concerning their needs and status.

Each one of us is anxious for respect, and sometimes recognition, from our peers. We might sometimes be told that these do not depend on status. But everything around us tells us that they do. And status comes with assets and power. If you have the best car, you get the girl. At least, that is the message. You have to have the right clothes and the right music. You have to fit in. This means that you have to have, and do, the right things. In a modern society this, in turn, means that you have to have money.

If you don't fit in with the general society, if you are made to feel alienated from it because of your lack of status, race, religion, poverty, or for any other reason, that will impact upon your feelings of self worth, and perhaps

your sense of anger with those who make you feel this way. Those factors are a breeding ground for crime.

This is no new insight. A French writer, A Lacassagne, writing in the late nineteenth century, said:

The criminal is the microbe, an element which only becomes important when it finds the medium which causes it to foment. Every society has the criminals which it deserves.⁸

We all have the potential to be criminals. What stops us from being so is usually a better upbringing, better education and an absence of poverty. These things don't make us better people. They mean only that we have not been subjected to the same disadvantages, prejudices and temptations as those who commit crimes. Adolph Prins, writing in 1886, said that 'Criminality proceeds from the very nature of humanity itself'.⁹

I should add one comment concerning poverty. It is a relative concept. I wonder whether poor communities in a rural area in a country such as Malawi have as high a crime rate as 'poor' people in or near an Australian city. I doubt it. If those around you have as little, or as much, as you do, your wants, and conditioned 'needs', are less. We have a notion of poverty that would be astonishing to the majority of the world's people. We have a different concept of 'need'.

Mental illness

Advances in neurology, psychiatry and psychology have shed a great deal of light on mental illness. The law, and general community understanding, still lag a long way behind.

In the middle ages mental illness was not ordinarily a defence to crime, or even an extenuating circumstance. Sometimes people who were seriously mentally ill were executed merely because of their illness. At other times they were flogged to drive the 'devils' out of them.¹⁰

We have only relatively recently started to treat mentally ill people differently. The first institution to be established in Europe for the exclusive care of insane criminals was Broadmoor. This was established in England in 1863.¹¹

Sometimes it is not the illness itself which induces criminal behaviour, but its social consequences. A study conducted in Chicago in 1928 revealed that, of a 1,000 young criminals, 70% were epileptics, compared with the national average of two in every thousand. It is of course possible that a person in the throes of an epileptic seizure may have no control over his or her actions during the seizure. But that statistic is more probably explained by attitudes which then existed towards epileptic people, and the social and economic difficulties faced by them. At the time of the study, some states in the USA prohibited them from marrying and in all states they found it difficult to obtain employment.¹²

We still do not treat mentally ill people well. Often, illnesses are not identified or understood. Mental health facilities are still inadequate, although they have improved considerably in the last few years. The law's definition of mental incapacity is simplistic and even risible in the eyes of many mental health professionals. People are found guilty of crimes and punished who would never have committed those crimes were it not for a recognised mental illness. Persons found not guilty of serious crimes by reason of insanity are still sometimes detained in prisons rather than in psychiatric institutions. Any prison superintendent will tell you that there are many prisoners who should more properly be in mental institutions.

There are increasing numbers of mentally ill people. As drug use multiplies, so its effect on mental health increases. In the courts we are increasingly confronted with crimes committed in the course of a drug induced psychosis. There are other things that come with drugs that fall short of

accepted notions of mental illness. There is the increased aggression and feeling of invincibility that often accompanies amphetamine use. There is a lack of cognitive capacity, a putting together of cause and effect in such a way as to take account of longer term consequences, that may be present in a long term marijuana user. There is a question whether the courts should make any allowance for what are essentially self-induced behaviour patterns.

With greater knowledge and understanding of non self-induced mental disconnects or misfirings, and their effects on human behaviour, there is a greater need, as yet unfulfilled, for the criminal law to redefine the parameters and consequences of mental illness. This will be no easy task. It will involve not only medical considerations, but also pragmatic considerations. It has long been recognised, and is obvious even to lay persons who deal with criminals, that criminal behaviour is often accompanied by a disconnect between intellect and emotion. Psychopaths, who are not usually regarded as legally insane, provide an extreme example. But there are many gradations of disconnection, some capable of being remedied and others not. Recent discoveries concerning the 'executive' function of the pre-frontal lobe of the brain have revealed a direct correlation between trauma to that area and human behaviour.¹³ How far the law is able to go in categorising such behaviour as mental illness, or even as mitigating its culpability, is an issue that will have to be confronted.

Drugs and alcohol

Young people, by nature, are often restless, inquisitive and reckless. They are easily bored and constantly looking for excitement. If you add to that mix other features of a typical offender, for whom life seems to deliver a good deal less than it does to other members of the community, then the prospect of drug or alcohol abuse becomes almost inevitable.

There were, in 2001 (the latest year for which I have been able to obtain figures), 98,000 heroin dependent injecting drug users in Australia.¹⁴ This drug,

and other illicit substances, make their users feel good, when life without them does not. They are also able to obtain a sense of identity from the relationships which come from drug and alcohol abuse.

Drug and alcohol abusers are more likely to commit crimes while under the influence of these substances. Also, they have to find the money to pay for them.

The problem has been around for a long time. In the 1890s, a study of 1,392 convicts in San Quentin prison in the USA revealed that over 44% of them were addicted to opium on admission. Forty-nine per cent of them were alcoholics.¹⁵ The Royal Australian College of Physicians (RACP) and the Royal Australian and New Zealand College of Psychiatrists (RANZCP) have recently released a joint report, described as their current policy statement (Illicit Drugs Policy), which records that, in 2000, a study was made of 1,631 adult males detained in four police lockups across Australia. It was found that 65% of those detained for violent offences and 82% of those detained for property offences tested positive for amphetamines, benzodiazepines, cannabis, cocaine, methadone or opiates. Illicit drug use was reported to be the single largest factor affecting the lives of offenders. Over two-thirds of prisoners reported a history of illicit drug use and a high correlation between illicit drug use, criminal activity and re-offending.

There is a limitless supply of drugs and alcohol for those who want them. The community, rightly, sees the higher level drug trafficker as the most serious element in the illegal drug industry. Drug trafficking is essentially a pyramid style operation. The traffickers who are most usually arrested are users who engage in trafficking in order to pay for drugs upon which they are dependent. Their dependency is exploited by others, higher up the chain, who are much more difficult to apprehend. Young people, especially drug dependent young people, are not the best analysts. Many of them see nothing wrong in

supplying drugs. The street dealer's refrain is, 'I only supply drugs to people who want them. If I didn't supply them, someone else would'. With this attitude, coupled with the need for money to feed their habit, there is no shortage of street level suppliers.

Every year, representatives of the parties to the International Treaty in respect of the illicit drug trade meet in order to review the operation of the Treaty. Every year they resolve that programmes must be pursued with greater vigour. Every year the drug trade grows. The United Nations Office on Drugs and Crime produces an annual World Drug Report. Its most recent estimate is that the scale of the international illicit retail drug trade is now US\$320 billion per annum.¹⁶

The RACP and RANZCP report criticises the emphasis of drug funding. It has called for better funding for harm reduction measures and less emphasis on law enforcement. The Executive Summary contains the following paragraphs:

It is undeniable that efforts used to reduce the demand and supply of illicit drugs have had limited effectiveness. Nevertheless, the supply reduction measures, though often costly and accompanied by serious unintended negative consequences, are generously funded. In contrast, pharmacological drug treatments and harm reduction interventions that have proved to be relatively inexpensive, effective and safe are relatively poorly funded. For the last three decades, illicit drug policy has been a major political issue during many election campaigns. This has not served the interest of effective policy making.

Improved outcomes can be achieved by investing more appropriately in interventions better supported by evidence of effectiveness. This will only happen if politicians are prepared to lead an informed community debate rather than respond to vocal and often unrepresentative media commentators.

Two of the report's recommendations are that governments should:

- Invest in more cost effective interventions which provide the greatest social and health benefit, and reduce investment in interventions weakly supported by evidence of benefit;
- Take a longer-term view of community benefits when selecting interventions and pay less attention to short term political gain.

Estimates have been made, by David Collins of Macquarie University and Helen Lapsley of the University of Queensland, of costs to the Australian economy related to illicit drug use, tobacco and alcohol (primarily crime, loss of workplace production and health costs) for the 2004-05 financial year.¹⁷ In the case of illicit drug use, the cost was a staggering \$8.2 billion. Of this, some \$3.8 billion was accounted for by crime. An additional amount of \$1.26 billion was ascribed to crime involving both alcohol and drugs. The cost to the economy of alcohol related problems was \$15.3 billion. Tobacco related problems cost \$31.4 billion.

The RACP and RANZCP report refers to an Access Economics estimate that, in 1997 (the latest available figure), consumer spending on illegal drugs in Australia amounted to \$7 billion. Access Economics also estimated that \$6 billion was spent on cigarettes and tobacco and that \$12 billion was spent on alcohol. These figures would now be considerably greater. They might be compared with Australian consumer (non-government) spending of \$7.9 billion on education.

The RACP and RANZCP report cites a RAND (a non-profit institute in the USA that helps improve public policy through research and analysis) study¹⁸ which estimates that each US\$1 million spent on 'tough prison sentences' reduced cocaine consumption by 13 kg, compared to an estimated 27 kg reduction by the same expenditure on conventional prison sentences and a 103 kg reduction by the same expenditure on drug treatment for cocaine users. The RAND Drug Policy Research Centre suggests that each US\$1 million spent on drug treatment programmes would reduce serious crimes 15 times more effectively than incapacitating more offenders.¹⁹

It is fanciful to think that we can put a stop to the supply of drugs, given the range of available producers, the style of distribution, the huge amount of money involved and difficulties in enforcement. To take only one example on

the supply side, recent news reports indicate that there has been a large influx of heroin originating from opium grown in Afghanistan. Four million families in that country depend, for their survival, on crops grown for heroin production. Crop production has doubled in the last two years notwithstanding a large military presence in Afghanistan.

Some comparison might be made with prohibition of alcohol sales in the United States in the early 1920s. Kenneth Allsop, in his book 'The Bootleggers' (1961), suggests that this became perhaps 'the most alcoholic period in American history'. In one year alone, over 1 billion gallons of alcoholic drinks were consumed, resulting in an estimated profit of \$4 billion for the bootleggers. It was also one of the most violent periods in American history. During the 14 years of prohibition in Chicago alone, fights between rival gangs resulted in over 7,000 deaths.²⁰

The comparison between alcohol and drugs raises interesting (if peripheral) questions. If there was to be a return to prohibition (which is not something I would advocate), would we regard an alcohol user in the same way as we do a drug user? Would we regard a street level bootlegger in the same way as we do a street level drug dealer? I doubt it. And yet alcohol probably results in more harm than all of the other drugs put together. Many people become readily addicted to it. It often leads to violence, some of it in the confines of the family home. It is a constant factor in sexual offending. It results in thousands of deaths on the road. It causes a range of serious health problems. Close to 2,000 people are detained in a lock-up each year for public drunkenness.²¹ In the 2004/05 financial year (the latest available figure) there were 3,494 alcohol caused deaths.²²

A recent newspaper article²³ reports that 168,000 Australian people aged between 12 and 17 drink alcohol at harmful levels every week and that one in five 16 and 17-year-olds binge drink each week. Nearly 500,000 Australian

children are exposed to an adult who drinks at harmful levels. Official police figures²⁴ show that the number of juveniles charged with violent offences in Western Australia has risen by 19% in the last two years. Police Commissioner Karl O'Callaghan is reported as ascribing this to a decline in youth values and to high levels of drug and alcohol abuse.

Experience to date teaches us that we are unlikely to have much greater success in trying to stop people from using drugs than we had in prohibiting alcohol.

Why do we punish criminals?

There are five recognised sentencing objectives. These are personal deterrence, general deterrence, rehabilitation, retribution and the protection of the community.

Do we achieve our objectives?

The answer to the third question, whether we achieve those objectives, is critical to the issue of crime reduction.

Deterrence

I will start with deterrence. I have said that it is widely accepted that the more severe the punishment, the greater will be its deterrent effect on the individual offender and on others who might otherwise be tempted to commit similar offences. People have believed this from time immemorial. But is it true?

There is no doubt that the fear of being caught, with its accompanying opprobrium, operates as a deterrent. Nor is there any doubt that the threat of imprisonment operates as a deterrent. But we need to ask ourselves three questions. Who do we want to deter? Who are we capable of deterring? Does increasing the severity of a punishment make any noticeable difference to its deterrent value?

I will deal with the third question first.

Do more severe penalties deter would-be criminals?

Throughout history, courts, or the executive, have attempted to deter people from committing crimes by imposing increasingly severe penalties. I will give some examples.

Not long after the death of King Alfred, attempts were made, in the fourteenth century, to substitute physical punishments for crimes that had previously resulted only in the payment of compensation. There was a widespread perception of a growing crime rate that could only be stemmed by the threat of sterner punishment. Executions or mutilations were considered to be a better deterrent. These penalties were introduced for a range of offences. However, the crime rate in respect of these offences did not decrease.²⁵

In order to deter the crime of coining at the time of Ethelstan, a coiner was punishable by having a hand cut off. When that didn't work, Henry I decreed that coiners should be castrated as well. That didn't work. A hundred years later, after an inquiry by Edward I into coining, 280 people were hanged for that offence in London alone.²⁶

Up to the middle of the sixteenth century men were mutilated and hanged for minor offences such as idleness. Bishop Rowland Lee, the Lord President of the Council in the Welsh Marshes, spoke of hanging thieves 'in hundreds, right and left' without making theft any less prevalent.²⁷

Similar efforts at deterrence were made in Europe. Christopher Hibbert records²⁸ that:

In 1666 at Auvergne, 276 criminals were hanged, 44 were beheaded, 32 were broken on the wheel, 28 were sent to the gallows and three were burned. A man who made an attempt on the life of Louis XV had his hand burned off, molten lead and boiling oil was poured into the stump and four horses were set to drag him apart. As the strength of the horses proved inadequate for this task the executioner loosened his joints with a knife. In Germany, men sentenced to death were nipped on their way to the place of

execution with red hot pincers which were used to tear out the tongues of blasphemers.

Again, these attempts at deterrence failed.

In the eighteenth century the owners of bleaching grounds in England and Ireland persuaded the government to impose the death penalty for stealing goods worth 10 shillings or more from grounds in England and worth five shillings or more from grounds in Ireland. These penalties were repealed in 1811. Sir Thomas Buxton, in a debate in the House of Commons, said, some nine years later:

We have gone on long enough taking it for granted that capital punishment does restrain crime. And the time is now arrived in which we may fairly ask, does it do so?

He answered that question by saying that, although crime had generally increased in Lancashire since 1811, the number of thefts from bleaching grounds in that County had noticeable fallen.²⁹

Anyone who believes that the death penalty is a deterrent is not a student of history. English experience has repeatedly demonstrated the contrary. In 1785, 97 people were executed in London and Middlesex alone, 74 of them for robbery, burglary and house-breaking. However, offences of this kind, which had been increasing for years, continued to increase notwithstanding that they resulted in a death penalty. A committee that had been set up in 1770 asked the House of Commons to consider whether the reason for the fact that, even though 'the gallows groan', the 'evil continued to increase' might be 'that extreme severity instead of operating as a preventive to crimes rather tended to influence and promote them, by adding desperation to villainy'.³⁰

It was not only adults who were executed in an attempt to deter criminals. Boys of 10 were sentenced to death in 1748 and 1800. The rationale was that there was an 'infinite danger' that it might otherwise be thought that others might think that 'a child might commit such a crime with impunity'. In

1801 a 13-year-old boy was hanged for breaking into a house and stealing a spoon. In 1801 two sisters aged 8 and 11 were hanged. In 1831 a 9-year-old boy was hanged for setting fire to a house. In 1833 another was sentenced to death for pushing a stick through a crack in a shop window and taking two pennies' worth of printer's colour. Thefts by children continued unabated.³¹

One might speculate what these hangings did to advance respect for human life. What was said³² by Cesare Beccaria, a noted Italian jurist, is as true today as it was in 1764:

Is it not absurd that the laws which detest and punish homicide, in order to prevent murder, publicly commit murder themselves.

Christopher Hibbert's researches reveal that the Europeans experienced a similar lack of success with the death penalty as a deterrent. He wrote³³ that:

Belgium, Holland, Luxembourg, Portugal, Rumania and Italy had dispensed with capital punishment by the end of the nineteenth century and experts from some of these countries were asked to give guidance to a Select Committee on Capital Punishment appointed in England in 1929. 'The lesson has been learnt,' said the Belgian Minister of Justice, 'that the best means of inculcating respect for human life is to refrain from taking life in the name of the law.' 'It is definitely established,' the Government of the Netherlands categorically informed a subsequent Royal Commission, 'that the abolition of the death penalty in the ordinary penal code' (most countries retain it for use against traitors and in time of war) 'has not resulted in an increase or worsening of crime.'

Nor was any permanent increase noticed by Norway which abolished capital punishment in 1905, nor by Sweden which abolished it in 1921. Denmark dispensed with it in 1930, Switzerland in 1942, Italy (the Fascists having re-introduced it for certain crimes in 1931) in 1948, Finland in 1949, West Germany (after Hitler had restored a uniformed headsman with a ritualistic axe) in 1949, Austria in 1950. 'The general view,' said Ivar Strahl, Professor of Criminal Law in the University of Upsala, 'is that the abolition of the death sentence has not entailed any increase in the number of crimes.' In Italy the homicide rate fell from an annual average of 10.6 per 100,000 of the population in 1880 to 3.5 in 1920. It rose sharply, as was to be expected in the post-war chaos, in 1946 but afterwards fell again, and continued to fall after the death penalty was abolished. The same is true of West Germany. The Council of Europe's publication, *The Death Penalty in European Countries* (1962) concludes that the information collected from all the countries concerned, although incomplete, 'does make it possible to say that the abolition of capital

punishment was not reflected in any European country by an increase in the number of crimes formerly punishable by death.'

Australian and New Zealand experience leads to similar conclusions. The same is generally true of those States in the United States of America that have abolished the death penalty.

We have also learned that there is often little correlation between the length of a term of imprisonment and its deterrent value. My analysis of statistics produced by the University of Western Australia's Crime Research Centre suggests that increased penalties imposed by the courts have often no discernible impact on crime rates.³⁴

The so-called 'three strikes' legislation introduced in respect of home burglaries in 1996 provides a good illustration. This legislation imposed a minimum term of 12 months' imprisonment in respect of a third or subsequent offence. A maximum sentence of 18 years' imprisonment was provided for home burglary (20 years if there were circumstances of aggravation - one of which is if the burglar was 'in company' with another). The legislation was accompanied by enormous media publicity, backed up by forceful poster campaigns. The statistics regarding home burglaries before and after these changes were analysed by Professor Neil Morgan of the UWA Crime Research Centre.³⁵ He reached these conclusions:

The most striking observation is that there was a leap in residential burglaries immediately after the introduction of the new laws, at precisely the time when the greatest reduction would have been expected. In fact, the figure for January 1997 was the second highest monthly figure on record. This rise was followed by a decline for a few months, and then another peak in January 1998. The other interesting point is that non-residential burglary rates, to which traditional sentencing laws applied, fared just as well - in fact, they did rather better than residential rates.

The irresistible conclusion is that the three strikes home burglary laws had no deterrent effect. Burglary rates appear to have a lifecycle that is to some extent seasonal and that operates quite independently of punishment levels. These findings are in line with other research studies ... but are important in both national and international terms because ... the

preconditions were such that a deterrent effect might reasonably have been anticipated.

However, there is a direct correlation between imprisonment rates and recidivism. This is no new insight. A report commissioned in England in 1960 revealed that 60% of men discharged from corrective training and long-term sentences of preventive detention since 1954 had been re-convicted by the end of 1960.³⁶ That doesn't mean that the other 40% had remained pure of heart. In some cases at least, they may simply not have been caught. In 1961 over half of the men in prison had been there before. A report commissioned in the USA revealed that 67.6% of men committed to federal prisons during 1959 had been there before.³⁷

Current imprisonment rates reveal that Western Australia ranks second in the country, behind the Northern Territory, in rates of adult imprisonment. The 2005 statistics (the latest available to me) show that we have an imprisonment rate that is around 35% higher than New South Wales or Queensland, 250% higher than Victoria, 180% higher than South Australia and 50% higher than Tasmania. Although we did a little better with juvenile detention in 2005 (coming third to the Northern Territory and Tasmania), our average rate of juvenile detention over the period 1990 to 2005 ranked second only to the Northern Territory. All statistics reveal that males are the main offenders, with male juveniles committing 84% of all juvenile offences.³⁸

A study prepared by the International Centre for Prison Studies at King's College in London³⁹ reveals that the Western Australian adult imprisonment rate of 234.3 per 100,000 people (UWA Crime Research Centre figure) might be compared with 139 in England and Wales, 125 in Spain, 116 in Canada, 100 in Italy, 85 in France, 68 in Switzerland and 53 in Japan. On the other hand, it might also be compared with the USA figure of 702. The study shows that the median rate in Southern Europe is 80, about a third of this State's rate.

Who do we want to deter and who are we able to deter?

Why is it that more severe penalties produce little or no additional deterrent effect with many offenders? This involves an assessment of the answers to the first two questions, who do we want to deter and who are we capable of deterring.

The answer to the first question is obvious. We want to deter anyone who might otherwise commit crimes. But who are we able to deter?

There is no doubt that we deter the average reasonably honest, reputable person with a job, family and friends. But these people are not likely to commit crimes anyway. The risk of being caught is too great, given what they have to lose. They have anyway less need to commit crimes such as theft. They are less likely to become involved with drugs or to abuse alcohol.

Can we deter those we really want to deter? This requires an analysis of why people commit crimes. That is why I addressed, earlier, the characteristics of the average criminal. I have said that those characteristics give us a good insight into why the average offender offends. He does so (I have said that the offender is likely to be male) because of a lack of any constructive guidance, because of an inability to make rational and moral assessments, because of a desire to gain attention and approval, because of poverty, because of community alienation, because of a lack of things regarded as 'necessities' by him and his peers, because of mental illness, because of an inability to control his temper, because he is unable to make any rational judgment or to control his emotions as a result of his alcohol intake, because of his addiction to drugs or because the rewards are seen to outweigh the prospect of detection.

Are we going to deter these people by longer gaol sentences? Experience has shown that a death penalty does not deter premeditated crimes of murder. Sentences of life imprisonment (and death, in some countries) do not deter the drug tsars or their lieutenants, or even street dealers (in those countries

which deal with them in this way). Can we expect longer sentences of imprisonment to deter crimes of passion, by people often lacking adequate cognitive skills? Will they deter people who think only for the moment, either not contemplating consequences at all or convincing themselves that there will be none? Will they deter those whose principal desire in life is to impress their delinquent peers? Will they deter someone who is mentally ill, or under the influence of alcohol or drugs? Will they deter someone who is addicted to drugs? Will they deter someone who no longer has anything to lose? The answer, in the majority of these cases, is that they will not.

If we want to stop the majority of these kinds of people from committing crimes, we have to look for other solutions. Those solutions lie, to a large extent, outside the purview of the courts. They involve, primarily, the redressing of social disadvantage.

The relationship between crime and social disadvantage is dramatically illustrated by imprisonment figures relating to indigenous people.⁴⁰ In 2005, indigenous persons accounted for 45% of prison receivals. In the same year an indigenous person was 31 times more likely to be imprisoned in Western Australia than a non-indigenous person. Of 4,272 juveniles dealt with by the Childrens Court in 2005, 1,759 or 41.2% were indigenous. The mean age of indigenous juveniles dealt with by the court was 15.6 years. That for non-indigenous juveniles was 16.5 years. The figures also reveal that indigenous juveniles were more likely than non-indigenous juveniles to be placed in custody (25.4% compared with 9.3%). The Western Australian indigenous juvenile detention rate is the highest in the country. It almost doubles the national rate. The rate, in 2005, was about 40 times greater than that for non-indigenous juveniles.

The point can be illustrated by any number of examples from other countries. There is one example that seems to me to be particularly telling. It

relates to the Burakumin people in Japan. The traditional word for these people, happily no longer used, was Eta, or 'much filth'. They are a minority group, comprising a little over 2% of the population. Importantly, they are an occupational minority group rather than a racial one. They are indistinguishable in appearance from other Japanese people and yet they were discriminated against for generations. Why? Because they are the descendants of people whose jobs were considered ritually unclean, such as butchering animals, making leather goods, digging graves and handling corpses. The reasons for the discrimination no longer exist, but the discrimination, although much less than it was, persists. Why? Because the product of centuries of discrimination has been disproportionate poverty, low education levels, high levels of alcoholism, dependency upon welfare, high crime rates and resentment from a public that believes they are getting special help. A study conducted in the 1960s found that Buraku youths were three times as likely as non-Buraku youths to be arrested for crimes.⁴¹

Rehabilitation

That brings me to rehabilitation, the third of the objectives of punishment.

Are we going to achieve this objective by imprisoning people? Sometimes, but not usually. We know from the statistics that recidivism is more probable in the case of those who are imprisoned. There may be more than one reason for this. For example, some recidivists may be in prison only because they are recidivists (for example, repeat drink drivers). We also know that there are some people who simply cannot be rehabilitated, for one reason or another. But we can be sure, and we have for a long time been sure, that imprisonment is unlikely to achieve much by way of rehabilitation, even for someone who is capable of it.

Prisons are not places where moral beliefs are restored or encouraged. That has always been so. Captain Arthur Phillip, the Governor of the Colony established in Botany Bay, wrote that the early convicts were required to work in conditions that were ruinous to both health and morals. He said:⁴²

[The] whole community might be classed into those who sold spirits and those who drank them ... there was neither marrying nor giving in marriage ... two-thirds of the births were illegitimate. Bands of robbers ... infested the country, levying black-mail' [and committing] 'the most fearful atrocities'.

(He also said that, after 1796, a few subsidised settlers immigrated, but these were generally 'not very superior' to the convicts.)

Today, prisons are better places, but they still contain the same kind of people. In Western Australia, prisons are subject to overcrowding. This makes it virtually impossible to separate out those who have a greater prospect of rehabilitation from those who do not, even if this was consistently attempted. Overcrowding in prisons forces people to live in close contact with others who are often brutal or uncaring. If new prisoners were not on drugs before, they are likely to be introduced to them in prison. They are forced to live a life without spouses or partners, without any normal social interaction, with little contact with family or others who might have a positive influence over them, with few responsibilities and with a sense of worthlessness and helplessness. Anyone who thinks that it is no great hardship to undergo a term of imprisonment is mistaken.

What happens to these people when they eventually come out of prison? Most of them, these days, are fortunate enough to be given parole and hence to have the support and guidance of parole officers (or as much of it as limited resources permit). Even with that support, readjustment into the community is difficult. Once out of prison, employment becomes more difficult for the ex-prisoner. A serious criminal record brings with it a social stigma. Marriages or relationships may, by then, have broken down. There are feelings of

inferiority, and sometimes bitterness. The person may have no home to go to. Former friends, if they are not also criminals, may well have moved on. Their former friends' families may not wish them to associate with someone with a prison record. They are often driven to friendships with people they have met in prison. Many of them will continue to take, or will revert to, drugs. It is small wonder that they are likely to re-offend.

None of this means that we shouldn't send people to prison. Nor does it mean that we shouldn't send them there for a long time. There are other sentencing objectives that may justify this. But it does mean that we have to ensure, first, that imprisonment is the only alternative, given the seriousness of the crime or the nature of the offender. We also need to be clear about the need for assistance with rehabilitation when they get out.

Courts do try and fit the punishment to the criminal as well as to the crime. The legislation under which we work rightly requires us to do so. But the courts are often criticised for thinking more of the criminal than of the victims. There are two responses to that. One is that courts, speaking generally, are acutely conscious of the effect of crime on its victims. We read, daily, what are often heart-rending victim impact statements. The second is that we have to ensure, as best we can, not only that we punish the offender, but also that, when we can, we do so in a way that will best protect the community in the long term, by lessening the prospect of re-offending. Sometimes an outcome that will offend a victim, or a victim's family, will protect other potential victims and their families.

This, too, is not a new insight. In 1764 Beccaria wrote that it is better to prevent crimes than to punish them.⁴³ Another Italian jurist, Enrico Ferri, wrote,⁴⁴ in around 1895, that:

The great thing is to be convinced that, for social defence against crime, as for the moral elevation of the masses of men, the least measure of progress with reforms which prevent crimes is a hundred times more useful and profitable than the publication of an entire penal code.

Ferri's words fell largely upon deaf ears, as had similar words from others before him. People continued to be locked up for lengthy periods, for even relatively minor crimes, without any reduction in the crime rate.

Surprisingly, the first modern form of probation was introduced relatively recently, in 1878, in Boston, Massachusetts. The system was spectacularly successful. Previously, 44.3% of former inmates of reformatories were subsequently committed to institutions. By 1915 that number had dropped to 12%.⁴⁵

Today, we have a range of options open to us, for both juvenile and adult offenders. There are diversion programmes, drug courts, community-based orders of various kinds that subject offenders to supervision, training and counselling, suspended sentences of imprisonment and a range of other measures. When these are made use of there is generally (but by no means always) an understanding of the reasons for it. But there is still a general community reluctance to spend money on these initiatives, probably because there is an inadequate understanding of what they might achieve. Initiatives of this kind are consequently currently seriously under-resourced and therefore much less effective than they could be. Notwithstanding this, those responsible for administering them are often criticised for their failures.

Dr Don Weatherburn (Director, Bureau of Crime Statistics, NSW) has said (February 2006) that Australia spends about \$1.6 billion per annum keeping an estimated 23,015 people in prison.⁴⁶ I have no doubt that, by spending more money attacking the causes of crime, we would spend a good deal less dealing with the consequences of it.

Protection of the community

That brings me to the fourth objective. There is no doubt that imprisoning someone protects the community (at least those members of it who are not themselves in prison) from the offender for as long as he is in prison.

This, by itself, is often a sufficient justification for imprisonment, even for a long time. There are many criminals from whom the community can only be protected in this way. In their cases, the longer that they can justifiably be kept there, the better it will be for the community. But, in the case of other offenders much surer long term protection is provided by rehabilitating them (which will not usually happen in prison) or, even better, by addressing the social factors that are likely to lead to crime.

Retribution

That leaves retribution. What is this? Is it anything more than revenge? We sometimes speak of retribution or denunciation of the offence as if it is something distinct from revenge. But is it? Denunciation or retribution is not deterrence. That is a separate sentencing objective. Nor is it designed to protect the community. That, too, is a separate sentencing objective. So what is it designed to do? The only rational answer is that it is designed to satisfy a need for revenge.

Revenge is important to the victim and sometimes to the community. Those of us who are offended against want to see the perpetrator of our suffering suffer in turn. That is an understandable reaction. The community wants to see an offender punished because of a sense of outrage at what he or she has done. That is also an understandable reaction. It is one that is shared by the courts and the legislature. Also, the courts and the legislature are conscious of the depth of community feeling. If neither was to respond to the community's wishes, there would be immediate consequences. For the legislature, the failure to respond would result in the loss of office by the incumbent government. For the courts, there would be a loss of community confidence and respect, and the very real risk that people would begin to take matters into their own hands. But we have to be open about what we are doing, and why. We also have to be aware of what will, and will not, be achieved by taking revenge.

We need also to decide what it is we are taking revenge for. Is the punishment to fit the crime or the criminal? Are we to punish the act or the consequences of the act? If I am some-one who cares nothing for others and drive my car at high speed in a residential area and injure no one, through good fortune, is a fine an appropriate penalty? If so, is it right that someone else, perhaps ordinarily a moral, caring, law abiding person, who does precisely the same thing in precisely the same circumstances, should be sent to gaol for 10 years because some-one chanced to run across the road at that very moment? If we were to gaol the first offender for 10 years this would send a chill down the spine of most members of the community. We would have to build many more prisons. If we were to fine the second offender, the family of the victim and the community would be outraged. But each offender has the same moral culpability. Indeed, the first offender may be more morally blameworthy than the second. All that has changed is the desire for retribution.

We need to decide how far we want to go in satisfying this need for retribution or revenge. What kind of society do we want to be? Do we want to force our courts to exact mandatory, or uniform, revenge on offenders, regardless of their motives, personalities or prospects of rehabilitation? Is that just? Is it even useful?

We can, and should, have this debate about the need for revenge and the weight that should be given to it. It is not something only the courts need consider. It is an issue for the community. Like it or not, the desire for revenge is part of human nature. We are unlikely to be satisfied if revenge is denied to us. But we should be aware of the true nature of the debate, and not pretend that it is about something else. We should, as a community, ask ourselves in what kinds of cases this need for revenge should be satisfied, and how far it should be taken by a civilized society.

Where does this leave us?

We know that crime is a subjective concept. What we saw as crimes yesterday are not always crimes today. What we see as crimes today will not always be crimes tomorrow. We know, and have long known, what are the attributes of the average criminal and why that person commits crimes. We know that sending criminals to gaol is, in most cases, a deterrent, but that in some cases it is not. We know that in some cases the length of a sentence of imprisonment is a deterrent but that in many cases it is not. We know that some people cannot be rehabilitated and that the best that we can do to protect others from them is to lock them up for as long as possible. But we know also that, where offenders are capable of rehabilitation, the only effective way of protecting the community is by rehabilitating them. We know, too, that the need to give effect to revenge is a significant aspect of our penal system, whether we choose to call it that or not, and that it will sometimes stand in the way of rehabilitation and, consequently, effective community protection. Finally, we know that prevention is better than cure, and that the best outcomes are likely to be achieved by addressing the causes of crime.

Where do we go from here?

That brings me to the year 2020. Where are we likely to be then? Unless things change, we are likely to be in the same position as we were in in 1020, 1520 and 1920. There will be a community perception, probably incorrect if past statistics are any guide, that serious crime is increasing in a manner disproportionate to population growth. There will also be a perception that this is because the legislature has not done enough to force the courts to impose more severe penalties and because the courts themselves are weak and out of touch with community values. That longstanding perception,⁴⁷ too, will be incorrect. Surveys have been carried out on members of the community who have had close contact with the justice system, sitting as jurors. One that was

performed by the University of Tasmania in 2008⁴⁸ revealed that, when asked, in advance of the sentencing process, what sentence they considered to be appropriate for the offence that they had tried, 51.7% of jurors suggested a sentence less severe than that subsequently imposed by the judge, 9.2% would have imposed the same sentence and 39.1% would have imposed a more severe sentence. A survey conducted after the juries had heard each sentence and read the judge's sentencing remarks revealed that more than 90% of respondents rated the sentences as appropriate.

Nonetheless, these perceptions will be present, as they have been for a thousand years and probably longer. At the same time, courts will continue to hand down increasingly severe penalties, as they must do, in response to community demands and legislative changes brought about by those community demands. This will do little to reduce the crime rate. Notwithstanding this, we will not want government to give a high spending priority to the hard issues of social inequality and rehabilitation of offenders.

There will be a degree of hypocrisy. We will decry the failures of the legislature, the executive and the judiciary to win the war against drugs, while fiercely resisting any attempt to make us drink less alcohol. We will criticise government for its failure to prevent crime, but we will continue to be an acquisitive and essentially selfish society. We will demand that the speeding driver who kills some-one should be sent to gaol, but we will resist the notion that anyone who speeds in a residential area should be imprisoned.

There will be some improvements. We have already seen positive changes. While increasing sentences and removing discretions, governments have, at the same time (if a little more quietly), given the courts more options designed to rehabilitate offenders and to avoid filling our prisons with people who need not be there. There has been greater recognition by government of the importance of these measures for the protection of the community. I have said

that we have seen such things as the creation of drug courts, courts administering therapeutic justice, more and different diversionary programmes and community-based dispositions. We have seen some, albeit relatively small, improvement in the treatment of mentally ill offenders by the justice system. There has been a growing realisation of the need to address the true causes of crime.

However, we have come only a short distance down this road. There is a long way to go. Whether, and for how long, we will continue the journey is something that, in the end, only the community can decide. If the community chooses not to continue the journey (or not to do so in any meaningful way), that is its democratic right. We will then go on as we have done for many years. But the choice must be informed. That requires a debate in which the real issues are aired, and seen for what they are. There has to be a clearer understanding of the causes of crime and the objectives of punishment. We must decide which objectives are more important to us. There must be an understanding of which punishments are able to achieve those objectives and which are not.

We must also recognise that we do not want a perfect society. We want to drink alcohol, knowing that others will do so and that they will commit crimes as a consequence. We don't want every aspect of our lives to be effectively regulated. Many of us want to be free to speed every now and then, when we are running late, without risking a gaol sentence. We want to be richer, and lead more comfortable and interesting lives, knowing that others will be poorer and anxious to have what we have, making it much more likely that they will commit crimes.

We have to decide how much we care about the disadvantaged and the mentally ill. We must know what can and cannot be achieved in reducing crime, and what it will cost to achieve those things that can be achieved. We must be honest about what we are, or are not, prepared to give up in order to enable our

objectives to be funded. Only then will we be in a position to make rational decisions. Whatever those decisions may be, if they are informed and rational we will, at least, have the society we deserve. Importantly, we will also know why.

-
- 1 Christopher Hibbert: *The Roots of Evil* (Sutton Publishing) (1963), 3. I have drawn significantly on this remarkable book.
 - 2 Hibbert, 28.
 - 3 Luke Pike: *'A History of Crime in England'* (1873 - 1876), quoted by Hibbert, 30, 31.
 - 4 Hibbert, 240.
 - 5 Hibbert, 29.
 - 6 Hibbert, 239.
 - 7 See the discussion in Hibbert, 241.
 - 8 Quoted by Havelock Ellis, *The Criminal* (1901).
 - 9 Quoted by Hibbert, 225.
 - 10 Hibbert, 201.
 - 11 Hibbert, 210.
 - 12 Hibbert, 200.
 - 13 Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilised Mind* (Oxford University Press 2001).
 - 14 RACP and RANZCP: *Illicit Drugs Policy* (Current 2008), 20.
 - 15 San Quentin Prison Report 1891 (1892), referred to by Hibbert, 229.
 - 16 United Nations Office on Drugs and Crime: *World Drug Report* (2007), 170.
 - 17 D J Collins and H M Lapsley: *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05* (2008).
 - 18 Caulkins JP, Rydell CP, Schwabe W, Chiesa JR, 'Mandatory Minimum Drug Sentences: Throwing Away the Key or the Tax Payers' Money?', Santa Monica, California, RAND 1997.
 - 19 M Mauer: 'Comparative International Rates of Incarceration: An Examination of Causes and Trends' (June 20, 2003), 13, citing Caulkins J et al, (1997).
 - 20 Quoted in Hibbert, 332 - 333.
 - 21 University of Western Australia, Crime Research Centre: *Crime and Justice Statistics for Western Australia: 2005*, ix.
 - 22 See D J Collins and H M Lapsley, above, fn 17.
 - 23 Sunday Times, 2 March 2008.
 - 24 Quoted in *The West Australian* newspaper, 27 February 2008.
 - 25 See the discussion in Hibbert, 8.
 - 26 Pike, above, quoted by Hibbert, 8.
 - 27 Hibbert, 26.
 - 28 Hibbert, 34, citing Cesare Lombroso, 'Crime: Causes and Remedies' (Trans 1911) and Alister Kershaw, 'A History of the Guillotine' (London: Calder 1958).
 - 29 Hibbert, 63.
 - 30 Sir Archibald MacDonald, *Parliamentary Debates* (1785), quoted by Hibbert, 57.
 - 31 See the discussion in Hibbert, 62 - 63.
 - 32 Quoted by Hibbert, 373.
 - 33 Hibbert, 375- 376.
 - 34 University of Western Australia, Crime Research Centre: *Crime and Justice Statistics for Western Australia 2005*.
 - 35 N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164.
 - 36 Report of the Central After Care Association, quoted by Hibbert, 422.
 - 37 'Federal Prisons' (1959) 26, quoted by Hibbert, 423.

-
- 38 University of Western Australia, Crime Research Centre: Crime and Justice Statistics for Western Australia 2005.
- 39 Kings College, London, International Centre for Prison Studies: World Prison Population List (6th ed); Roy Walmsley.
- 40 University of Western Australia, Crime Research Centre: Crime and Justice Statistics for Western Australia 2005.
- 41 New York Times, 30 November 1995; see also Masami Dewaga, 'Racism without Race? The Case of Japan's Invisible Group'.
- 42 Quoted by D L Howard, *English Prisons*, 29, referred to by Hibbert, 142.
- 43 Cesare, Beccaria, *An Essay on Crimes and Punishments* (Trans. 1769), quoted by Hibbert, 451.
- 44 Enrico Ferri, *Criminal Sociology* (Trans 1895) quoted by Hibbert, 461.
- 45 Frank Tannenbaum, 'Crime and the Community' (Columbia University Press 1951), quoted by Hibbert, 451.
- 46 Dr Don Weatherburn, Director, Bureau of Crime Statistics, new South Wales, 'The Impact of Prison on Crime', February 2006..
- 47 A Lovegrove, *Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community* [2007] *Crim L R* 769, points out that, in Western Australia, a 1986 survey found 76 per cent of the public thought sentences were not severe enough.
- 48 K Warner, J Davis, M Walter and R Bradfield, 'Talking to Juries about Punishment: Investigating a New Way to gauge Public Opinion and Inform the Public' (2008). See also Lovegrove, above, fn 47.