

**PLENARY ADDRESS GIVEN AT THE
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Criminology in the Age of Talk-back

This conference deals with difficult topics. Identifying the causes of crime and correcting and preventing criminal behaviour has exercised every society. We should not be surprised that they continue to vex us.

The level of crime is a source of proper public concern. As such, in a democratic society, crime is rightly the subject of close political attention. In recent years the level of anxiety has intensified. How crime can be best prevented and how the balance is to be struck between punishment of a criminal and effecting safe reintegration of the offender into society are old questions. But they are of particular urgency today. They are the subject of heated debate within the wider community and within the political arena. That is not something we should deprecate. These are matters of legitimate interest to all in our society.

What the level of public anxiety and political interest means is that there are some particular challenges for those who work in the field of criminal justice and penal policy. Popular anxieties are never an easy background for scientific discourse. There are no simple answers. But that message itself is hardly welcome. Nor is the public and political debate easily informed in an age where modern mass communication is geared to simple messages. The images and stories of individual crimes are readily and graphically communicated to a mass audience. They are properly shocking. The level of anger and anxiety they generate is not easily addressed. But if we are not to lurch from one ineffective and increasingly punitive reaction to another, the debate must be reasonably informed. Not just about the facts of crime. But also about the principles and practices our law requires and how criminal justice fits into the wider legal system and its principles.

There is much room for reasonable differences of opinion on the difficult questions thrown up by criminology. It is necessary for all engaged in the field in one capacity or another to keep an open but critical mind about developing policies and strategies. We need to be rigorous in the methodology by which we evaluate strategies and innovations. Simplistic enthusiasms may work as much damage in the end as punitive reaction.

We need to be very careful that we do not load more expectations into the criminal justice system than it can deliver. We must ensure that our institutions are not put under intolerable strain by the heat of the debate. We need to acknowledge and be respectful of informed public opinion and accept the obligation to inform the public of

the work we do, so that the debate is based on fact, not fiction. We need to recognise that all of us are on the same side, even if we have different ideas of how to make progress and even if we have different functions to perform. All of us want to see crime reduced and increased safety in our communities.

I feel diffident about addressing a gathering of criminologists, particularly as you come from a number of disciplines. The experience of a working judge in the criminal justice system is a narrow one. I talk about aspects of punishment today.

Criminology does of course bear upon other work judges do, particularly at appellate level where questions of policy in criminal law can arise. Perhaps the insights of criminology are not taken into account as much as they should be,¹ but there is I think a growing appreciation of the insights to be gained from scientific research into crime and its causes. Such research tests some of the assumptions and generalisations we have been too comfortable with in legal reasoning about such matters as provocation, vulnerable witnesses, victims, policing, gang culture, remorse, and alcohol and drug abuse.

But the principal way in which our disciplines converge is in the sentencing of offenders and it is in connection with sentencing that I want to raise a few questions about criminal justice.

My perspective is skewed by being that of a judge dealing with serious crimes in which the truly difficult threshold question of imprisonment or community based sentence is seldom in issue. It is also skewed by the fact that, as a judge of a court of general jurisdiction, I am concerned with wider values in the justice system than the ends of punishment in the particular case. That makes me cautious about strategies which may have real merit in terms of penology but which could compromise other important values in the legal system.

Therapeutic intervention and incapacitation through secure containment of offenders have the potential to impact adversely upon human rights. Pilot programmes for sentencing (such as the current Restorative Justice pilot being undertaken in New Zealand in selected District Courts) and regional variations in the availability and quality of community programmes have the potential to cause injustice through inconsistency in sentencing. Informality in the procedure adopted in Youth Courts as part of the restorative justice initiative (such as the acceptance of a “no-contest” indication at Family Group Conferences and greater use of inquisitorial procedures) has the potential to undermine procedural safeguards developed over many years to ensure fairness and to prevent wrongful conviction. The central position now accorded to victims in sentencing, bail, and parole determinations and the importation of a concept of community distinct from the State both have the potential to change the face of public justice and to cause inconsistency in sentencing. If parole eligibility arises at an early stage of the sentence (as it does under the New Zealand legislation) and requires reconsideration of the factors taken into account at sentencing, public expectations of “truth” in sentencing may be disappointed and,

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¹ The High Court of Australia has been criticised for seldom referring to criminology scholarship and research. Blackshield et al (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001), 183.

more importantly, in effect substantial sentencing discretion (in our system a judicial responsibility) has been transferred from the court to the Parole Board. In addition, we continue to struggle with the disparate ends of sentencing and the lack of a coherent theory of punishment to provide guidance to judges and to quell those who believe the sentencing judge is a “free-wheeling palm tree”, accountable to no one.

I do not suggest that these risks will necessarily eventuate. But we need to take care.

I want to expand on a couple of these points. First, I want to say something about my perception of where penology is at the moment, and why I think you should be optimistic about where it is going.

Optimism, it has to be said, is not exactly the frame of mind one gets from reading some of the criminology literature.

So, for example, there is a sense of weariness indicated in the 50th anniversary edition of the *Criminal Law Review* by such veterans as ATH Smith, Martin Wasik, and Caroline Ball. Referring to the English experience, the articles deprecate the highly politicised way in which sentencing issues are now characterised, the “talking up” of sentences by politicians who portray the public as “insatiably punitive” (contrary to the research findings of a number of studies)². They refer to the “managerialist” takeover of youth justice in the 1980s and resulting inconsistencies in treatment, inefficiencies, and punitiveness.³ Professor Smith expresses the gloom:

The extent to which the criminal justice process has become a matter of party political posturing must be (well, it is for me) a matter of regret. The nostrums that “prison works”, and that it is possible to be “tough on crime, tough on the causes of crime” are perhaps the best known illustrations of the sloganising with which politicians from either side of the political divide vie to outdo one another in pursuit of electoral supremacy. The result has been a cascade of criminal justice and cognate legislative measures, filling prisons to bursting point, and prompting the editor of *Archbold* to plead for mercy.⁴

The same disenchantment appears in the works of many of those engaged in rehabilitation and reintegration. Modern research from the 1920s into the causes of crime identified the multiplicity of factors bearing on criminal behaviour, including the personal background of the offender and the social conditions in which he developed. That led to therapeutic interventions and welfare programmes for rehabilitation. From the 1970s empirical research increasingly seemed to suggest that optimism about the efficacy of the initiatives adopted in preventing crime had been misplaced. Through the 1980s in particular the prevailing mood that “nothing works” resulted in widespread retreat from programmes of rehabilitation and paved the way for more punitive responses.

² Martin Wasik “Going Around in Circles? Reflections on Fifty Years of Change in Sentencing” [2004] *Crim LR* 42.

³ Caroline Ball “Youth Justice? Half a Century of Responses to Youth Offending” [2004] *Crim LR* 28.

⁴ ATH Smith, ‘Criminal Law: The Future’ [2004] *Crim LR* 183.

In her Hamlyn lectures in 1963, Baroness Wootton advocated treating crime as a social pathology best addressed by medical and social services, with prevention of crime the primary policy of sentencing policy. By 1981, she was pessimistic. Reviewing her earlier lectures then, she expressed sadness that in the intervening 17 years “in spite of all the words that have been spoken and books and papers that have been written on penal policy, the crime rate has persistently risen ... the prisons are more crowded than ever”.⁵

...I have to confess that over the years since these lectures were delivered, I have been increasingly haunted by the image suggested in the concluding paragraph of my first lecture of the whole penal system as in a sense a gigantic irrelevance – wholly misconceived as a method of controlling phenomena the origins of which are inextricably rooted in the structure of our society.⁶

The conclusion that crime and its causes cannot adequately be addressed through penal policy alone strikes me as inevitable. David Garland has expressed it best:

...it is only the mainstream processes of socialization (internalized morality and the sense of duty, the informal inducements and rewards of conformity, the practical and cultural networks of mutual expectation and interdependence, etc.) which are able to promote proper conduct on a consistent and regular basis. Punishment, so far as “control” is concerned, is merely a coercive back-up to these more reliable social mechanisms, a back-up which is often unable to do anything more than manage those who slip through these networks of normal control and integration. Punishment is fated never to “succeed” to any great degree because the conditions which do most to induce conformity – or to promote crime and deviance – lie outside the jurisdiction of penal institutions.⁷

If punishment is rightly to be seen as a backup to more reliable social mechanisms, it is critical that the strategies for addressing crime are wider than penology can deliver and that they are directed at reinforcing and building on the mainstream processes of socialisation. But it does not follow that those who have “slipped through the cracks” should not be the subject of specific strategies delivered through the criminal justice system.

Nevertheless, in the last 20 years there has been widespread public and professional disillusionment about the effectiveness of rehabilitative strategies. Crime rates rose during the period dramatically. There were calls for increases in prison sentences and the imposition of minimum sentences. In New Zealand the average prison muster increased by 99% from 1985 to 1999. Pessimism among professionals and government policy advisers led to a retreat from rehabilitative programmes. Law and order became a highly charged political issue. Public confidence in the criminal justice system declined.

My sense is that the mood has turned a little. There are signs that professional pessimism about the efficacy of corrections based programmes for rehabilitation may

⁵ Barbara Wootton, *Crime and the criminal law: reflections of a magistrate and social scientist* (2nd ed, 1981), 117-118.

⁶ *Ibid*, 119.

⁷ David Garland, *Punishment and Modern Society: a Study in Social Theory* (1990) University of Chicago Press at 288-289.

be waning.⁸ The huge public cost that results from recidivism means that a punitive strategy alone towards offenders is demonstrably contrary to the public interest. That message has I think been understood by decision-makers.

The fact that we cannot expect too much of strategies for dealing with those in the criminal justice system has not deterred us from seeking better ways. We all have cause to be grateful to the professionals within our justice sector agencies for their efforts. In New Zealand, criminologists in both the Ministry of Justice and the Department of Corrections have carried out important research and been willing to address new strategies in a way that may not be sufficiently appreciated in the community. They have informed the choices made in our present system and their work points to the way forward.

In law reform of sentencing and parole considerable effort has been made to ensure that a proper response to electorate requirements that serious offending is met with firm punishment does not require the imprisonment of those for whom a community-based sentence will best promote reintegration. Nor does it preclude programmes to rehabilitate. Effort continues into the causes of crime, in significant studies of the mental health and other characteristics and history of prison inmates. It would be wrong not to acknowledge that this work is an outcome of the political will to address crime. And that political priority is to be welcomed, not deprecated.

Better communication with the public about the efficacy of sentencing options is clearly necessary however. (It would certainly help the sentencing judge!) There appears little public consensus that the interests of the offender and society are reconcilable. At the same time, there is an unwillingness among some to face up to the cost and risk to society in treating prison and lengthier prison terms as the best strategy for dealing with crime, in what Garland has called "punitive segregation".⁹ Some groups seem to consider that community based sentences are no punishment and are ineffective compared to prison sentences. The research into the comparative efficacy of sentences needs to be more widely available. Canadian research¹⁰ demonstrates that rehabilitation is not promoted by prison sentences and that community sentences are more effective in reducing crime. Long prison sentences are counterproductive for the eventual security of the public, measured by recidivism rates. Getting that message across should be a priority.

If we are serious about crime reduction, then it seems to me we have to have a strategy that goes beyond criminal justice. Such strategy is discussed in the Department of Corrections 2001 publication *About Time*.¹¹ It is clear it would require

⁸ See, for example, Brendan Anstiss, *Just How Effective is Correctional Treatment at Reducing Re-offending* (Corrections Department, 2003): <http://www.corrections.govt.nz/public/research/effectiveness-treatment/effective.html> (last accessed 1/3/05).

⁹ Garland, *supra*, n.7, 140.

¹⁰ Thus, Canadian research based on 300,000 offenders found that imprisonment, compared with community sentences, did not reduce re-offending after release. Longer prison sentences did not reduce re-offending and may indeed have increased it. Gendreau et al, *The effects of prison sentences on recidivism* (User report: Office of the Solicitor General, Canada, 1999), 24 cited in *About Time: Turning people away from a life of crime and reducing re-offending* (Wellington, Department of Corrections, 2001), 10 (*About Time*).

¹¹ *Ibid.*

a wide public commitment and a willingness to reserve imprisonment for serious crime. In New Zealand, the Sentencing Act 2002 points in that direction, although it does not rank the policies of sentencing to make things explicit. It is not clear to what extent a wider strategy than a punitive penal one has widespread acceptance.

What might be entailed in gaining such acceptance is illustrated by the effort in Finland discussed in *About Time* to reduce the number of prison inmates.¹² Key factors identified in the considerable success of the strategy were:

- Clear expert understandings of the criminology basis behind the policy changes, both in government and in the public service
- A political accord, maintained across the 20 year period of the reduction that it was necessary and that there would be no use of “fear of crime” as a populist theme
- Sober and reasonable media reports of crime stories
- A strategy both of reducing sentence lengths and reducing the range of crimes resulting in imprisonment
- The support of the public, which was attributed not only to the political accord and the news media restraint but to regular public education pieces about the limited crime reduction gains to be had from imprisonment
- A range of crime control strategies beyond the core justice sector, including education, social welfare and youth justice.

In the meantime, judges are left with the criminal justice system. Criminal law is, as Professor Smith describes it, “...the bluntest of society’s social instruments of control...”.¹³ In New Zealand, the Sentencing Act 2002 avoids mandatory and for the most part, minimum sentences. It is a restrained and sophisticated statute which identifies the purposes, principles and factors bearing on sentencing, without ranking them. It creates a presumption in favour of reparation, and is supportive of community based sentences and restorative justice procedures and outcomes. Because the principles identified are mandatory considerations and because of the statutory requirement to give reasons, full explanations of sentences are necessary. It is early days yet, but some of my colleagues on the Court of Appeal think they can detect a drop off in sentence appeals as a result of the elaboration of reasons against the statutory considerations. It is hoped that the more extensive consideration required will also achieve greater consistency in sentencing.

The purposes of sentencing identified in s7 are familiar considerations. They include denunciation, deterrence, rehabilitation and reintegration. But they also emphasise accountability to and reparation for the victim and “the community”. The principles required to be taken into account under s8 are for the most part similarly familiar, starting with the culpability of the offender and the seriousness of the offence. The Court is required to impose “the least restrictive outcome that is appropriate in the

¹² M Lappi-Seppala, *Regulating the prison population: experience from a long-term policy in Finland*, National Research Institute of Legal Policy Research Communications, Helsinki, 1998, 38 cited in *About Time*, supra, n.10, 11-12.

¹³ Supra, n.4, 192.

circumstances” (with a hierarchy of fine, community-based sentence and imprisonment), but is directed to impose penalties “near to the maximum” if the offending is near to the most serious of its type. The Parole Act 2002 provides for home detention for those serving short-term sentences (2 years and less) who have been granted leave by the sentencing court to apply and eligibility for parole for those serving long-term sentences after one-third of the sentence has been served unless a minimum non-parole period is imposed by the sentencing court. The paramount consideration in releasing an offender under s7 of the Parole Act is the safety of the community. Subject to that consideration, offenders must not be held “any longer than is consistent with the safety of the community”. The rights of victims and any restorative justice outcome must be taken into account by the Parole Board.

It remains to be seen whether the new system over time results in a reduction of the prison population. A recent Corrections Department study of high-risk offenders indicates that approximately 28% of prison inmates have risk scores assessing them at 70% risk of serious recidivism. In a sample of 150 inmates studied at Waikeria Prison in 2002 with a mean sentence length of 33 months (with a range from 6 months to 11 years), 48% were in the very high risk group (80% risk of serious recidivism). It is not clear whether the “safety of the community” permits the Parole Board to reconsider general deterrence and denunciation.¹⁴ If so, as Young and Trendle point out, the Parole Board will effectively be undertaking a second sentencing exercise. The length of the period of eligibility for parole may give rise to difficult decisions and issues of principle. As the Corrections Department study shows, many of those assessed as being a high risk to the community have been sentenced for relatively minor offences. It is reasonable to expect that some of those sentenced for crimes which have outraged the community may be assessed at low risk of re-offending. Under the legislation they may be released after one-third of the sentence imposed unless a minimum non-parole period has been imposed. There are concerns from some about the methodology of assessment of risk and fears that it discriminates against those of particular race, social background, and mental health status. It is likely that matters such as these will end up before the courts.

Although understandable that the sentencing legislation does not rank the purposes of sentencing, it seems that the axis between retribution and rehabilitation remains. That is likely to be less troubling to the Courts than to legal philosophers. Most judges¹⁵ do not adopt the utilitarian view that the only ethically defensible end of criminal punishment is crime prevention. The view is regarded as counter-intuitive to the deep-seated belief that someone who has committed a grave crime should be punished. Just punishment is considered a proper response to transgression of the criminal law. And indeed, is considered in itself to have rehabilitative value. The liberal justification of punishment as retribution accords with the ideas of criminal responsibility and culpability applied in criminal law. Sentencing has therefore been traditionally concerned with retribution, deterrence and rehabilitation. These purposes remain in the legislation. But they are joined by concern for restorative justice outcomes, reparation to victims and consideration of their wishes, and an

¹⁴ Warren Young and Neville Trendle, ‘Developing the Sentencing Framework: The Sentencing Act and Beyond’ in J Bruce Robertson (ed), *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004) 50, 68.

¹⁵ A distinguished exception is Lord Steyn.

emphasis on community safety which, with the length of the period of eligibility for parole, may suggest a purpose of incapacitation.

Research cited by Lord Bingham suggests that the effect of incapacitation on general levels of crime is very small.¹⁶ He points out that it presents problems when the offender does re-enter society (as will almost always be the case), often more dangerous than before. He suggests that ensuring certainty of punishment and speed of its delivery may be more critical in deterrence (and therefore the safety of the public) than the sentence itself.

Both the justification of utility and the justification of retribution in liberal theory are based on impersonal and impartial administration of punishment. Retribution is justified in liberal tradition as in itself the rightful response to someone responsible for a public wrong,¹⁷ not to effect a private vengeance. McCormick and Garland explain the procedures of criminal justice as having been designed “to turn hot vengeance into cool, impartial justice”.

They aim to interpose rationality, reflection, circumspection, balance and collective group interests as a break upon the unrestrained expression of individual emotions.¹⁸

Some aspects of penal policy are now difficult to reconcile with these attributes. Some may be thought to fit uncomfortably with basic assumptions of criminal law and human rights. David Garland has commented that “...the modern Western division between ‘public justice’ and ‘private right’ is being quietly redrawn...”¹⁹

McCormick and Garland and Ian Edwards have pointed out difficulties for traditional approaches in moving the victim of crime to a central position in sentencing. Courts have been quick to point out that an injured party cannot dictate the sentence to be imposed and that vengeance is not part of criminal justice.²⁰ But forgiveness or compensation as part of restorative justice outcomes is even more difficult. Ian Edwards says of forgiveness:

First, it threatens to upset retributive orthodoxy when introduced into traditional sentencing processes by compromising principles and proportionality and consistency....Second, giving weight to forgiveness appears incompatible with deterrence. It would undermine the potential deterrent effect of the criminal sanction, either on the individual offender or potential offenders. Third, forgiveness is incompatible with an incapacitative basis for sentencing, under which an offender is sentenced on the basis of his dangerousness. Forgiveness provides no insight into an offender’s potential for offending.²¹

¹⁶ Tom Bingham, “The Sentence of the Court” (delivered to Police Foundation at Merchant Taylor’s Hall, London on 10 July 1997) in *The Business of Judging* (OUP, 2000), 304, referring to Tarling, *Analysing offenders: data, models and interpretations* (HMSO 1993).

¹⁷ See RA Duff *Punishment, Communication and Community* (OUP, 2001), 7.

¹⁸ N McCormick and D Garland “Sovereign States and Vengeful Victims: the problem of the right to punish” in Ashworth and Wasik (eds) *Fundamentals of Sentencing Theory* (Clarendon, 1998), 26.

¹⁹ *Ibid*, 12.

²⁰ See *Nunn* [1996] 2 Criminal Appeal Reports 136; *Roche* [1999] 2 Criminal Appeal Reports (S) 105. In New Zealand, see *R v Kanura* (CA 238/93, 9 August 1993), 3.

²¹ Ian Edwards, “The Place of Victims’ Preferences in the Sentencing of “Their” Offenders” [2002] Crim LR 689, 697.

I do not think that the problems are insurmountable. It is certainly the case that in the past victims have felt marginalised in the criminal justice system. The criminal justice system will adjust. But in achieving the balancing required by the sentencing policies of the Act, some expectations may be disappointed and appellate and perhaps further legislative attention seems inevitable.

Similar problems may arise in application of an apparent policy of incapacitation. (I say apparent because it is not clear to what extent the size of the parole period is to be attributed to concerns for community safety and to what extent it is prompted by concerns about cost and/or the belief that release into the community is the best policy in achieving reintegration except in cases of risk.) The Courts are not well-equipped to predict future behaviour, particularly when viewed at the time of sentencing. It is true that the same disadvantage attaches to prospects of rehabilitation, which have traditionally been considered in the sentencing exercise. But that did not call for anything like the assessment that will now be expected of the Parole Board. And arguably, the Court may now have to consider what portion of the sentence should be ascribed to deterrence and denunciation (and the subject of a non-parole period) and what is to be ascribed to the preventive detention (unless the prisoner is assessed by the Parole Board to be no risk).

I do not have answers to these questions. Nor do I know how the community is properly to be identified, and how it differs from the Crown. Some of the literature on the fragmentation of the community suggests it is largely a romantic construct which causes inconsistency in treatment of offenders in practice. The insights you have on these and the other topics you are to discuss during the course of the conference are of great practical importance.

I conclude by reiterating the view that criminal justice is part only – and not the most important part – of an integrated strategy to deal with crime and the safety of our communities. There are challenges in the current heightened public concern about crime. In the age of talk-back, it is important to communicate with the public about what works and what does not. It is important that the views put forward are based on solid research rather than pious hopes or negative reaction. It is necessary to keep in mind that strategies to address crime must fit into a wider world view and be consistent with values which underlie our legal system. But the political will to achieve lasting change is an important opportunity for those interested in criminology. As the range of topics you will consider over the course of this conference suggests, there is much going on and much to share.
