

Adam Smith Institute
Omega Report

JUSTICE POLICY



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FOREWORD as the definitive views of any one author.

The Adam Smith Institute's **Omega Project** was conceived to fill a significant gap in the field of policy research. Administrations entering office in democratic societies are often aware of the problems which they face, but lack a developed programme of policy options. The process by which policy innovations are brought forward and examined is often wasteful of time, and uncondusive to creative thought.

The **Omega Project** was designed to develop new policy initiatives, to research these new ideas, and to bring them forward for public discussion in ways which overcame the conventional difficulties.

Twenty working parties were established more than one year ago to cover each major area of government concern. Each of these groups was structured so as to include those with high academic qualification, those with business experience, those trained in economics, and those with expert knowledge of policy discussion, and those with knowledge of parliamentary or legislative procedures. The project as a whole has thus involved the work of more than one hundred specialists for over a year.

Each working party had secretarial and research assistance made available to it, and each began its work with a detailed report on the area of its concern, showing the extent of government power, the statutory duties and the instruments which fell within its remit. Each group has explored in a systematic way the opportunities for developing choice and enterprise within the area of its concern.

The reports of these working parties, containing, as they do, several hundred new policy options, constitute the **Omega File**. All of them are to be made available for public discussion. The **Omega Project** represents the most complete review of the activity of government ever undertaken in Britain. It presents the most comprehensive range of policy initiatives which has ever been researched under one programme.

The Adam Smith Institute hopes that the alternative possible solutions which emerge from this process will enhance the nation's ability to deal with many of the serious problems which face it. The addition of researched initiatives to policy debate could also serve to encourage both innovation and criticism in public policy.

Thanks are owed to all of those who participated in this venture. For this report in particular, thanks are due to Joanna Bogle, Dr. Colin Brewer, Philip Fixler, Howard Gray, Warren Hawskley, Charles Moore, Hilary Nichols, Graham Smith, and Dr. Peter Waddington, amongst others. All **Omega Project** reports are

the edited summary of work by many individuals, and should not be construed as the definitive views of any one author.

Even though English law has its roots in the ancient customs practised prior to the Norman invasion, much of the credit for the birth of the system has gone to Henry II (1154-89), who 'took steps to ensure that royal justice would be open to all'.¹ However, while these changes represented the start of our modern system, and there is some similarity within England, Scotland, Northern Ireland, and Wales, it is important to recognize that between the countries of the UK, considerable differences remain in law, organization, and practice.

At the moment there are three main sources of law: legislation - the passing of laws defining permitted and prohibited actions; common law - based on precedent and custom, and amended by changing religious beliefs, theories of natural justice and opinions;² and the European Community - usually restricted to economic and social matters. With all these variables and inputs, it is perhaps not surprising that the English legal system has been accused of developing in a very piecemeal and haphazard fashion. Perhaps that has not been helped by Parliament, which 'vacillating between reforming zeal and unbending conservatism, has produced a hodge-podge of laws and legal institutions'.³

The legal system is under pressure from many fronts. Last year 'nearly £500m was spent on the administration of justice in England and Wales - running the courts, paying the administrators and the judges, and providing legal aid. But the consumer of legal services too often gets a bad deal. Some critics feel that it is time to stop tinkering with the system and change it fundamentally.'⁴

This report does not attempt to answer the moral and political issues surrounding the legal system - for example, what the powers of the police should be, or what punishments are appropriate to particular offences. It looks instead at the economic and organizational framework of the system, and suggests methods of providing a more effective service at lower cost. It endeavours to address all the main areas of dissatisfaction, with a view to improving the workings of the legal system. It does not seek to explore the common suggestion that the present problems can be solved by an injection of more funds, but asks how

1. K Smith and D J Keenan, English Law (London: Pitman Publishing Ltd, 1979).

2. F Randall, British Government and Politics (Plymouth: Macdonald and Evans Ltd, 1979), p. 80.

3. The Economist, 30 July, 1983, p. 24.

4. Ibid.

1. INTRODUCTION

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present expenditures can be made to work more effectively. By promoting choice and suggesting a number of long-overdue reforms and innovations, it provides new options for the construction of a more smoothly functioning legal system based on equity, effectiveness, and efficiency.

The report begins first with an analysis of the nature and purpose of law, and its correct and incorrect use. It then examines the purposes and requirements of punishment, before turning to explore more fully the practicalities of policing and the administration of justice. Many of the proposals explored would be equally relevant outside the context of the English system. Confusion between justice and administrative law. This confusion, in turn, has allowed the law to be applied for illiberal purposes that are, in fact, contrary to the notion of justice. The problem will become clearer if we examine the two different purposes that are served by the law.⁵

Justice. The smooth operation of the social order is possible only because individuals adhere to general rules that are in turn respected by others. These are rules about how we deal with our fellows: the accepted rules regarding the ownership and transference of property, the rules which forbid us from infringing the freedom of action of others, which prevent us harming others, and so on. The acceptance of these rules is very deep-seated: it has to be, since modern society evolved because of and along with their acceptance.⁶

These rules of justice are hazy at their edges, and hence we have a common law system which attempts to resolve the inconsistencies and define the limits of rules that are often only vaguely understood. The judicial system works as a discovery procedure, clarifying and improving the notions of justice that are deeply held but not always perfectly clear.

Justice in this sense therefore evolves, and cannot be imposed from above. Some rulers have attempted to codify these rules of justice in written statutes, but these have generally been attempts to express what is accepted rather than to impose a new and conscious legal order. A ruler who attempted to impose a new law that was in conflict with traditional notions of justice would soon feel the resentment and opposition of his people.

Administration. Ancient governments therefore confined their

5. For a detailed analysis on these lines, see P. A. Hayek, Law, Legislation, and Liberty: Vol. 3, The Political Order of a Free People (London: Routledge, 1979), and the summary in Raymond Butler, Hayek: His Contribution to the Political and Economic Thought of Our Time (London: Maurice Temple Smith, 1981), Chapter 6.

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2. LAW AND JUSTICE IN A LIBERAL SOCIETY

The development of the legal system over seven centuries has not seen it move progressively towards an improved understanding and a better administration of justice. Many parts of its evolution are due more to conflicts of power than to genuine motives of justice. Conflicts between church and state, monarchs and parliaments, lords and commoners, and judges and legislators have torn the legal system away from its proper goals. Consequently, there is today a pervasive misunderstanding of the nature and purpose of the law, manifested particularly in terms of a confusion between justice and administrative law. This confusion, in turn, has allowed the law to be applied for illiberal purposes that are, in fact, contrary to the notion of justice. The problem will become clearer if we examine the two different purposes that are served by the law.⁵

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attention to the discovery of correct action; it was understood that they could neither create nor abolish laws - since it would mean that they were creating or abolishing justice, which is absurd - though they might help to refine them.

A growing government, however, needed to set out the administrative rules by which it operated. The collection and marshalling of resources for specific governmental objectives required new rules and orders, outside the traditional limits of justice. Much of what is called law today is in fact this setting down of administrative orders to operate a bureaucratic machinery and to raise and disburse funds, rather than an attempt to improve the operation of justice.

Because the protection of justice and the implementation of administrative orders were vested in one body, there has been much confusion between them. This confusion, which became prominent only in the last three centuries, further strengthened the power of the legislature: it gave the false status of true laws of justice to the administrative commands of the authorities, and gave Parliament the intoxicating idea that it could 'create' new rules of justice simply by legislating them.

Problems of the confusion

Unfortunately, once legislators come to believe that they are the standard and measure of justice, there is little that can be done to restrain them, no limit on the scope of the new rules that they impose in their attempts to fashion a new society closer to their own beliefs. Those beliefs are often temporary and changing, which is not a recipe for preserving a stable system of justice. And, however prolonged one particular viewpoint might be, the confusion tempts legislators to suppose that they can run an entire country as one might run a factory, by administrative command - another source of discontent and disruption, because it necessarily comes into conflict with deeply-held ideas of justice.

The confusion of administrative power and the preservation of justice in one body has therefore increased the scope for massive injustices to be practiced. Such a sovereign body might declare it to be 'just' that all members of a particular race or social group should be exterminated, and its power and the confusion itself might make it difficult for the public to object; but such an action, however called, would still be contrary to the most widespread and fundamental understanding of justice.

The safeguards to protect the individual from undue state power in Britain are many, and include the more well-known concepts of habeas corpus, innocence until proven guilty, freedom of expression and association, etc. But little attention is paid to as Lord Hailsham's point that if Parliament chose to abuse its powers then the ordinary citizen would have little recourse short of revolution.

There is, consequently, a need for the separation of administrative power from the authority that is charged with the discovery and refinement of the rules of just conduct. Despite crude attempts and pretences at this (with, for example, the 'separation of powers' in the United States or the independence of the judiciary in the United Kingdom), such a division on these lines does not actually exist: justice and administrative power are hopelessly confused. Yet the prospect of unlimited growth and intrusion of official power will always be present until some such division of responsibilities is established that prevents a government from acting unjustly.

CONSTITUTIONAL ISSUES

In the United Kingdom, a separation of the powers that are presently conferred upon parliament would, of course, require a substantial constitutional change, and the details of that change are outside the scope of this report. However, some preliminary options can be canvassed.

Reform on the basis of existing institutions

Interestingly enough, the present bicameral system of parliament might afford a way in which a separation of powers might be effected. The upper house has long since given up its right to discuss budgetary matters, or in fact to do much more than hold up or amend the legislation of the lower. The presence of non-elected members has again led to its weakening as a long-stop against the excesses of the other chamber.

One option, however, would be to separate the establishment of administrative commands from the preservation of justice, dividing them between the existing lower house and a reformed upper chamber. The reformed house would therefore act as a constitutional restraint upon the other, preventing it from acting unjustly.

The existing lower house would still have control - indeed, would have more control - in deciding the nature of the apparatus of government and in allocating the use and disposition of the materials and financial resources entrusted to it. It would be able to raise taxes as at present. But it would not be able to impose orders that were contrary to the rules of justice, upon which the reformed house would decide. It could not, for example, impose taxes that were designed to fall only upon people of a particular race or religion, or to impose its moral views by laws against the private behaviour of particular minorities. In either case, the other house, charged with preserving the rules of justice, would be obliged to prevent the measure becoming law.

This does, of course, require the judicial assembly to be elected and nonpartisan. A one-term-only membership of, say, seven years should be sufficient to guarantee their independence.

During their membership, and after retiring, they might still retain the title of 'lord' along with the hereditary peers, who would not of course be active members of the reformed house. It may, in addition, be necessary to establish a new constitutional court which would be able to resolve disputes between the two houses; but in general, the existence of this 'long-stop' restraint on administrative power should be sufficient to limit the prospect of abuses.

Advantages of the reform. Such a reform is relatively easy to introduce, once the nature of the problem has been understood. Most of the vehicles for its implementation exist already, and it requires only a reform of the membership rules and the purview of the upper house for the essential elements of the new system to be put into place. It will, however, require considerable thought as to how best to ensure that the new house, charged with the discovery and consolidation of the rules of justice, could be best kept well away from partisan involvements or the influences of temporary fashions.

This kind of reform is also superior, in our judgement, to the other common proposal to protect justice against the incursions of politicians, that of a new bill of rights. As the United States has shown, the tendency of written constitutions to change their meanings, with the result that a nation is held to principles that were no part of the original intention, is a dangerous one. Interpretations of printed words are unlikely to remain as stable as the pursuit of unwritten but accepted principles of justice.

Taming administrative despotism

Another option, that of establishing judicial review while leaving the legislative structure untouched, is more problematic. To some extent, judicial review already exists, and judges are able to (and sometimes do) reject administrative rules that are deemed to be contrary to justice. However, the pervasive source of the confusion is always present: and because it remains, the judicial review procedure is likely to be seen only as a power contest between Parliament and the judiciary. With an otherwise unlimited parliament, there can be only one outcome to such a contest.

Nevertheless, some useful reforms can be made along these lines, for it should be remembered that politicians alone are not the only source of the threat of unbridled power. The unelected administrators who have grown in number as the details of wide-spread social and economic planning had to be attended to have also acquired a significant degree of power that is unpopular, often capricious, and difficult for the ordinary citizen to take action against. With some thought, however, it should be possible to provide a series of remedies in an environment of administrative law that would bind public officials by known principles and limitations. Although this would be an important

constitutional improvement, little structural change is in fact required.

This administrative law, as we conceive it, would give a right of action to any member of the public against specific government and anti-government officials, making them directly and individually accountable, and would replace the (fictitious) doctrine of ministerial responsibility. Officials in the civil service, local government, nationalized industries, quangos, the NHS, professional bodies (where protected by statute), education services, and monopolies created by government would all be covered. All these bodies and officials derive their strength from being created in the 'public interest', and it is quite reasonable therefore that they should be genuinely accountable to members of the public, and no longer sheltered by the political process.

The mechanism. There already exists a Supreme Court in the shape of the High Court and the Courts of Appeal. Much of the reform could occur through the existing procedural rules, although a new statute might be clearer in intent and in practice. The objective would be to create a division of the High Court to adjudicate and enforce the law on the actions of public bodies and public servants. It would therefore be no different in form from the other division: Chancery, Queen's Bench, and Family divisions. Administrative justice would be dispensed in the Administrative Division, and that would cover the familiar laws of contract, tort, property, and trusts, plus the statute laws created to administer government programmes. In short, little would change.

Procedure and remedies would, however, be very different. Juries would be re-introduced in order to prevent any possibility of judges (themselves public servants) being partisan to the officialdom being tried; and because juries make lawyers present their cases straightforwardly, there could be additional benefits in terms of the duration and cost of trials. Secondly, there is a good case for reversing the burden of proof, which would alleviate the need for a Freedom of Information Act and would counter the 'lost file' syndrome that is common in bureaucracies; thus, if the official or the body on trial cannot or will not prove a case, then the plaintiff wins and is entitled to proper remedy. Third, interlocutory reforms might extend to search government and statutory bodies for evidence should it be likely to be destroyed, or perhaps a simple extension of the powers of discovery.

The remedies should be personal as well as general in effect, and because the problem of state power is extensive, they are likely to be so too. They might include:

- (a) damages (mainly compensation for any damage done, a traditional remedy);
- (b) court orders, including the injunction on other court orders to make people carry out their obligations and to prevent damaging actions from occurring;

(c) declarations from the court, clarifying and setting out the law in the traditional manner; and

(d) specific remedies against offending officials, which might include restitution for damage, apology, salary reduction, pension reduction or revokation, dismissal, imprisonment, restitutive service, demotion, or regrading.

Such remedies reflect the fact that officials are special people who must act in the best interest of the public at all times.

This system could also be made available, with minor amendment, in the County Court and the small claims element of arbitration could be extended to provide low-cost justice against local authorities and local officials.

The results. The result of this series of reforms, though fairly simple to introduce, would be to provide genuine scrutiny over the way that administrators behave. Not only would government have to be far more open, but it would be limited, with the public having powers to seek redress if the limitations on official power were transgressed.

The pressure on parliaments to move from the protection to the direction of the individual can be considerable if their powers are not limited constitutionally, and Britain already displays many areas of life where the private or voluntary actions of individuals are subjected to coercive restrictions by those in power. Laws directing personal moral behaviour, limits on shop hours, licensing hours, and much else are common. But even though parliamentarians might be revolted by some personal morality, might object to those who do not respect the sabbath, and might think it incredible that anyone should wish to drink alcohol in the afternoon or late at night, a free society would leave such decisions up to the individuals concerned, unless some obvious nuisance were caused to others by their indulgence.

Most people, particularly legislators, have a vision of an ideal world. That is not to say that they have any right to impose that vision on others. But the confusion of administrative law and justice leads legislators, though idealists as much as anything, to attempt to impose their administrative ideals on the general public as well as on the government sector. Lacking clear concepts and devoid of restraints on their power, they can hardly be expected to act otherwise; but it is then possible for a country to drift very far from the ideal of a liberal society.

EXAMPLES OF THE CONFUSION OF LAW AND MORALITY

Shop hours, licensing, and restrictions on personal morality are examples of how arbitrary power has overshadowed the rules of justice. In no case is the example clear, since it can always be argued that other people are affected by an individual's actions.

3. LAW, LIBERTY, AND MORALITY

The main threat posed by the confusion of justice with administrative law is not the risk of an unrestrained parliamentary tyranny. There certainly is no check against this at present, and in wartime, parliaments have assumed extraordinary powers that in normal circumstances would run directly counter to basic rules of justice, though in wartime there is common agreement that the normal rules are inappropriate. (There is less agreement about the suspension of traditional rules of justice in cases of emergency such as Northern Ireland, however.) So the mechanism does exist whereby an unscrupulous parliament could sweep away the traditional rules, subject only to the threat of rebellion and revolution.

But the main threat is almost certainly not this. It is the slow and corrosive expansion of administrative fiat over the rules of justice. It is the gradual replacement of a parliament that seeks to prevent the use of coercion by individuals against one another by one which, out of confusion, supposes that its administrative powers can be extended legitimately to directing free people to act according to its desires.

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but in each case there is little doubt that the combination of power, confusion, and illiberality is greatly dominant over the desire to avoid inconvenience of third parties.

Trading laws

The legislation regulating Sunday trading, perhaps more than any other aspect of British law, exemplifies how official fiat has been the consumer's expense. The numerous anomalies serve only to bring the law into disrepute. It is the prime example of a 'victimless crime', which unnecessarily uses up police time.

Even though restrictive trading laws go back as far as the Fairs and Markets Act of 1448, the 1950 Shops Act was the most far-reaching. The main bone of contention concerns Part IV of the Act, where under (Section 47) it is laid down that all shops have to close on Sundays, except for the sale of:

- (a) intoxicating liquors;
- (b) meals or refreshments, not including the sale of fried fish and chips at a fried fish and chip shop;
- (c) newly cooked provisions and cooked or partly cooked tripe;
- (d) table waters, sweets, chocolates, sugar confectionery, and ice-cream (including wafers and edible containers);
- (e) flowers, fruit, and vegetables (including mushrooms) other than tinned or bottled fruit or vegetables;
- (f) milk and cream, not including tinned or dried milk or cream, but including clotted cream whether sold in tins or otherwise;
- (g) medicines and medical and surgical appliances;
- (h) aircraft, motor, or cycle supplies or accessories;
- (i) tobacco and smoker's requisites;
- (j) newspapers, periodicals, and magazines;
- (k) books and stationery from the bookstalls of approved aerodromes, railway or bus stations;
- (l) guide books, postcards, photographs, reproductions, photographic films and plates, and souvenirs from museums or on passenger ships;
- (m) photographs for passports;
- (n) requisites for any game or sport;
- (o) fodder for horses, mules, ponies and donkeys;
- (p) post office business; and
- (q) the business carried on by a funeral undertaker.

There are other restrictions and regulations, such as those permitting those of the Jewish faith to switch closing day to Saturday (only after submitting a declaration objecting to working on a Saturday, and accompanied by a declaration from a panel appointed by the Board of Deputies of British Jews).

A system such as this does nothing but create jobs in the government at a direct financial cost to the taxpayer, and at a time and inconvenience cost to the shopkeeper. Yet it is the anomalies of Part IV that have aroused the most controversy. Shoppers on a Sunday can legally buy fresh carrots but not tinned

ones, partly cooked tripe but not a packet of tea, milk or cream but not dried baby milk, and nuts in cellophane but not in air-tight cans. Perhaps worse, they can buy pornographic magazines but not a Bible, aspirin but not soap, or fodder for ponies but not food for a pet cat.

The law reached the pinnacle of absurdity when the courts decreed that a shop was not breaking the law by selling kippers because they fell under the heading of 'a refreshment' which could be eaten raw in the shop, while a packet of sugar is not 'a refreshment' (although athletes sometimes eat sugar neat).⁷ Many cases since the Shops Act was passed have highlighted the absurdity, and have induced shoppers and traders to go to great lengths to 'get around' the law. In March 1972, an ingenious attempt to get around the law resulted in a famous court case. The defendant sold a carrot for £520 and gave away, as a free gift, furniture with it. Needless to say, it failed and this loophole was closed.

Opening hours. A less well known but outmoded restriction is outlined in Part I of the Act, which governs the hours of shop opening and early closing days. Shops can stay open until 9pm on one night of the week, and no later than 8pm on any other day; and shops must close one day of the week at or before 1pm. There are certain goods exempt from this, but these limitations on a firm's activity are nevertheless at best an inconvenience, and at worst, an unnecessary restriction preventing shops from doing business and office workers and others from shopping when they choose. Moves toward a twenty-four hour day for shoppers should be encouraged. We suggest that the rules governing opening hours should be abandoned.

The law at the moment prevents opening after certain hours, and only then gives exemptions. We propose instead a blanket assumption that shops be allowed to open at any time and that if there are objections (for instance, on the grounds of local nuisance in residential areas), it would be a court's job to take away, either partly or completely, the right to open. So if a shop begins to cause a nuisance, it will be the responsibility of, say, a neighbour or the local council (or any other interested or affected party) to make a case why its activities should be restricted. For example, if there was excessive noise and activity late at night, the onus would be on the complainant to prove that the right of opening should be restricted.

The arguments answered. Understandably, before there is any change, certain fears have to be dealt with to ensure that it will lead to an overall improvement. We believe that the standard objections to Sunday trading and more extended opening hours can all be answered.

(a) 'There is no point in changing the law, since no-one

7. The Mail on Sunday, March 11, 1984.

really needs to open on Sunday. All necessary business can be dealt with in the rest of the week'.¹

This is perhaps the most mistaken of all the arguments. Clearly, the lengths that many shop owners have gone to get around the law, the willingness of many traders to disobey the law (and accept the fines as a cost of operation), and the popularity of Sunday opening among customers, all show that there is a suppressed desire for a more liberal regimen. However, this cannot be appreciated properly until the law is changed to allow this desire to surface and reveal itself.

It must be recognized in addition that allowing a shop to open, and a shop actually opening, are two distinct things. Many shops do not open for the full time presently permitted, and it is quite possible that many shops may not open on a Sunday; but many other shops may (and indeed do) wish to open, and may even wish to close on another day while still operating a five-day or six-day week including Sunday. In conclusion, it is a democratic decision that the whole of society will make, by each individual 'voting' every time he or she buys a product. In this way, the people, and not the government, will decide whether they want Sunday trading or not.

(b) 'Practicing Christians would lose their jobs'.

There is no evidence to support this in, for example, the United States, France, or even in Scotland (where the law does not apply and only barbers and hairdressers are caught by any Sunday trading restrictions). Most shops work staff rotas that allow sufficient flexibility.

(c) 'Because of extra costs - wages, power, etc. - prices would rise at the consumers' expense'.

The point to consider here is the **marginal** cost of operating on Sunday or late at night. The main fixed costs - capital costs, rates, insurance, and advertising - are covered whether a firm is open for five, six, or seven days and for whatever length of time. The only significant additional costs are wages and power. However, no shop would open additional days or hours unless the increased business covered these costs, so it is unlikely that there would be any upward pressure on prices at all. The probability is that prices would fall as more competitive practices became prevalent as trade increased.

At the moment a comparison is available between those retail outlets that operate either side of the Scottish border. Firms such as Habitat, Asda, and Comet all have the same price list even where demand makes them open on a Sunday. Costs are being absorbed or covered by increased throughput, not higher prices.

(d) 'Shopworkers' wages would be adversely affected and shopworkers would be forced to work an extra day or late hours'.

¹ See the Mail on Sunday, March 11, 1984.

Firstly, shopworkers' wages are not only enshrined in the 1950 Act, but also in wages councils, so it would not represent a licence to cut wages if opening restrictions were abolished. Take-home pay would probably rise because many shopworkers, especially in depressed areas, would choose to work an extra day or half day if they could.

As to whether people would be forced to work an extra day, that is another matter. Removing the restrictions does not assume that shops will open for all seven days. Experience in Scotland is varied, but a common innovation is a nine-day or ten-day fortnight when every other Saturday, Sunday, and Monday is a day off. However, as with any trading innovation, it is the job of the union or individual workers to renegotiate their contracts or reach some agreement over new arrangements.

Any desired conditions of employment covered by Part II of the 1950 Act, e.g. statutory half-holidays, Sunday working, or meal times, can be retained. However, it must be remembered that such restrictions, however desirable, reduce the productivity of shop labour and so raise unemployment. There may be a case for considerable relaxation of these rules in an industry that has a mobile workforce and at a time of unemployment.

The proposals. This suggests that the wisest course is the removal of opening restrictions (subject to nuisance law), rather than its modification. The restrictions fail to achieve any desired aim, and tinkering around with the law would obviously succeed in removing the present anomalies, but would give rise to new ones.

There is already some move towards greater liberalization of shop hours. Local authorities can grant exemptions; the West Midland County Council Act 1980, for instance, gives exemption to shops in the Birmingham centre while an exhibition is on. Allowing firms to decide when they open more generally would benefit the consumer who would be able to get what he wanted, when he wanted. It would probably lead to an increase in trade - one main source would be the tourist market, who are still not used to our antiquated shopping laws, and would prefer a more liberal approach. Such a reform would remove one more victimless crime from the statute books. It would enhance respect for the law, which would be seen to be in step with public opinion once again (78% of people in a recent survey⁸ favoured shops opening on Sunday, and the figure in similar previous polls is constantly in this region).

The local authorities who generally administer and enforce the Shops Act restriction would no longer have a role, except perhaps in prosecuting over cases of nuisance. Contention caused by differences in the way they presently enforce the law - some being less strict than others - would disappear, as would nearly

8. See the Mail on Sunday, March 11, 1984.

all of the need for the authority-appointed inspectors used to enforce the law.

Finally, industry would have one more Act taken off its back, allowing it to get on with its business of supplying the customers with what they want.

Licensing laws

For seven decades, Britain's alcohol drinkers (nearly all the adult population) have had to suffer some of the toughest licensing laws outside the Moslim world. The restrictions as we know them today are largely the product of wartime efforts to encourage efficient armament production in the first world war, but even Tudor monarchs attempted to regulate the number of alehouses in an effort to encourage the analogous activity of archery. Victorian statutes required that licenses should be given only to 'fit and proper persons', and Edwardian laws attempted to limit the 'excessive' number of licensed premises by removing licenses from existing holders and building in new conditions. Other legislation relating to theatres, clubs, young children, and excise duty all combine together to form the body of law that today restricts the sale of alcohol.

Attempts at reform. Some MPs have attempted to amend that part of the law relating to 'permitted hours' of opening, but with little success. The problem is really a political and public choice one: licencees (and to some extent, the British public) have become used to 'licensing hours that were designed to fight the Kaiser',⁹ and the interests that conspire to defeat liberalization are more concentrated, and therefore more effective than the diffused interests of the general public.

The arguments that have been used to justify continued regulation of opening hours are not, however, persuasive in view of the evidence. As with the Shop Act, it is argued that longer hours will raise overheads and therefore prices: but analogously, fixed costs become easier to bear when opening times are extended, and increased revenue must cover marginal costs if the longer hours are to be worthwhile. The permission to open for longer periods does not of course oblige publicans to do so, and indeed they would not if their costs rose and they became uncompetitive.

A second objection is that longer hours would mean increased alcohol consumption, and therefore a rise in social and health problems. International comparisons on this subject can be very misleading, but there is an example nearer to home which helps meet this objection. Scotland, formerly one of the most restrictive areas in the United Kingdom, is now the most liberal. Some pubs in Edinburgh and other areas are now open around the

9. The Economist, 12 February, 1983, p. 31.

clock, while opening from 11am until 11pm is common elsewhere.

Social problems, however, seem to be less of a problem in Scotland today. Without the hurried 'drinking up' that early closing hours encourage, people drink more slowly, so that even if they drink a larger amount, it can be absorbed by the body and has a less significant effect. In addition, drinkers in Scotland today leave pubs at different times, so that the police are no longer stretched by a 10pm peak in street crime. Also on a social plane, the standard of Scotland's drinking places has improved significantly, with the traditionally grim pubs being replaced by wine bars and cocktail lounges with food being served. No longer are licensed premises used for the sole purpose of getting drunk.

Even so, it is difficult to quantify these changes. The improved efficiency of the police (and new drink-driving crusades) can make the arrests for drunkenness more numerous even if the problem is less. Better awareness and improved spending on health care can similarly increase the amount of alcohol-related diagnosed. However, 'in Scotland since 1976, the upward trend in alcohol-related diseases has slowed; drunkenness offences have decreased; and drunk driving offences show a slower rate of increase than for motoring offences overall'.¹⁰

Advantages of reform. Some advantages of reform are less difficult to quantify. The present division between bars and restaurants is an arbitrary one which is more likely to encourage drinking for its own sake (and outside the influence of the family) rather than as an incidental part of social activity. More congenial leisure and entertainment facilities, where drinking is no longer the primary objective, are to be welcomed. Tourists too would appreciate the added convenience of longer opening hours. Not only are those from abroad mystified by the present hours but even British travellers who inadvertently miss the lunchtime opening period would find longer hours a considerable relief, even if their demand was only for soft drinks or snacks.

Children will certainly be better protected by greater liberalization. At present, children of any age can enter clubs, licensed restaurants, and hotels: barring them from pubs simply serves to make drinking for its own sake appear to be more 'adult' to them. Pubs are attempting to change to serve the wider refreshment needs of families, which would in fact produce a greater degree of parental guidance over alcohol consumption, but are prevented from doing so by the present regulations.

Mechanics of reform. It may well be possible to remove opening restrictions at once. However, this could prove problematic in three ways. Firstly, the lobbies against liberalization might be able to block any reform if everything were attempted at once;

10. Hansard WPQ, 30 November 1983, c.525W.

secondly, the pub trade would face the sudden need to restructure their staff rotas and the range of services they offered as their protected position was removed; and thirdly, there might be an initial tendency for the public to overindulge the new freedom.

The third of these problems should be overcome quickly; the second might be more persuasive, but is essentially a matter for publicans themselves; the first is the most powerful. Therefore, it might be best to embark on a programme of progressive liberalization, which might have several steps. Initially, the restrictions on evening closing times might be relaxed until, say, midnight; and then the afternoon opening restrictions might be dropped if the experiment proved successful; finally, morning opening restrictions would be dropped. It might still be desirable to leave a measure of control with local magistrates, but only if this were necessary to solve problems of nuisance.

Encouraging the change in the nature of pubs away from drinking shops and towards centres of family relaxation could also be pursued. Again, it might be desirable to restrict children to designated family rooms at first, until the liberalization becomes more accepted. Permitting alcohol to be served with meals at any time of the day would also be of benefit to people who are obliged to work late or early shifts.

Personal morality

The confusion between justice and the imposition of arbitrary commands is nowhere more evident than in the treatment of personal morality. In many areas of life, individual freedom is curtailed solely because those in government, with the coercive might of the state to back them up, disapprove of particular activities. The law here is no longer a device to help people live peacefully together, but a weapon to enforce the prejudices of the ruling elite. There are certainly grounds for preventing actions which harm others, which take place with children, or which (like addiction) threaten the reasoning capabilities of the individual concerned. But there can be very little justification for preventing actions which involve only rational adults and which lack any victim.

Indeed, the attempt to prevent such activities usually worsens things. The prohibition years in the United States saw a sizeable and sudden increase in organized crime; the illegality of prostitution has forced prostitutes onto our streets, where a nuisance is caused, and out of the classified advertisement section of magazines, where none is; the efforts by local authorities to drive out sex shops has simply concentrated them in areas where their adverse impact is compounded; and rigid restrictions have made the buying and selling of even the softest drugs fraught with danger and impossible to control.

Today there is a general move towards a more liberal position on these and other personal activities. Some restrictions, like

those on homosexuality, have been eased considerably (though in that case, the restrictions still apply in Scotland) without any ill effects being evident. With better education and more self-confidence in the young, and with a more mobile population, morality today is more a matter for individual choice than for restriction by the local community, and traditional rules have been relaxed.

If there is a threat, it comes from technological developments whose impact on moral questions cannot be fully anticipated. Cable television, for example, opens up the prospect of pornographic material being freely available in an almost uncontrollable manner: and so the natural tendency of politicians is to attempt to control it. (In this case, the attempt to regulate every aspect of the technology is a serious obstacle to it being developed at all.) Growth in the practice of 'womb leasing' whereby a woman agrees to carry a fertilized egg for another who cannot bear children has also caused consternation. But it is difficult to see any sound reason why this practice, which is voluntary, contractual, and gives much pleasure to the parents involved, should be prohibited, or why it should not be done voluntarily or at a price like any other service. If there are psychological or other dangers, only experience will reveal them; and even so, while the state might have a duty to point out these issues, it can hardly claim the right to interfere in the victimless decisions of free individuals.

The second point can also be dismissed. Undoubtedly television and programmes like *Dallas* portray a level of wealth that most people will not achieve in their lifetime, and might be expected to raise perceptions of existing and real inequality. The strength of such an effect is hard to estimate, and cannot be relied upon to explain the rise in the level of crime. If anything, the growth of government and of prohibitive taxes which constrict personal advancement and prevent people being able to improve their station in life, are more of a problem meriting investigation.

Misconceptions about crime

Current thinking perpetuates an oversimplified picture of crime and law enforcement. The first mistake is the assumption that there is a clearly defined set of actions that can be described unambiguously as 'crimes'. From there, it is supposed that the people who commit these crimes, the 'criminals' are an identifiable group of persons who are qualitatively different from the

11. M Friedman, *Tyranny of the Status Quo* (London: Secker and Warburg, 1984).

4. THE NATURE OF CRIME

In the debate about crime, one of the few islands of agreement is the empirical fact that crime is rising. However, there is less agreement about what is the cause of this rise, and less about how to reduce it.

False explanations of rising crime

There are two popular explanations for the rise in crime: poverty or inequality and the idea that the actual degree of inequality is less important than the perceptions of potential criminals.

The first point can be answered quite easily: while inequality may contribute to some crime, it fails to explain the rise in crime, especially since inequality in advanced capitalist countries is actually falling. Furthermore, even the poorest members of the advanced capitalist countries live at a standard far higher than was dreamt possible before the industrial revolution. The rise in crime over that period therefore cannot be attributed to absolute poverty. As Milton Friedman puts it:

'Poverty is certainly more prevalent, more degrading, more intolerable in India than in the United States, and unquestionably the spectacle of rich versus poor is more blatant. Yet, there is less chance of being mugged or robbed on the streets of Bombay or Calcutta at night than on the streets of New York or Chicago'.¹¹

The second point can also be dismissed. Undoubtedly television and programmes like Dallas portray a level of wealth that most people will not achieve in their lifetime, and might be expected to raise perceptions of existing and real inequality. The strength of such an effect is hard to estimate, and cannot be relied upon to explain the rise in the level of crime. If anything, the growth of government and of prohibitive taxes which constrict personal advancement and prevent people being able to improve their station in life, are more of a problem meriting investigation.

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average 'law-abiding' citizen. Next, it is assumed that criminals can be deterred and crimes can be prevented by the presence of larger numbers of police patrolling the streets and otherwise having an obvious presence, and that deterrence is also boosted by improvements in the ability of the police to detect those responsible for the offence.

The conclusion of this line of reasoning is that insufficient or ineffective policing is the root cause of the rise in crime, and that larger and better-equipped police forces will work to reduce it. While this may indeed be part of the problem, the argument ignores many of the sweeping and profound changes that have occurred in developed countries since the second world war and which are even more fundamental explanations and determinants of the rise in crime.

The argument answered. A closer look at the current, over-simplified argument reveals some of its weaknesses.

First, there are a number of clearly defined events which can easily be labelled as crimes - old ladies battered in their homes, and assaults on young children, for example. Yet there is a large grey area where the 'crime' is not so clear-cut. This can be seen every day when ordinary people have to decide whether the actions of others are sufficiently objectionable to justify involving the police. The British Crime Survey showed that only between a quarter and a third of most crimes - including those involving violence and theft - were considered worth reporting. More importantly, the only offence whose reporting rate approached 100% was the theft of cars! This indicates that what is considered worth reporting (and thereby comes to constitute the crime rate), may be influenced by exogenous considerations, such as the need to fulfil insurance requirements. However, as the General Household Survey of burglary has shown over the past ten years, an apparent increase in the crime rate for burglary may have more to do with changes in reporting behaviour among victims than it does with the increase in actual burglaries. In short, what people may consider worth reporting as crimes to the police may vary according to the type of offence and over time because of conditions that the police can do nothing about.

Second, criminals can hardly be regarded as a single group warranting special attention. In fact, most people have at one time or another committed quite serious offences - whether it be smuggling that extra bottle of scotch through customs, or 'adjusting' tax returns, or even pilfering from employers. The last of these is regarded by many as a 'perk' of employment but costs British industry several thousand million pounds per year.

Third, it is wrong to believe that preventative patrolling by the police has anything more than a nominal effect on crime levels. Most crime is opportunistic (the criminal sees a window open and acts on the spur of the moment) and generally occurs on private property, not in public places where policemen patrol. So the odds against a policeman coming across an offence as it is

happening are very slim.

Fourth, the police do not detect many offences through their own unaided efforts. This is not because they are inefficient, but because of the inherent obstacles to detecting 'cold' offences. The majority of offenders are detected by victims or others at the scene, who either detain the individual until the police arrive, or identify him in ways that lead to quick arrest. Unless there is something which obviously links the offence to a particular suspect at the time it is discovered, the police usually confront a crime that could have been committed by almost anyone.

Other explanations

The inadequacy of the police force, then, is not a sufficient explanation of rising levels of crime. There are many other factors inherent in recent social changes which, to a greater or lesser extent, may provide more useful explanations.

Growth in legislation. It is not surprising that if the number and range of rules in society increases, the total number of criminal offences is also likely to rise, since there are simply more rules to be broken. Since the second world war, there has been a continual and rapid growth in the public sector, and in the regulation of the private sector. Laws are passed at an astonishing rate (over 2,000 pages of legislation in 1982-83), and the part of human life covered by some or other piece of legislation has been growing progressively.

It is not just that the individual can more easily trip up unwittingly when there are growing numbers of legal rules governing normal activities such as operating a bank account, starting or running a business, or driving and riding in a car. The growth in the number of laws stretches further than the ability of the police to make sure they are enforced. Each new law adds to the burden; and every police force has to make the decision (sometimes consciously, sometimes not) about which laws it will attempt to enforce and which it regards as less worth the trouble. The growth of legislation therefore increases the scope for arbitrary enforcement policies and reduces the confidence of the general public in the efficiency of the legal system. Similarly, the impunity with which some laws can be transgressed suggests to offenders that they can continue on to other, more serious, crimes. There is, consequently, a tendency for increasing legislation and an overstretched police force to lower the barriers of self-restraint that hold back criminal activity.

Government responsibility. The state's assumption of the main burden of responsibility in preventing, detecting, and punishing crime may have helped generate additional crime by allowing individuals to escape (or forcing them to abandon) customary responsibilities that help keep crime down.

The fact that the state employs social workers, for example, may reduce the willingness of neighbours to 'interfere' where they suspect, for instance, the mistreatment of children. The provision of education by the state may also have some effect, since it may encourage parents to leave the control of a child's behaviour more up to the school. (Schools, meanwhile, are less inclined to use the simple physical punishments that parents would normally use to control behaviour, so the circle is completed.) Or again, care of the elderly is an essential in any humane society, but the tendency in Britain has been to achieve this by concentrating old people in particular homes or housing schemes, rather than to encourage families to take responsibility for them. This probably makes the elderly an easier target for mugging, burglary, and other crimes than if family responsibilities were wider. Lastly, the assumption that a government can and should always guarantee the existence of plentiful employment, whatever the state of labour or product markets, may also have encouraged an over-reliance on official employment agencies, and the lengthening of the time which people spend unemployed during a time of industrial change. This in turn may stimulate increases in petty crime.

The impersonal nature of a society which places great reliance on the state to educate its young, to look after its elderly and its poor, and to provide work for its unemployed, has a more subtle effect which should also be noted. Being dominated by official, rather than personal, responsibility, it encourages the supposition that individuals are not truly in charge of their own lives and actions. The burden of responsibility for a bad character or a criminal action can be passed away from the individual and onto the back of 'society' as a whole. Again, this does little to restrain anyone faced with the temptation of breaking the law.

It is hard to say just how profound all of these changes are. However, there has been a major change in the pattern of family and community life since the second world war, and in the balance of responsibility shared by individuals and the state. Some noticeable effect would not therefore come as a surprise.

Further confirmation of this might be visible in an innovative approach taken in Kansas City. By handing responsibility over to city blocks for the maintenance of roads, street lights, and for services such as refuse collection, the city has devolved much responsibility down to small groups of citizens. A portion of property tax is remitted if the services are undertaken by block associations. Not only do the citizens get better services at better value, but they maintain a closer watch on performance. A fascinating by-product of this operation is that crime rates have been reduced in the areas concerned by roughly 80%. It is not, apparently, a case of crime being moved on to areas which are less patrolled, but of a real reduction. Tentative conclusions indicate the possibility that having local control over decisions and services gives people more of a sense of involvement, and reduces the sense of alienation from society. It has been sug-

gested that the Swiss 'grassroots' democracy might achieve a similar effect.

while virtually all the sectors of government activity have been

Conclusion

More policemen and stiffer sentences for offenders may have some effect on the crime rate, but cannot be expected to cure the problem by themselves. A gradual reduction in the role of government agencies, and in the dependence of individuals upon the state rather than upon themselves or each other, is likely to be a far more important and enduring contribution.

A first priority must be the simplification of existing legislation, so that the general public are more fully aware of their responsibilities when engaging in any everyday activity. One essential part of that is probably the removal of a number of statutes and orders that are of marginal value but which cause confusion and uncertainty to ordinary individuals who can suddenly find themselves breaking the law without knowing it.

Company and employment legislation are an example of rules which are so complicated that it is remarkable that any individual would ever take on his first employee. Larger companies may be able to handle the legal minefield that business activity and employment pulls them into, but self-employed or smaller businessmen are more seriously burdened. Arbitrary restrictions on the voluntary activities between individuals, on personal morality, and on many aspects of private conduct, are also in need of reassessment.

The encouragement of the moral growth of individuals, and the recognition of the basic ability of most people to organize their own lives better than they could be managed from afar by officialdom, is also needed. It is essential to ensure that those in need are provided for; but instead of taking all decision-making out of their hands by the provision of 'free' state services, a more humane approach is probably to transfer to them directly the cash resources they need to choose and buy those services for themselves.

Deeper thought needs to be given to the question of how families might be encouraged to take more responsibility of their elderly or needy members. The tax system, and the existence of state-run care services as a first resort, do little to prevent the break-up of families and the greater care and attention that a family is likely to expend on its own members. But demographic changes such as these may lie at the centre of the changing attitudes that are associated with a less stable society.

12. F Randall, British Government and Politics (Plymouth: M & E Ltd, 1979), p. 87.

5. THE POLICE

While virtually all the sectors of government activity have been under some form of analytical economic and financial restraint, the resources available for the police have been more forthcoming. The belief that law enforcement is the sole prerogative of an arm of government, and the fear that private involvement will introduce bias into what has been regarded as a high-quality and independent police force, has militated in this expansion of a part of the public sector. But it is paramount to acknowledge that the problems that exist with government services in general - powerful bureaucracy, high and rising costs, lack of flexibility, etc. - give no indication of being absent from the police.

While many improvements have occurred, the central problem is one of evaluating the success of the police. It is not possible to measure police effectiveness simply by the barometer of the crime level. There are innumerable factors affecting crime rates (perception of the chance of being caught, possible punishment, the reward of a successful crime, etc.) which are outside the control of the police. However its efficiency is measured, there is still a strong case for extending the private sector involvement that has already started to undertake several aspects of the police function. Not only do the private services take pressure off the publicly provided police force, but they can be used to serve as a yardstick for comparison, of providing ancillary functions cheaply, and ensuring that new methods are explored.

DEFINITION AND FUNCTIONS

The police are a regular force established for the preservation of law and order and the prevention and detection of crime. In pursuance of this, a police officer may have to be a social worker one minute, a diplomat the next, but such skills are all incidental to the main function: to keep the peace and maintain public order; to prevent crime; to provide protection of life, body and property; and to detect and apprehend criminals.¹²

Only recently has there occurred the first restatement of these policing principles since 1829, but aside from accommodating some very twentieth century issues such as race relations, and some slight rewording, the principles remain the same.

Organization and size

With the exception of the Metropolitan Police in London, the police are the responsibility of local authorities, and a total

12. F Randall, British Government and Politics (Plymouth: M & E Ltd, 1979), p. 87.

of fifty-one (forty-three in England and Wales and eight in Scotland) separate forces operate in mainland Britain. Northern Ireland has its own separate force of about 7,500 maintained by a police authority appointed by the Secretary of State for Northern Ireland.

Table 1
Police strength, 1976-1982

End year	Metropolitan	Other	Total
1976	22,202	85,837	108,039
1977	21,966	84,758	106,724
1978	21,961	85,650	107,611
1979	22,528	89,226	111,754
1980	22,562	92,310	115,872
1981	25,103	94,492	119,595
1982	26,303	94,648	120,951

However, it is the Home Secretary who has overall responsibility for law and order in England and Wales, while in Scotland it is the responsibility of the Secretary of State for Scotland. The relationship between the Home Secretary and the police varies between London and other areas. For the Metropolitan Police, the Commissioner is directly responsible to the Home Secretary, but for the rest of the country, this is the job of the Chief Constable, who is appointed by the local police authority.

A police authority has the main duty of providing an efficient police force for its area. In pursuance of that aim its functions, some subject to ministerial approval, include appointing the chief constable, deputy chief constable and assistant chief constables; fixing the maximum permitted strength of the force; and providing buildings and equipment.¹³ The police are funded on an approximately 'fifty-fifty' basis between central and local government, although there is some flexibility in this arrangement.

Because they are funded publicly and come under the supervision of politicians, the police are always subject to political debate. Two areas in particular are very much on the political agenda: first, police control and accountability; and secondly, the role of 'bobbies on the beat' and community policing.

13. David Regan, *Are the Police Under Control* (London: Social Affairs Unit, 1983), p. 4.

14. *Ibid.*, p. 6.

15. *Britain 1983* (London: HMSO, 1983), p. 103.

Control and accountability

Demands for greater 'public control' and improved 'accountability' have been on the increase, especially over the last decade, and specifically after the unrest and rioting of 1981.

The relative independence which has evolved over the years stems from the fact that the police today have inherited the status of parish constables, who were, originally, in charge of law and order. This inherited office has its base in common law, which means that a 'policeman's' responsibilities to enforce the law and maintain the peace are original, not delegated'.¹⁴

While this may be dismissed as an accident of history, the much-vaunted alternative - increasing the legal powers of local politicians over the police - is probably unnecessary. A survey by the County Secretary of South Yorkshire in 1977¹⁵ showed that many local authorities play an extremely passive role towards the police. The findings showed that in eight of the forty-two English and Welsh local forces, aside from the annual report, the Chief Constable did not give any form of regular report; in twenty-seven of the same forces, the Chief Constable was rarely asked for information. Clearly, it would be more sensible to improve the effectiveness of the existing system before a new and controversial mechanism is deemed unavoidable.

Scope for improvement. Policing is governed by the Police (Scotland) Act 1967 and the Police Act 1964. Under these Acts, the police authorities were given three responsibilities, to provide the force, to appoint and discipline senior officers, and to question and exercise general control over policing.¹⁶

It is plainly feasible under the existing legislation to improve the recruiting and control of the police by the local authorities: under Section 11 of the Police Act 1964, members of county councils can ask questions of the police and Section 12 can be used to make the Chief Constable submit a report on any 'special matter'; under Section 6 of the Act, local police authorities appoint the Chief Constable, Deputy Chief, and Assistant Chief Constables, and under Section 4 (2) can influence the appointments of other ranks; under Section 4 (3) and (4) there is the power to improve financial limitations and even prevent the purchase of particular items; under Section 50, police authorities can examine complaints against the police.

This last point is, perhaps, the most significant. Of all the areas of police procedure, it is the complaints procedure that

14. David Regan, Are the Police Under Control (London: Social Affairs Unit, 1983), p. 4.

15. Ibid., p. 6.

16. Ibid., p. 7.

has been most challenged for not being thorough or for allegedly showing bias. The establishment of the Police Complaints Board has probably increased the public criticism because the expectations that it would be a more vigorous and impartial review body were perhaps set too high at the outset. The police can, and should, be disciplined where necessary through the courts.

The bobby on the beat: myth or reality?

It is currently accepted by all major political parties, without challenge, that a return to more 'bobbies on the beat' would help to correct what is supposedly wrong with policing in the 1980s - police who are car-bound, remote from the community, and not much in evidence as a deterrent to potential offenders.

Most crime takes place on private property, however, and a highly-mobile police force is more appropriate in providing the necessary help. Immediate arrival at the scene of a burglary improves the chances of detecting the burglar, but just as important is that victims are often frightened and confused, and want calming, professional assurance that someone in authority is taking their plight seriously. Clearly, having to wait for a police officer to walk (or run) to the scene of the crime would not bring those benefits of a more prompt arrival, and would also reduce the chances of detecting the offence. Of course, if police numbers were increased sufficiently that any foot officer, in communication to headquarters by radio, could arrive more quickly, this argument would not hold, and there would be the added advantage that the police presence would be highly visible and would help discourage crime. But this is unlikely to occur under present institutional arrangements.

A common assumption is that by maintaining close relationships with those in his area, the 'bobby on the beat' is able to detect more crime, since he will know more about the area. The weakness is that the vast majority of police work is based around calls made by the public, and not as a result of who a policeman may know on his beat. At best, he can get to know only a fraction of those in his area, and even then it would not put him in a good enough position to improve his detection of crime.

Generally speaking, the public at the scene of a crime are in a better position to observe or identify the offenders. This is partly due to the fact that many crimes are committed by those known personally to the victim, and also because witnesses and victims are often able to provide an unambiguous description such as vehicle registration number, which leads to detection.

Community policing

Hand in hand with the 'traditional' view of the bobby, goes the fashionable solution of 'community policing', especially in inner-city areas.

The effectiveness of 'community policing' can be evaluated by an examination of crime statistics in Birmingham. True, the level of street robberies and the like have been reduced since community policing policies were applied. However, this improvement is more than offset by the rise in burglaries, and it is doubtful whether anyone would willingly exchange greater security on the streets for less in their own homes.

Moreover, the pattern of street crimes, as for crime generally in the area, shows a decline during the early days of the 'community policing' initiative followed by an increase later. If the policy was succeeding, a gradual and progressive improvement would be expected, as relationships with the community improved. The U-shaped pattern is more consistent with a cosmetic, public relations campaign, where initial enthusiasm causes an immediate improvement, followed by a return to normality as the novelty wears off.

The economic climate

The police force 'is the most fundamental city agency, representing the ultimate power of government to enforce certain rules within its areas of jurisdiction. Because of this, and because of people's fear of crime, the police budget tends to be virtually immune to questioning by economy-minded citizens.'¹⁷ Yet law enforcement, like any other service, is essentially an economic activity. It requires allocating scarce resources, setting priorities, and controlling costs. Like any other nationalized industry, the police are at present freed from the disciplines of competition, and of profit and loss. This has rarely been found to stimulate improved methods and efficient practices.

The problem

At the moment, the police services in England and Wales cost £2.4 billion a year and employ over 150,000 officers and civilians. But while police strength has grown, crime rates have risen, and the clear-up rates have fallen. As local authorities are faced with having to make economies, the option of increasing funds to the police is an unpopular one - and is not necessarily the answer in any case.

The way forward is a twofold one: to recognize obvious areas of waste; and to introduce private sector expertise even more extensively into selective parts of the police force. The Audit Commission recently outlined¹⁸ ways in which productivity might

17. Robert W Poole, Jr., Cutting Back City Hall, (New York: Universe Books, 1980), p. 17.

18. Efficiency, Effectiveness and Economy (London: The Audit Commission, 1983).

be improved, including greater use of new technologies, appropriate reimbursement for special duties, recovery of a higher proportion of fixed penalty tickets, and the increased use of civilians in the police force.

The first three are self-explanatory, and refer to improvements in police effectiveness rather than purse cost savings. The fourth, however, deserves greater explanation. The potential for civilianization is considerable and involves increasing the use of 'civilians in support activities, thus releasing more trained uniformed policemen for the jobs that only they can do'.¹⁹ A study by the Audit Commission revealed that 'it cost roughly £6,000 less in 1981 (say £7,000 today) to employ a civilian than it does to employ a uniformed person to do the same job. Thus a police force with 800 constables and 100 civilians might be able to increase its 'front line' strength by up to 50 (as well as its total head count) without any increase in overall expenditure'.²⁰ This civilianization therefore helps a fixed budget to go further and to improve output - an obvious advantage, given current crime trends.

A further means of reducing costings while improving policing are the police specials. A similar unit, the Territorial Army, fulfills a vital back-up role in supplementing the regular army. Greater recruitment and use of special constables could have comparably beneficial results, if correctly integrated into police forces.

The greater use of reserves in a wide range of ancillary duties may help regular constables to deal with crime directly. During the 1981 riots, many reserves were used for the manning of police stations, thus freeing full-time officers for large scale deployment. They could also be used to man casualty inquiry bureaux, to control traffic and investigate traffic accidents (a common occurrence in the United States), and there are many other tasks that could be taken on by the 'specials'. A shift away from ordinary constables performing the less-essential policing tasks would improve flexibility, allow economics to be made and in turn raise the quality of the British force.

But some reform of the special system is needed if it is to work. The voluntary and thankless nature of the job has meant that recent years have seen a remarkable decline in their numbers, from around 118,000 in 1938 to just over 48,000 in 1960, 21,500 in 1975, and 14,978 in 1981. Financial remuneration would probably require to be improved, perhaps on the mode of the £200 a year payable on proficiency, attendance and training, as in the TA. This estimated budget increase of approximately £3 million is offset by the reduced need to hire additional full-time police officers.

19. Ibid.

20. Ibid.

There is a case for doing more than simply raising new special forces and paying them for their work. In troubled city areas, for example, it might be possible and desirable to set up a communications centre in a local flat or office (perhaps even in the houses of specials themselves) that can be used to provide some of the records, computing, and communications facilities of a police station - but with minimal cost and overheads. Such a move would help spread a police presence and police resources to specific areas where they are needed but not presently available. More radical thinking upon these lines is needed; but until greater reliance is placed upon specials and innovative private security services, it is unlikely to develop rapidly.

The police officer has powers above those of an ordinary citizen, such as search and confiscation. Because of this, a point to consider is that if there are to be more 'special constables' and even ordinary civilians becoming increasingly involved in what are now police duties, there is a need for an examination of the powers that these people will have. For the most part, however, there is no conflict; no special powers are needed to direct traffic, drive support vehicles, administer police stations, and many other activities. It is even possible for ordinary citizens to make arrests for certain offences. Limited powers only are required for an even larger number of police services.

New operating methods

In policing, there is a need for 'thinking smarter' - considering new ideas and initiatives that might improve efficiency. To take some American examples that could apply to Britain also:

- in San Diego, a comparison between one- and two-man patrol cars showed that without any noticeable loss of safety, a saving of 83% of the annual cost was possible;
- in North Charleston, North Carolina, the restructuring of shifts allowed the existing force to be more effective without any additional cost;
- a comparison of vehicles in the Los Angeles Sheriff's Department in 1977 led to a saving of 4-5 cents per mile for total operating costs;
- there are many examples of savings as a result of contracting out police vehicle maintenance;
- the use of lower-paid civilians to perform many routine police tasks that do not require particular training.²¹

Police complaints about the inadequacy of manpower levels

21. Robert W Poole, op.cit.

reflect a pervasive tendency in the state sector to provide services using people rather than technical innovations. In any state industry, from steel to shipbuilding, mining, education, and hospital care, the politicians in control have always been prepared to cut back on capital investment programmes when funds are tight; but the political pressures against unemployment have put much less budgetary pressure on staffing levels and (in some cases) wage rates. This, of course, is natural in any industry that is under political control, but it does produce a long and slow departure from the most efficient mixture of manpower and capital equipment.

The shortage of police numbers might be worrying, but it becomes particularly serious when too much reliance is placed on manpower and too little on technical back-up; inadequate capitalization reduces the efficiency of each person employed and so makes the task of policing less effective. For example, many people were astonished that the Yorkshire Ripper enquiry was performed laboriously on a record-card system, with little hope of effective cross-checking of leads, when a less labour-intensive computer system (even a cheap microcomputer) might have brought a conclusion much more rapidly. Or again, the police response to a break-in at Buckingham Palace was to raise noticeably the number of officers patrolling the perimeter, instead of immediately installing improved intruder detection equipment. For many people (including executives of commercial security firms) it was surprising that effective security equipment was not already installed. Moreover, the installation of bright security lighting on estates in city centres could deter crime and reduce the need for foot patrols; but this sort of cost-benefit analysis is difficult to do in an industry (and with local government) that is organized for non-economic ends.

Simply throwing manpower at the police problem is therefore not the answer; there needs to be a more effective assessment of the manpower/capital mix that will produce the most efficient results. Unfortunately, there is little or no incentive for such an exercise to be undertaken, and the bureaucratic mind that is found in all state industries finds it hard to accept new methods. One effective means of changing attitudes, however, is to introduce commercially-based services in parts of the operation, in order that new ideas can be tried in practice and competitive pressures to improve efficiency are introduced for the first time.

New methods from outside

The idea that these can only be performed by government is disputed not just in theory, but by fact as well. The last few years have seen a growth in private security firms and the United States has many examples of towns 'contracting out' their police services. We regard the growth (both independently and by official agencies) of the use of private security firms as a particularly important development, and one which will stimulate

the introduction of more efficient methods at lower cost.

First of all, there are certain common services provided by central government departments and by inter-force arrangement. The most important are: training services; a forensic science service; telecommunications services (police radio equipment); and central and provincial criminal records available to all forces. Of these services, a number are potential candidates for greater private sector involvement. Training services, forensic science, telecommunications, and criminal records are the sorts of activities which can be performed more efficiently under contract, as they are elsewhere. Were these services to be contracted out (in a similar manner to that practised by many local authorities) it would permit better central control and the maintenance of both quality and security standards by managers. If this experiment proved successful, then local police authorities might go on to contract out certain minor areas of police activity, such as inviting tenders for traffic control.

Remarkably, crime detection itself is an activity where an increased measure of reliance on private investigation agencies could bring technical and operational improvements. There is a growing investigation industry, far away from the traditional image of the 'private eye', which may be able to help an overstretched police force on the clearing up of some categories of case. The new methods introduced by such firms, employed on a contractual basis, could stimulate other improvements in the operation of the police force's own investigation procedure.

Security patrols are another area in which private companies can and do supplement police services. Already in some crime-ridden housing estates in London, residents can call on private security firms to provide escort services and make regular checks of property. Some have installed automatic alarms or video equipment to provide effective patrolling functions without an undue investment in manpower. It seems reasonable that this kind of service could be used with benefit by the police themselves in troubled areas where they are unable to provide a sufficient service given existing methods. Again, it is unlikely that the force itself possesses the 'political' incentives to change methods radically, but simply contracting out a specific task, such as providing security patrols on a particular estate, would enable new methods to be introduced painlessly, and indeed for a variety of new methods to be assessed one against the other.

Another step is to investigate the possibility of tapping the resources of the community. A much cited success is the Guardian Angels - a group of young people acting as unarmed safety patrols on the New York subway, with the result that crime has dropped significantly. They are carefully organized:

'All members undergo three months training in self-defence, legal implications, first aid, how to remain cool under verbal abuse and never to argue with the police. Carrying drugs, alcohol or a weapon means instant expulsion: their

uniform - a white T-shirt and red beret, plus an identity card (stating clearly that they have no special rights or privileges) - is issued only when they go on patrol and is collected back directly afterwards. Although ready to effect citizen's arrests, they do not look for confrontation: it is their visible presence which reassures the public and discourages crime. No charge has been brought against any of their members or patrol.'²²

Another successful American experiment, which is now showing its benefits in experimental areas of Britain, is that of 'neighbourhood watch' schemes. Under these, the residents of a street or small city area agree to take extra care in observing and reporting suspicious behaviour, to look after houses where the owners are on holiday, and otherwise co-operate in an attempt to reduce burglary and street crime. The areas are marked by signs and window stickers so that potential criminals are aware of the heightened vigilance of the local people and the increased chance of a crime being noticed and reported to the police. Again, these schemes have produced a significant drop in crime rates in several important US cities. In Britain, the success of experimental schemes has urged police forces to recruit more special constables from the community, in order to set up and operate new neighbourhood watch arrangements.

If there is to be a move towards community policing, would it not be better to actually involve the community itself, and especially young people, in the basic vigilance and patrol? The 'Guardian Angel' idea, if carefully controlled, might have a wider application in terms of boosting street safety as well as subway safety. As Alec Dickson says: 'Who would be relieved by the sight of similar safety patrols in Britain? I suggest that they might be minority groups such as the Bangladeshi in Brick Lane, Whitechapel: office cleaners and nursing sisters coming off late night duty: parents of youngsters attending football matches as well as the local inhabitants in the neighbourhood of Wembley and similar stadia: old people living alone, whether in dilapidated slums or in many council estates: residents and ratepayers in numberless areas wrecked or defaced by vandals; casualty departments of big city hospitals, particularly over weekends; and every young woman in the West Riding during the period when the Yorkshire Ripper was active.'²³

Conclusion. The accepted wisdom, that individual responsibility should be quietly vested to a greater and greater degree in the hands of professionals and officials, no longer reigns. In policing, too, the institutional problems of a nationalized industry have become clear, and the time therefore seems right for a rethinking of the accepted view. There are many examples available of how ordinary citizens can help with the prevention

22. Alec Dickson, Letter to The Times, 28 June, 1983.

23. Ibid.

and control of crime, and many instances of how new and competitive services can complement existing forces and can introduce new ideas and improvements in the delivery of the service. Now is a good time to explore them.

According to The Economist, the 'Law Society, the solicitors' professional association, is to legal matters what the national graphical association is to print'.²¹ As a professional body, it has the contradictory dual role of acting as a trade union for the profession and, at the same time, to be the guardian of the public interest. (The Bar Council and the Senate of the Inns of Court could be criticized on much the same grounds.) It is well recognized that the Law Society often fails to perform its public interest function - its opposition to the recent bill attempting to break the solicitors' conveyancing monopoly might be cited.

It is not completely fair to criticize the Law Society for its actions, however - it is just acting as any other interest group might. The root of the problem is the special privilege under which the Law Society operates, particularly the delegated powers it has under the Solicitors Act, giving it 'closed shop' powers over entry into the profession. In our judgement, there are considerable dangers in having a professional body - an organization with the aim of serving its members' interests - also charged with the duty of serving the consumers' interests.

We doubt the desirability of present restrictions over entry into the legal profession. Ideally, the right of audience before courts should be open to all, giving clients the greatest possible choice of practitioners and specialists to represent them. There is no doubt at all that present entry restrictions, particularly at the Bar, serve to reduce the size of the profession, discouraging even those who would be able and competent, and thus raising the cost to the client and restricting choice. Long courses and numerous examinations, apprenticeships and other methods are all used as obstacles to entry.

It is perfectly possible that an individual with a less comprehensive training might be able to provide a specialist service (for example, dealing with divorce or immigration cases only) without the comprehensive training in all aspects of the law currently required. This would help to reduce the costs of entry and the barriers to increased numbers of practitioners becoming available, and so might be expected to reduce the cost of these specialized services.

A method of protecting clients against poor practice while allowing a more open entry to the profession is the introduction of professional indemnity or malpractice insurance as a requirement for each practitioner. Ideally, this should be arranged by each firm and not through a professional body like the Law Society, as it is today. It would then be up to the less partial

21. The Economist, 10 December, 1983, p. 23.

6. THE COURTS AND THE LEGAL PROFESSION

THE LEGAL PROFESSION

According to The Economist, the 'Law Society, the solicitors' professional association, is to legal matters what the national graphical association is to print'.²⁴ As a professional body, it has the contradictory dual role of acting as a trade union for the profession and, at the same time, to be the guardian of the public interest. (The Bar Council and the Senate of the Inns of Court could be criticized on much the same grounds.) It is well recognized that the Law Society often fails to perform its public interest function - its opposition to the recent bill attempting to break the solicitors' conveyancing monopoly might be cited.

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24. The Economist, 10 December, 1983, p. 23.

assessors of the insurance companies whether or not an individual was competent.

Another method of improving the accountability of any profession is to increase the market information available to the public. Bans on advertising serve to restrict the information that potential clients need to make a competent choice of adviser, and provided that they are not misleading, there can be no justification in a free society for preventing people in any profession from advertising themselves. Recent easing of the restrictions on advertising are to be welcomed, and since most advertising is done by new market entrants, it should boost competition from newer firms. But the statutory backing of the present rules is still arbitrary and a cause for concern.

There is a strong case for separating the representative functions of the Law Society from the control of entry qualifications. An independent examination body, private or administered through the Home Office, is perhaps a more desirable mechanism to regulate entry to the profession.

Renewing the conduct of lawyers once qualified is almost certainly a task best left to a self-regulatory body, but statutory backing is a dangerous power. Again, some regulatory agency that includes a majority of people outside the profession might be the desirable mechanism. It may be possible that various accreditation agencies could set themselves up - much as hotels and restaurants are assessed by competing agencies - so that the public could compare the alternative accreditations given.

Conveyancing

Scope for development

The last few years have increasingly seen the once sacred cows of the legal profession come under detailed analysis; there is a wide feeling that their monopolies, restrictions, and regulations have ossified their practices and ignored the changing demands of the consumer.

If reforms are to occur, opening up choice, promoting competition, and lowering costs, there are several possible starting places:

- (a) the division between solicitors and barristers;
- (b) conveyancing and other monopolies;
- (c) advertising;
- (d) profit sharing; and
- (e) use of new technology.

The solicitor/barrister division

The original reasons for lawyers being separated into two distinct groups have long since disappeared, but they still remain divided - in fact Britain is almost the only English-

speaking country to maintain this divide. 'Most people think of the 44,000 solicitors as office lawyers and the 4,800 barristers as court lawyers. This is partly true. Solicitors look after the day-to-day legal business of their clients. Barristers are retained from time to time by solicitors to perform specific tasks for clients'.²⁵

The debate has concentrated on whether it is better to continue with the division, enforced by statutory backing, or whether a fusion was better. It has ignored the salient point of the case for deregulation: 'remove the statutory controls and let the demands of clients determine the best system'.²⁶

Even if a lawyer is qualified in both branches he must be formally excluded from one before he begins to practice in the other. In a post-regulatory situation, there may be lawyers who will want to do both. At the moment solicitors have equal rights of audience with barristers in the Magistrates' Courts. Equally, there are examples where 'a solicitor may decide to brief a junior barrister rather than go into court himself because the barrister, with low overheads, may be able to charge less than the solicitor who has an expensive office to run'.²⁷ With the removal of the compulsory division (possibly the granting of an unrestricted right of audience), and the establishment of increasing competition, there is every reason to believe that lawyers will divide and fuse their activities according to the interests of the consumer, with benefits in terms of efficiency and cost.

Conveyancing

Action is being taken to break the monopoly that solicitors have on conveyancing. The current plan is to allow banks, building societies, and estate agents to undertake house transfers for clients/customers. Thus far the signs are promising. 'The Liverpool solicitors and the Consumers Association think that competition could reduce conveyancing prices by 25%'.²⁸

The only problem here is that the reforms will not go far enough. The original Bill (by Austin Mitchell) included 'a new category of licensed and insured conveyancers',²⁹ and perhaps would have quelled the legitimate concern that building societies

25. The Economist, 6 August, 1983.

26. Graham Smith, 'Law Shops', in Free Life, (London: Libertarian Alliance, 1979) Vol 1, No 1, Winter 1979, p. 8.

27. The Economist, 6 August, 1983.

28. The Economist, 19 May, 1984, p. 38.

29. The Economist, 10 December, 1983, p. 24.

and clearing banks, presently few in number, may form a conveyancing cartel.

By permitting (professionally insured) conveyancers to undertake the business, larger consumer choice would be possible and the regulation of market performance would be performed by the insurance companies, who would in their own interests maintain standards, and who would be liable to pay compensation if mistakes were made.

Advertising

Under the recent changes, solicitors are able to place advertisements so long as they are in good taste, accurate, and do not bring the profession into disrepute. The benefits are obvious: improved information leading to greater specialization, increased competition, consumer-led pricing, a larger market and better value for money.

We believe that advertising devoid of Law Society control, but subject to the normal rules governing advertising, would be preferable. It would introduce the following benefits:

- (a) it would be simple to enact, being subject only to the same rules as any other advertisement: Trades Description Act, Advertising Standards Authority, IBA, etc;
- (b) there would be less room for restrictive interpretation of the rules; and
- (c) it will increase the scope for competition and therefore increase the benefits that come with that.

LEGAL AID

An optimist might say that despite the growth of legal aid, the law is still an expensive luxury; a realist might say that the law is expensive partly **because** of legal aid. It was intended that legal aid would permit everyone to have access to the law regardless of wealth. Now, it cries out for reform amidst accelerating costs, allegations of waste, inducements for general delays in the court system, and cases of blatant unfairness.

The system

In general terms, 'A person in need may obtain help from public funds to meet the costs of legal advice and legal representation in court. The state is entitled to be reimbursed from contributions which assisted people may have to pay according to their means, and from costs and money or property recovered or preserved in the legal proceedings.'³⁰

30. Britain 1983 (London: HMSO, 1983).

'There are effectively three kinds of legal aid;

(a) legal advice and assistance which covers 'preliminary advice and assistance from a solicitor including advice, writing letters, entering into negotiations, obtaining an opinion and the preparation of a tribunal case',³¹ and assistance by way of representation in magistrates courts;

(b) legal aid for civil court proceedings and is a means-tested benefit, but if the applicant's disposable income is below a prescribed amount then the legal aid is free. The applicant 'must also show reasonable ground for taking or defending the proceedings';³² and

(c) criminal legal aid, which can only be given when a person has actually been charged and is not available for those who want to bring a criminal prosecution.

The first two are administered by the Law Society. Criminal legal aid orders are granted by magistrates' or Crown Courts but the Law Society pays the bills for cases undertaken in the magistrates' court. The Crown Court taxing offices pay the bills for Crown Court cases... The Law Society is responsible to the Lord Chancellor for the proper administration of the civil legal aid scheme and the assessment and payment of magistrates' courts criminal bills. The Lord Chancellor is the Minister responsible for both civil and criminal legal aid.³³

The problems

The undesirable problems of legal aid are as follows:

Cost to the taxpayer. In the last five years the cost of legal aid has doubled: it is now the fastest growing part of the welfare state. 'Criminal legal aid now accounts for the lion's share of the spiralling costs. It totalled more than £100m last year compared with £500,000 in 1961, £63m in 1979/80 and £85m in 1980/81: an increase the Lord Chancellor has described as "cascading out of control". In Scotland, in just one year, 1981, legal aid rose from £17m to £29m.'³⁴ This year the total bill will reach £220m.

Scope for abuse. Legal aid can be misused in a number of ways. First, it is possible for solicitors to make claims for work not

31. The Law Society, Legal Aid Handbook 1983 (London: HMSO, 1983), p. 3.

32. Britain 1983

33. Legal Aid Handbook 1983, p. 3.

34. The Times, 4 July, 1983.

done in preparing a case for trial. This appears to be quite widespread but is difficult to quantify. Second, the recently expanded duty solicitor scheme, 'under which a solicitor is on call at a court for defendants who need advice or representation',³⁵ poses the problem that there is the incentive to go for adjournments since the money continues coming in. Even though this abuse is restricted to a very few, it would make sense to argue that a 24-hour service is not needed, but more of a first-aid service.

Inconsistencies in granting legal aid. 'Most defendants on serious charges have their defence paid for by the state. But in magistrates' courts, where relatively minor cases are dealt with, but where prison sentences of up to six months can be imposed, there is an embarrassing inconsistency in granting legal aid. The official guidelines say that anybody who passes the means test and who is in serious danger of losing his liberty, job, or reputation should get legal aid. But there are wild disparities from court to court in interpreting these criteria. Highgate magistrates' court in London turns down eight times as many applicants for legal aid as neighbouring Hampstead.'³⁶

Even more startling is that nationally the refusal rate for magistrates' courts is fourteen per cent, while it is only one per cent for crown courts. 'But the Legal Action Group of Lawyers has shown variations of between three per cent to more than forty per cent'.³⁷

Cause of delay. An indirect disadvantage is that, because the strong economic motives to dispose of weak cases are absent, when legal aid is guaranteed, such cases still go on. Because there are, therefore, too many cases in the courts (of which legal aid is partly to blame), and since price as a rationing mechanism is absent, delays will occur.

It is unfair. The effect of the Law Society's first charge on property recovered by legally aided litigations that, if both parties are legally aided then both parties' costs may come out of the subject matter of the litigation; the 'successful' party thereby can end up paying his own and his opponents' costs, which is a curious result in a legal system where the (sensible) rule is that 'costs follow the event', i.e. the loser (in theory) pays the winner's costs. (In practice, however, the winner does not receive the whole of his costs, but only around two-thirds, as the courts only allow the winner to receive what are known as 'party and party costs', i.e. those which the court decides are essential to the running of the action.)

35. Ibid., change in lifestyles that has occurred recently, with people choosing to drift into and out of marriage more

36. The Economist, September 3, 1983. strong case for simplifying the divorce procedure even further, and for dealing with such

37. The Times, 4 July, 1983. that would be more specialised and

Proposed reforms

It is important to be clear about the rationale behind legal aid before any reforms can be attempted. In the first place, it is agreed that some mechanism should exist so that those of low incomes or modest wealth should not be debarred from using the court system, which of course carries a cost. However, the ideal system would not necessarily cover cases which are frivolous or where the chances of success were extremely slim or the rewards of success were trifling. Secondly, it is a reasonable principle that the assistance should go only to those who genuinely need it, and not to those who are able, or who would be willing, to pay their own way if legal aid did not exist. Thirdly, an ideal and efficient system would be as straightforward as possible and not open to widespread abuse.

Meeting these ideals is not easy, but several possible options exist, some or all of which might move us closer to the ideal.

(a) Reducing court and legal costs. Legal aid forms an effective 'blank cheque' from the taxpayer for a profession that is restrictive and to a court system that similarly is under little pressure to improve its efficiency. The ideal here would be to bring costs down to a level that could be afforded by the great bulk of people at the middle of the income distribution, whereupon large savings in the costs of assistance would be possible.

This, of course, moves the problem back to its root causes: an outdated and restrictive legal system. More access to the profession, greater specialization, advertising and other means of extending competition and encouraging new methods, and the promotion of private arbitration alternatives to the court system, will all provide a downward pressure on costs. With approximately two-thirds of the income of average law firms going on office costs, there is evidently considerable scope for such efficiency improvements.

(b) Refinements in coverage. There may also be scope for a closer definition of the sorts of cases which are covered by legal aid, and for simpler and cheaper ways of resolving those which are not.

For example, matrimonial disputes account for the largest item on the £82m civil legal aid bill. It is difficult to see why taxpayers should bear the costs of these disputes which are a common and identifiable risk following from any marriage. Compulsory legal insurance to assist married couples in the event of divorce proceedings would seem a much fairer way of putting the cost onto those who carry the risk.

Given the change in lifestyles that has occurred recently, with people choosing to drift into and out of marriage more frequently, there is in any event a strong case for simplifying the divorce procedure even further, and for dealing with such cases in a new tribunal system that would be more specialized and

cheaper to operate. Again, this takes us back to the root cause of the expenditure problem, the costs of the court system itself.

(c) Simpler means tests. Discrepancies naturally occur when any means test is operated, but there may be a case for accepting this and in making the means test more straightforward. For example, administrative costs might be reduced by reducing the number of income bands. Initiatives in welfare policy, including the introduction of a negative income tax, could make the system much cheaper to administer.

(e) 'First aid'. Another proposal is to reduce legal aid to more of a 'first aid' system, providing only initial or essential services. For example, it has been suggested that the 24-hour solicitor service should operate so that the solicitor helps clients for the day as far as possible, but should not have to assist with the whole case. A 'duty advocate' system may be appropriate in criminal work.

(e) Wider information. A lawyer has everything to gain by advising a client to prosecute or defend a case, while a client has little to lose if its costs are covered by the state. On both sides, therefore, there is always the temptation to proceed. However, a better-informed client may be less willing to take part in a lengthy procedure that may in fact bring little reward.

A widely recommended suggestion involves the introduction of Section 48 of the Criminal Law Act 1977, 'which would oblige the prosecution to disclose its case to the defence before trial and to allow changes of plea on advice at magistrates' courts, as at crown courts. Many defendants, it is believed, would then not press for jury trial... No less than £25m (more than one-third) of criminal legal aid was spent in 1981 on defendants electing crown court trial and then changing pleas'.³⁸

(f) Contingency fees. Another proposal is to scrap whole sections of legal aid, but to allow a system of contingency fees, whereby lawyers charged a fee on the basis of damages recovered. However, the experience of this in the United States is not a desirable one, leading to soaring damages claims, frivolous cases, and the need for expensive malpractice insurance by the potential defendants, although it may be that the power of US juries to fix awards is in fact the major cause of the problem. But continuing doubts mean that we would not suggest its introduction here. It might be possible, however, to introduce a type of fixed contingency fee, whereby fees at a set level were payable only if the case were successful. This would provide legal representation paid out of awarded costs, without the abuse caused by having fees related to the amount of damages.

(g) Compulsory legal insurance. There is a strong case for relying more on the private insurance sector to make certain that is not surprising that the problems should be that much more severe. Moreover, consumers have a strong incentive to complain 38. The Times, 6 July, 1983.

individuals have wide access to legal redress. Some element of this might be made compulsory on all contracts, including marriage. Professional indemnity or malpractice insurance, covering court costs and damages, might be made a condition of all business trading.

(h) Tax relief on insurance. The wider the coverage of private insurance, the less is the need for a system of legal aid operated through the state. Consequently, there may be benefits in extending tax relief, or a rebate or credit, to those who provide themselves with their own cover and thereby make themselves independent of the legal aid system. Given the relatively small size of premiums (many business groups already offer legal expenses insurance to their members as part of the membership charge), the use of tax concessions or outright allowances to encourage personal legal expenses insurance would not be costly, and could produce a large boost in coverage. That would bring us nearer to the ideal of a legal system with open access to all.

THE COURT SYSTEM

Measuring and improving efficiency

It is sometimes said that the British court system is run like a Rolls-Royce when a good Mini would suffice. It would be more accurate to say that it runs about as fast and as smoothly as a Model T Ford while charging Lambourghini prices. The cost of the system to the taxpayer is £484 million, with fines amounting to another £117 million (see Table 2). Meanwhile, the delays in the court system are shocking: in the High Court, eight out of ten accident cases take more than two years between the event and the trial, and nearly half of those take more than four years; people on serious charges can spend a year or more in prison before their case is heard, despite being 'innocent until proven guilty'.

Measuring the efficiency of the judicial system is not easy, but there seems little doubt that it is dismal. The system is shrouded in ancient traditions and practices, which might add to the gravity and help ensure the impartiality of court proceedings, but which are very resistant to new methods. The delay in hearing cases is a strong indicator that the demand for court time has greatly out-stripped the ability of the present methods to provide it.

In economic terms, it must be remembered that the courts are much like any other nationalized industry. The lack of a competitive market structure is bound to make them unresponsive and inefficient. Unlike other nationalized industries, the courts have been under producer control for many centuries, so it is not surprising that the problems should be that much more severe. Moreover, consumers have a strong incentive to complain about most nationalized industries if they get poor treatment,

Table 2
Expenditure on administration, 1982-3

	£(m)
Civil and criminal legal aid in all courts	223
Salaries of administrative staff and judicial officers in higher courts	84
Legal costs ordered to be paid from central funds	44
Net costs of running magistrates courts *	38
Buildings and accommodation, upkeep, etc.	27
Administrative costs of higher courts (excluding salaries)	24
Payments to jurors, shorthand writers, etc.	22
Salaries of judges	22
TOTAL	484

* This £38 represents £155m gross less £117m recovered in fines, etc.

Source: The Economist, July 30, 1983, p. 25

even though monopoly provision of the services means that they can do little about it. But those affected by the inefficiencies of the judicial system are much smaller in number than those affected by most other nationalized industries, and if they are awaiting trial in prison or are convicted of an offence, they are not in a strong position to form an effective chorus of complaint.

The court system as presently organized puts no premium at all on efficiency. There are no incentives for those involved to resolve cases more quickly and efficiently, and there exist few effective standards on the behaviour of court officials that would yield a more productive working day. Moreover, the restrictive nature of the legal profession is itself a cause of rising costs which leads to injustice, since it becomes prohibitive for many people to use the legal system even though they have a justified grievance. The same reluctance to use the courts follows from the inefficient use of court time, since busy members of the public are reluctant to waste time in court waiting for magistrates who do not arrive promptly or to suffer the interminable delays while organizational points are sorted out. All of this tends to erode public confidence in the court system.

There is, in consequence, a real and urgent need for reform. Vested interests (there are sizeable numbers of lawyers in the legislature, and few non-lawyers understand the inner recesses of the system) may resist any change, but justice itself demands that the system should be constituted more to serve those who use it than those who provide it.

Costly nature and organization

The reasons for the high cost of the court system are numerous, but one is the way that solicitors' charges are made up, i.e. on a 'cost-plus' basis, multiplying the time spent by a charging rate, with a mark-up representing such factors as urgency, the importance of the matter to the client, etc.

Another reason is the court system itself, which is cumbersome. 'Its machinery has not had a thorough overhaul for 100 years. The royal commission on legal services in 1979 called for "a full appraisal of procedure and of the operation in practice of our system of justice, in particular in all civil courts". The latest report of the law commission, the statutory body meant to keep the law up to date, agreed.'³⁹ In consequence of this inefficiency, the cost of appealing all the way to the House of Lords can reach £20,000, and can be double that if the case is lost and winners' costs must be paid. Legal aid does cover much of this, but '30% of the population is too well off to qualify for legal aid'.⁴⁰

Routine litigation. Many of the more routine services, e.g. undefended divorce and some criminal work, could be provided by means of 'package deals', at an all-in fixed price. Thus, the lawyer would make an economic return by specializing and employing suitable systems, perhaps computerized, to carry out large volumes of similar work. To some extent this has already begun (a debt-collecting system is now commercially available which makes it economic to recover small sums).

Where an 'off the peg' solution will be quite adequate, it should be left to the client and his lawyer to decide without having any particular way of conducting litigation imposed from outside by regulatory bodies; it is simply a matter for consumer choice. Package deals, of course, depend upon advertising to be effective, to generate the volume of business to make them viable commercially. As in other fields, advertising will tend to reduce the cost to the consumer.

'Costs follow the event'. In theory, a party who wins his litigation is entitled to compensation from the loser for the money he has had to spend on legal costs to establish his claim, or in legalese, 'costs follow the event'. The courts, however, can control (in the 'public interest') the amount a winning litigant can recover towards his costs, by means of a process known as 'taxation'. It is quite common for a winner to recover only around two-thirds of his costs, so that the remaining one-third represents an irrecoverable cost of going to law.

Use of new technology. As dispute continues over the cost of

39. The Economist, 20 August, 1983, p. 38.

40. Ibid., Economist, July 30, 1983, p. 25.

using a lawyer's services, consumers are increasingly demanding an efficient and competitive services. New technology has the potential to lower costs and assist in improving the service of lawyers. Rather than acting indifferently to new technology, or even accepting it reluctantly, there should be an open attitude towards it. Inevitably it will come, and by embracing it, any adjustment that will occur will be less painful and the consumers will benefit. Even now, OYEZ, the Solicitors Law Stationery Society, have introduced a package of systems for computers to cover domestic conveyancing, undefended divorce and probate. 'The systems, thought to be the first of their kind, tailor-made to solicitors' work, aim to cut out all routine tasks in the three areas of work which account for half the total workload in many firms and hence could lead to cost-cutting to clients'. And in Liverpool, six law firms have joined together to provide a common service of computerizing the legal side of each firm.⁴¹

Judges and magistrates

There are nine law lords, including two from Scotland, in the House of Lords. On the next tier come eighteen judges in the Court of Appeal, then seventy-seven High Court judges in the Queen's Bench division (mostly handling civil claims above £5,000), the Family division (mostly handling divorces), and the Chancery division (dealing with the legal aspects of companies, trusts, tax property, and so on). Next come 345 circuit judges who sit in the Crown Courts ruling on minor civil disputes.

The obvious problem is that the pool of people from which judges are chosen is very limited:

'The top judges - in the high court and above - are appointed by the lord chancellor from the ranks of senior barristers. Solicitors are barred from being high court judges, as are legal academics, however eminent.'⁴²

Solicitors are eligible to become circuit judges and stipendiary magistrates, but only twenty-four have in fact been appointed. They cannot go to the High Court or higher.

The justification for this restrictive practice is the fear of lack of competence in what is a very important job. However, this does not seem to be an adequate reason to exclude distinguished academics from filling the positions, nor to prevent able solicitors from rising to the most senior positions. Indeed, the wider use of this pool might bring some fresh ideas and possibly some younger people into the system without any loss of competence at all. At present, judges are selected from a

41. See The Economist, May 19, 1984, p. 37.

42. The Economist, July 30, 1983, p. 25.

profession that is not only restrictive in membership but which decides and polices its own entry conditions. The restricted entry may make the profession lucrative and attract able people; but it is also likely to exclude a number of people of considerable ability, wisdom, and fair-mindedness who are unwilling to work their way through the professional hierarchy. These people of ability are forever excluded from being judges.

The qualifications of some judges might also be overestimated. Judges begin by being recorders on small cases, an over-academic approach which gains little and puts costs up. Otherwise, training (or 'judicial studies' in the jargon) is minimal, and refresher courses are optional. This may explain the popular caricature of judges as being excessively conservative and out-of-touch. In the light of these criticisms, there is consequently a need for:

- (a) closer definition of the qualifications required for each judicial post, and of the terms and conditions of services;
- (b) a larger pool of people available for selection, and more open competition for the posts available (in the same way that other distinguished posts, such as university vice-chancellors, are publicized widely and large numbers of candidates with different attributes and skills are interviewed);
- (c) improved training (possibly provided by an independent private-sector agency), and regular assessment or review of the objective performance of all judges; and
- (d) allowing parties to refuse a judge by consent, leading to suspension of judges with a large number of refusals.

Magistrates. It is perhaps remarkable that most of the judicial work of the country is done by unpaid, badly-trained volunteers in the shape of magistrates. They deal with ninety-seven per cent of all criminal cases, involving more than two million defendants per year. Serious charges are heard by the higher courts, and most of the offences magistrates deal with are relatively trivial - very often to do with motor cars. But magistrates (or justices of the peace, JPs) send 20,000 people a year to prison for up to six months.⁴³ They also deal with many other areas, including marriage break-ups, licensing, making care orders, and issuing search warrants.

Relying on volunteers to supply justice at the magistrate level is not always a recipe for success: it attracts people who sometimes have more time than ability, and who are more interested in imposing their own views than administering justice. By and large, however, the system is effective, and it is certainly cheap in terms of its salary bill.

However, the use of unpaid volunteers imposes other costs. Magistrates, precisely because they are unpaid, cannot always be relied upon to be in court at the right time or available when they are needed. This imposes waiting costs on those using the

43. The Economist, July 30, 1983, p. 25.

court system or the magistrates' services. This cost is difficult to estimate. Another serious problem is the lack of training (and occasionally of experience) among magistrates. Some people contend that they are too willing to rely on the word or evidence of the police, or to be swayed by a polished presentation rather than by sound arguments.

Paradoxically, a method of overcoming these objections might be to enable magistrates to ascend higher up the judicial ladder, perhaps to the level of circuit judge. This would tend to open up opportunities which would attract a higher calibre of individual into the magistracy. The opportunity would undoubtedly have to be limited to stipendiary (paid and legally qualified) magistrates at first, but any enhanced opportunity of this nature would help to increase competition among candidates and ensure that more qualified individuals were more likely to apply and be successful.

An alternative might be to attract a wider range of outsiders into the job. Possibly by extending jury service. For example, two lay assessors would be recruited from the jury service list to sit under the chairmanship of a stipendiary magistrate. This would bring in a greater fairness, would remove accusations of magistrates being dominated by the police, and yet would still retain a legally qualified chairman.

Civil justice

'The main sub-divisions of the civil law in England, Wales, and Northern Ireland are: family law, the law of property, the law of contract, and the law of torts (covering injuries suffered by one person at the hands of another irrespective of any contract between them and including concepts such as negligence, defamation and trespass). Other branches of the civil law include constitutional and administrative law (particularly concerned with the use of executive power), industrial, maritime, and ecclesiastical law.'

Generally speaking, magistrates' courts have only a limited civil jurisdiction covering matrimonial proceedings for custody and maintenance orders, adoption orders, and affiliation and guardianship orders. The courts also have jurisdiction concerning nuisances under the public health legislation, and the recovery of rates. Committees of magistrates license public houses, betting shops and clubs.

The jurisdiction of the 300 or so county courts covers actions founded upon contract and tort (with minor exceptions); trust and mortgage cases; and actions for the recovery of land. Cases involving claims exceeding set limits may be tried in the county court by consent of the parties, or in certain circumstances on

44. Britain 1984 (London: HMSO, 1984), p. 116.

transfer from the High Court.

Other matters dealt with by the county courts include hire purchase, the Rent Acts, landlord and tenant and adoption cases. Undefended divorce cases are determined in those courts designated as divorce county courts (defended cases are transferred to the High Court) and outside London bankruptcies are dealt with in certain county courts. The courts also deal with complaints of race and sex discrimination. Where small claims are concerned (especially those involving consumers), there are special arbitration facilities and simplified procedures.⁴⁵

It is in the area of civil justice that, probably more than any other aspect of the law, highlights how expensive, slow, and time-wasting the system can be. It merits the immediate introduction of new avenues for the settling of disputes, cheaply, quickly, and at minimum inconvenience to the parties involved.

The first step could be a series of minor reforms which are commonsense but can save considerable expense and time. Delays are the norm, and any moves to reduce the length of time that a case is being heard must be welcomed. For example, it might be suggested that:

(a) the plaintiff should have far greater access to his opponent's documents, to eliminate the wasting of a significant amount of court time;

(b) there should be greater briefing before the case, in writing, rather than orally (as in the High Court) at the start of a case;

(c) the court should be encouraged to take on the responsibility for ensuring that the time limits on civil cases are adhered to, as on the continent; and

(d) there should be an examination of the court system by private sector management consultants, and a full review of existing inefficiencies should be undertaken and acted upon.

However, we doubt the ability of the court system ever to improve itself very much. In the first place, the restricted nature of the legal profession has produced hierarchical structures and chains of status that would be broken by any reforms motivated by efficiency objectives, so the support of the present practitioners is likely to be hard to obtain. Secondly, it is difficult to devise an objective measure of the efficiency of the judicial system, although court costs and waiting time suggest themselves as candidates. Thirdly, legal aid and other institutions that are not completely within the control of the courts tend to increase the number of cases coming to trial, the length of appearances, and the costs of representation. Fourthly, only a small proportion of the general public is directly affected by court procedures, and their interests as taxpayers are diffused, so that there is no large and concentrated voice arguing for change. Fifthly, as a monopoly service, the court

45. Ibid, pp. 116-7.

system will always lack the pressure to revise and improve its organization. If there is no effective source of competition, there is nothing to compare the methods of the court system with in order to judge its performances and to absorb and refine the best practices that others can devise.

These shortcomings can be met, and pressures for improvement can be established, only by the introduction of new subsidiary or parallel mechanisms of justice, such as independent arbitration. Measures to take more cases out of the court system entirely have been proposed before, usually in the form of no-fault insurance schemes for road or other accident victims, but the settlement of a number of disputes in commercial and financial cases provide a much more comprehensive route to reform, since independent arbitration already exists in those areas and could form a more general model.

Of course, the use of arbitration does require the parties involved to agree (as part of a contract) to settle their disputes through arbitration. It is therefore most suited to the settlement of commercial disputes, which are now (partly as a result of the recession and high rate of business failures) clogging the court system. The first step would probably, therefore, be to generally raise the status of independent arbitration through improved professionalism and more widespread use. For example, overloaded courts would 'contract out' certain cases to the Chartered Institute of Arbitrators or some similar body. Inducements for contracts to contain arbitration clauses would also help, and because arbitration saves the taxpayer from the expense of court overheads, might be worth supporting financially.

An alternative system will work effectively, and reduce the burdens on the courts, if it is generally quicker and cheaper (which, being less restrictive in its choice of personnel and less conservative in its management practices, it is likely to be), and if it offers its users a judgement that is sufficiently professional that it is unlikely to differ from that arrived at by a court. Where that is so, people may well elect to arbitrate even where there is no clear contractual obligation to do so, knowing that the legal costs of each side will be less and the dispute will be resolved more quickly by an institution whose judgement is just as reliable as that of the courts. Even where no original contractual obligation was made, therefore, it would be in the interests of both sides to agree legally to be bound by the arbitration. To take the extreme case of a civil dispute where one person knew he was clearly in the wrong, he would still have an incentive to use the alternative system if it were quicker and cheaper than the courts, and delivered the same judgement without a lengthy, nerve-racking wait and high costs.

The extension of the arbitration principle into a wide variety of civil cases is therefore possible, but is predicated on the assumption that the status of the alternative system is almost equal to that of the courts. Its shortcomings (that its judge-

Criminal justice

ments cannot be enforced except through the courts) must be more than balanced by its speed and cheapness.

Foreign examples

This development of arbitration has several precedents in the United States. In 1978, there were proposals for a National Private Court, but local efforts have been more successful.

'Since 1976, Californian companies have been by-passing the crowded courts altogether by hiring private judges to hear complex cases. The advantages? Speed, competence, and low cost. Under an 1872 law, Californian courts can appoint anyone they deem qualified as a "referee" to try any and all issues in a civil action'.⁴⁶ The big case in 1979 between a TV network and Johnny Carson, the chat show host, used a private judge to settle the disagreement.

Also in the United States, EnDispute sets up mini-trials at which lawyers present cases before both retired judges and executives with 'settlement power' from the involved companies. The judge explains which side he or she thinks would win in court, and executives go off to settle. EnDispute has formed joint ventures with lawyers in Chicago, Los Angeles, San Francisco, and Pittsburgh, with another soon to follow in New York.

Judicate has completed seven cases since it started in Philadelphia last year. President Allen Epstein anticipates Judicate will hear 500 disputes in the year ending March, 1985. The company holds hearings in front of judges (often retired from the state system) who issue opinions that are either binding or non-binding, depending on prior agreement of the parties, all at a cost of about \$600. Begun by three entrepreneurs, the company intends to expand to New York and Washington this year, and six other metro areas in 1985. 'Our average time for a case will be eight weeks,' Epstein estimates, 'compared with the federal mean of 13 months.'

The idea of allowing the courts to 'subcontract' the settlement of disputes if they are too crowded to deal with them effectively and speedily is an interesting one which is worthy of experiment in the United Kingdom, although it would almost certainly be desirable that each side in the dispute agreed before any such discharge of the dispute to other agencies were effected. Distinguished arbitrators with an expertise in the subject of dispute would mean that hearings could be shorter and cheaper. The greater reliance on court-appointed arbitrators might also help to bring in some new managerial attitudes which would help the smooth running of the court system generally.

46. Reason, January 1981, p. 18.

Criminal justice

The area of criminal justice suffers from the same maladies as the civil system: cost, delays, and a dissatisfaction with the results. The large rise in serious crime in recent years has made matters worse, but is indicative of what is wrong with the monopolistic structure of the service. Private-sector concerns in any market generally welcome and adjust to rising demand for their services rather than allow the queues to form and the prices to skyrocket that will simply encourage competitors. Where there is an official monopoly, however, there is no such competitive pressure for improvement.

The prospect for introducing alternatives into the criminal justice system is limited, of course. The point about the criminal courts is that we confer on them a coercive power that we would not grant to any private institution. However, there may be some scope for the courts appointing subsidiary mechanisms to hear certain cases that would otherwise involve considerable waiting, along the lines of the court-appointed arbitrators already discussed.

In any event, there is a need for more efficient systems generally. For example, much of the delay in criminal trials stems from the lack of communication between the two sides before the trial opens, and this could be improved. Much evidence that is not in dispute is still given laboriously in the witness-box, and this again could be replaced by typewritten statements. Other cases, such as the motoring or parking offences dealt with by the magistrates, are so minor that improved administrative systems, rather than expensive court procedures, could be relied on to resolve them.

A principle of rehabilitation, stemming from the idea that an offender is inadequate to his social obligations and must therefore be cured or helped back to responsible life. This is a laudible attitude, but it again reduces the certainty of punishment when it becomes the guiding principle to decide the length and severity of a sentence. It is possible to administer a punishment, while attempting to rehabilitate those who need it at the same time; and though this may be occasionally harsh, the individual misfortune has to be balanced against the general rise in crime that is likely if confidence in the law is eroded.

Reform is another principle, whereby the purpose of punishment is seen as to ensure that the offender, whatever his state of mind, does not commit another offence. Supporters of this principle generally argue for harsher penalties that can be expected to make convicted criminals reluctant to risk the punishment again. While harsh sentences such as cutting the hands off shoplifters may be completely effective at reforming offenders, however, few people would support the dogmatic application of this principle.

Retribution is a principle of punishment which has grown unfashionable because of its emotional, rather than rational, base. However, it does help us to escape the excesses of the

7. PUNISHMENT

SENTENCING, PUNISHMENT AND FINES

General principles

Punishment is motivated by different principles, and the confusion of these different (and occasionally conflicting) objectives is responsible for much of the distrust of the punishment system that has surfaced in recent years.

Deterrence is, of course, a key principle. To serve it, however, the law needs to be clear in its identification of what actions are not permissible. The profusion of laws does not help this understanding. Moreover, to be effective, the deterrence principle requires the punishment for an offence to be known and certain. Again, recent tendencies to treat each offender with reference to his personal background - wealth or poverty, happily married or separated, from a stable or troubled family - erodes this principle, however well-intentioned it may be. So too does the parole system, which as we will see, builds considerable uncertainty into sentencing despite its obvious merits in some cases, and so does the spreading notion that criminals are somehow diseased individuals who should be 'treated' instead of 'punished'. Again, this may be a desirable attitude in some cases, but it undermines respect for punishment if offenders believe they can use it to advantage.

Rehabilitation. Recently, the principle of deterrence has been much diluted by this principle of rehabilitation, stemming from the idea that an offender is inadequate to his social obligations and must therefore be cured or helped back to responsible life. This is a laudible attitude, but it again reduces the certainty of punishment when it becomes the guiding principle to decide the length and severity of a sentence. It is possible to administer a punishment, while attempting to rehabilitate those who need it at the same time; and though this may be occasionally harsh, the individual misfortune has to be balanced against the general rise in crime that is likely if confidence in the law is eroded.

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Retribution is a principle of punishment which has grown unfashionable because of its emotional, rather than rational, base. However, it does help us to escape the excesses of the

reform principle and the dangers of a strict rehabilitationist approach. The fact that we expect a punishment to 'fit the crime' is not to be despised because we cannot explain it or because it is an ancient principle and therefore is assumed to be out of date. Modern ethology is in fact demonstrating the importance of such misunderstood 'emotional' institutions in the preservation of human and animal social structures.

Our failure to comprehend the non-rational but crucial public demand for retributive punishment may explain several cases of people 'taking the law into their own hands' or complaining bitterly when a punishment is motivated by other principles and so bears little relation to the offence. The right balance of motivating principles is, of course, a matter of ethical judgement upon which the economist cannot decide: but it is certainly necessary to look at the wider costs and benefits of each motivating principle, including its effect on the likely level of future crime, before the balance is struck. There is a need for an open debate about the purposes of punishment, so that the public can begin to understand the motivations of those who administer the sentences. Indeed, such efforts to clear our thinking are critical if punishment systems are to be reformed and applied effectively.

Particular reforms

Any worthwhile discussion covering 'sentencing, punishment, and fines' would prove to be a major task in itself, if we tried to cover all of its complexities and ramifications. Therefore, we have borne three criteria in mind while making our choice of areas where reforms are most needed:

(a) those examples where new and innovative ideas could enhance the system's operation and improve efficiency;

(b) those areas where an adequate deterrent to crime no longer exists; and

(c) those areas where there is no longer (or there never was) a marginal deterrent. The most well-known example of this arose during the 1970s when Angus Maude pointed out that, 'as custodial sentences for armed robbery become longer and longer, the difference between that and the so-called life sentence becomes so small that the inducement to shoot your way out at the expense largely of the police becomes that much stronger'.

We therefore believe that there should be a comprehensive review of the way in which criminals are punished. Some of the most obvious items ripe for reform are:

Community service orders. Orders should, at least, be independently monitored to ensure attendance and completion, and require alternative punishment otherwise. It might be best to enter contractual arrangements with independent welfare organizations to manage the scheme and use the available labour efficiently.

Experimentation in home-based punishment. Where the criminal

still lives at home, but at some noticeable inconvenience. Apart from being a low-cost option it also permits a wide variety of punishments to be chosen to suit the crime. This 'inconvenience punishment' can take many forms, such as the imposition of curfews, restrictions on getting a driving licence, restricting travel to certain areas, and the community service obligation to monitor and visit nearby OAPs. The options are too numerous to mention, and require extensive investigation and trial application. A key requirement in all of them is some form of balance which does not impose any undue burden on the monitoring services, but which maintains appropriate punishments for particular crimes.

Sentencing. It does seem reasonable that magistrates should
New technology will assist in this type of punishment. In New Mexico, 'some drunk drivers are being confined to their homes through the use of an electronic bracelet that is a high-tech version of a scarlet letter. If the wearer ventures more than 200 yards from home - or removes the device - a signal is sent immediately through the person's phone line to the police'.⁴⁷ It prevents drunk drivers from driving, or even riding in any vehicle, yet they can remain with their families, with monitoring of the scheme being possible cheaply through existing telephone technology. Another idea is that of 'home custody' sentences, with persons convicted of lesser offences required to remain indoors for successive weekends, say from 7pm Friday to 7am Monday. 'Electronic handcuffs' could also be used to police the sentence, which allows the offender to remain at work during the week and therefore has a less harmful effect on his family than a custodial sentence.

Temporary prisons. Following on from the last point, we recommend that greater consideration be given to the temporary prisons which operate abroad. They would involve the criminal being deprived of part of his freedom for certain times during a week, e.g. weekend prisons, prisons with day-release to go to work (or to work on community service projects), and so on.

Fines. There could be greater use of fines in dealing with offenders but in a far more equitable manner. For example, it may be better to levy fines that are related to criminals' income - perhaps a given percentage of the offender's annual income. There is also need for a reappraisal of the comparability of fines for different crimes - much noise has been made by motoring offenders who argue, with some legitimacy, that 'some fines imposed for multiple motoring offences when compared with those for offences more generally regarded as criminal, were unfair'.⁴⁸ Inflation has meant that many fines set down in the statutes are now too low.

^{49.} The Economist, 8 October, 1983, p. 21.

47. US News and World Report, April 9, 1984, p. 62.

^{51.} Sunday Times, 27 May, 1984.

48. Daily Telegraph, 24 May 1984.

Life sentence and punishment for murder. At the moment, murder carries a mandatory 'life' sentence - the only crime for which the judge has no discretion in sentencing. Willful murder is rare: 'Criminal statistics just released show that there have been only nineteen killers of policemen in the past ten years.'⁴⁹, while only 619 homicides were reported in 1982. But it is still the cause of much public concern, there is a case, especially for sexual and sadistic murders, to make life mean life, rather than 'at least 20 years'. Consideration of additional punishments, such as forced labour, might also be appropriate.

Sentencing. It does seem reasonable that magistrates should be allowed to give young (and especially first-time) offenders a short burst of custody; but this makes all the more important the current special provision for younger offenders to keep them apart from the residuals. There ought to be a similar rule for all first-time offenders, regardless of age. Furthermore, there may be benefits in reducing the association within a prison - not to lock the prisoners in cells all day, but to restrict contact with those convicted of different categories of crime.

New ideas. There is a multitude of other suggestions which might improve the system. They could include being forced to perform menial tasks⁵⁰; in cases of theft, property damage, and possibly minor assault, magistrates in Coventry are deferring passing sentence while victim and offender are encouraged to reach an agreement,⁵¹ so that the damage is repaired with perhaps some additional reparation. These ideas should at least be analyzed, and perhaps tried experimentally. Whatever the merits of any particular suggestion, there is certainly a need for greater innovation in the punishment of offenders.

PSYCHOTHERAPY AND 'TREATMENT'

Psychotherapy techniques have prompted sizeable changes in the way in which convicted criminals are dealt with. The traditional view that an offender should be punished for an illegal act has been gradually replaced in many areas with the view that he should be treated. Some offenders are not seen as being bad but as being 'sick'.

The acceptance of psychotherapy and psychoanalysis stems from it appearing to be a humane alternative to the prevailing treatments for mental illness used during and directly after the first

49. The Economist, 8 October, 1983, p. 21.

50. The Daily Telegraph, 18 May, 1984.

51. Sunday Times, 27 May, 1984.

of the Modern World (London: Weidenfeld and Nicolson, 1981), pp. 5-6.

world war.⁵² The use of drugs and electric shock therapy were proving less and less effective in the treatment for shell shock and other mental illnesses caused by stress when Freud offered, in psychoanalysis, an apparently sophisticated alternative. This replacement was accepted as being successful, by 1939, in preventing or in reducing the chance of future anti-social behaviour. There is much less agreement about its effectiveness today, and equal argument about which, if any, of the contemporary schools of psychotherapy are effective in each type of case.

When we accept the view that some criminals should not be punished but should be the subject of treatment, the problem arises that there are advantages to offenders in being classified as 'sick' - of being 'treated' rather than punished. It may be the case today that a determined criminal is no longer deterred from committing an illegal act if he knows the system and can use it to his own advantage. Clearly, this is not acceptable. A related disadvantage is that there can be surprise verdicts by judges who take past psychiatric circumstances into account. This arbitrary and subjective mitigation of a sentence reduces the certainty of a fixed penalty system.

Certainly, medical intervention has an important role in the reform of offenders. That is not to say that a crime should go unpunished. Punishment is often in itself a reforming technique, and even if the courts may not understand the true motives of a particular criminal as well as a psychologist may believe he does, the traditional remedy of punishment may be just as effective in preventing repetition.

Doubts about success. Another problem is that of correctly assessing the 'success' of psychotherapy. The studies on psychotherapy have been done with the aid of willing offenders, while therapists choose those who would be more responsive to their therapy. They of course prefer to work with those convicts who are reasonably articulate, intelligent, young, and open-minded - and not the older persistent offenders who are set in their ways. The implication is that psychotherapy is probably less effective on average than its statistics would suggest because of client and therapist pre-selection.

While the latest evaluations accept the problems in obtaining accurate data, there is no indication to suggest that a convicted felon who has had psychiatric treatment behaves any differently (or has a different re-conviction rate) from those who do not receive any particular treatment. It has been quite correctly suggested that a prison, where the whole emphasis is on punishment, may not be the perfect place for psychotherapy, but even if this is accepted, there is no credible evidence to indicate that the treatment of this kind has any lasting success in the com-

52. Paul Johnson, A History of the Modern World (London: Weidenfeld and Nicolson, 1983), pp. 5-6.

munity at large. SYSTEM

Even if it could be proven that psychotherapy patients had a very low re-conviction rate, there would still be some doubt for its continued use so extensively. Many crimes are 'one-offs': the individual perpetrator is in a position that allows him to commit the deed, but once caught and punished is unlikely to be in a similar position again. Examples include bank staff, computer personnel, cashiers, etc., all of whom will have problems once they 'have a record'.

(a) remission - applies for the vast majority of convicted
Treating alcoholic offenders. A greater insight into the weaknesses of psychotherapy can be seen in the way in which alcoholic offenders are dealt with. Recent years have seen an increase in the level of alcohol-related crimes and the number of prisoners with drinking problems. The number of detoxification units across the country have been shown to be at best, less successful in their purpose than prisons, and at worst, failures in reducing offences and in reforming their clients. Furthermore, there have been examples where the work of the detoxification units have heavily overlapped with that of probation service's homeless offenders unit, which has the task of assisting recently released offenders who have no definite place of abode. At the very least, there needs to be an immediate reduction of the overlap. Contracting out detoxification to independent clinics, and using local voluntary bodies or private companies to undertake the supervisory role, might be more effective options.

It would seem that existing detoxification centres have little justification for continued existence. In their place, we suggest that it might be possible to make legislative provision to allow alcohol offenders to have an option between a period in prison and the monitored taking of a drug, such as Antibus, which when taken two or three times a week (in pill form) will cause sickness if any alcohol is taken over the subsequent few days. behaved prisoner can be punished with the loss of his remission up to the maximum of a third of his total sentence.

But it is the parole system that has been the cause of most concern, partly because so much of the decision-making is done behind closed doors and by unaccountable officials. Under the 1957 Criminal Justice Act, the composition of the Parole Board was outlined, and among its members it should have:

- (a) someone who has either held or still holds judicial office;
- (b) someone who is a registered medical practitioner and a psychiatrist;

53. Jowitt's Dictionary of English Law (London: Sweet and Maxwell Ltd, 1977).

54. For greater detail and discussion see: Terence Morris, 'The Parole System - Executive "Justice"', in Criminal Welfare on Trial (London: Social Affairs Unit, 1981), p. 26.

8. THE PAROLE SYSTEM

Originally, parole was 'a promise made by a prisoner of war, when he has leave to go anywhere, to return at a time appointed, or not to take up arms till exchanged; the practice of releasing prisoners of war on an undertaking that they will not serve again during the war'.⁵³

As it exists today, the system can be divided into three main categories:⁵⁴

(a) remission - applies for the vast majority of convicted prisoners, with the exceptions of very short sentences, some offenders with mental disorders, and juveniles who have committed very serious offences;

(b) parole - applies for convicts who have served either a third of a sentence or twelve months, whichever is the longer; and

(c) licence - applies only to life sentences and sentences of borstal training.

Prior to the 1967 Criminal Justice Act, which resulted in the parole system, it was the common practice to have some form of discretion for sentences. When the death penalty was still in force, the Home Secretary had the discretion to commute it to life imprisonment based on the principle of 'licence', and it was the extension of licences under the 1967 Act that allowed release to occur prematurely if it was believed that the convicted criminal had either ceased to be a threat to the law-abiding community, or if a borstal inmate had made substantial progress on an appropriate training programme. This principle of licence is generally applicable only to life and borstal sentences.

Remission, for its part aims to reward good behaviour by the individual prisoner. In this way a well-behaved offender can be rewarded with remission of up to a third of the sentence; a poorly-behaved prisoner can be punished with the loss of his remission up to the maximum of a third of his total sentence.

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(c) someone that the Secretary of State regards as having knowledge in the field of supervision or the aftercare of discharged prisoners; and

(d) someone that the Secretary of State regards as having made a study of the causes of delinquency or the treatment of offenders.

Problems. Only about half of the eligible prisoners go to one of the panels of the Parole Board, the others being dealt with by Local Review Committees in the various prisons. The Board does not have any direct contact with the prisoner at all, the case being evaluated on the strength of the files. Doubt therefore arises regarding the lack of prisoner contact, which can only occur in an interview with the LRC, and on the accuracy of the files that are put forward. The secrecy that pervades the parole process and the items that are recorded in a prisoner's file is one of the reasons why some prisoners refuse to go for consideration of parole altogether. Terence Morris⁵⁵ points out that of the 10,814 cases considered in 1979, 658 declined to go forward. This lack of confidence in the system is disturbing.

Making decisions based on information within a file and with no contact with the prisoner whatsoever, is not only unfair to the person concerned but also infringes basic ideas of fairness and justice. If parole is not obtained successfully, it is seen as a re-sentencing by a seemingly distant Board that has no direct contact with the individual concerned. In fact, it adds up to sentencing in absentia, which is something otherwise unknown in criminal law. The prisoner may be interviewed by the LRC, but he 'has no right to consult solicitor or counsel in connection with his parole application and it would, in any event, be a waste of time since he has neither the right of audience himself nor the right to instruct an advocate'.⁵⁶ Perhaps even worse, if the prisoner fails in his application for parole, he is not told why. This permits no feedback, nor allows him to alter his behaviour or 'change his ways' if he wants parole.

(On the plus side, it must be said that the figures for recalling those given parole are encouraging. In 1979, of the 2,846 recommended for parole, only 421 were recalled - approximately fifteen per cent. This fell to around ten per cent in 1981.)

The system also reduces the certainty that a particular punishment will follow a particular crime. Parliament decides the minimum proportion of a sentence that has to be served - two-thirds if denied parole and one-third or six months for those who are successful. Thus when a judge states a sentence, it is only the maximum period that a prisoner can be detained, since it is the Parole Board which decides, within the constraints laid down by Parliament and the judge, how long the prisoner will spend in

55. Ibid.

56. Ibid.

detention. PRISON SERVICE

Therefore, the parole system undermines the basis of English Law in two significant respects: firstly, in the way it effectively re-sentences an individual in absentia; secondly, it transfers the final say on the length of a sentence from a court to an executively appointed committee, whose opinions may not be consonant with those who heard the case in court, and whose decisions do not hinge on the notion of punishment alone.

Proposals

There is a need to make the whole system more open. Parole might be better if established as a right, not a privilege to be earned, with the burden of removing this right falling on the Parole Board.

There is a case for granting automatic release on licence for all new sentences up to a maximum of five years, after the one-third point had been reached. (This would not prevent recall into prison.) This form of postponed probation would involve the prisoner being released on the condition of good behaviour. If set out in law, this would enable judges to take account of this licence when passing sentence.

Another proposal worthy of consideration is the introduction of new-style hearings where the Board would be required to state a case against a particular prisoner and where the prisoner would be permitted representation to argue and assist him in his case.

Perhaps a better option is to bring the length and conditions of sentence back within the control of the courts. Thus, judges would sentence criminals on two measures: the length of sentence in months or years, and the conditions and privileges to be allowed. Further court appearances would assess the prisoner's attitude and test his compliance with prison discipline, and it would be for the court alone to allow increase in privileges or earlier release. All releases would be subject to licence, and there would in consequence be no remission as such, the sentence being fixed in term. Such cases would probably require the establishment of a new Parole Division of the High Court.

The advantages of this are that there is no 'secondary' justice being dispensed in secret, that there is an open court review of prisoners' progress (which might in turn improve public awareness of the effectiveness, or otherwise, of the prison system), and the fact that a court could, if necessary, reduce a prisoner's privileges in a dispassionate manner. In effect, the prisoner has the choice, through his behaviour, of whether he goes up or down a liberty and privilege scale that is decided objectively by the courts instead of by closed panels of officials.

57. The Economist, November 26, 1983, p. 36.

58. Britain 1983 (London: HMSO, 1983), p. 112.

9. THE PRISON SERVICE

Because many of Britain's prisons were constructed during the nineteenth century, they have become unsuited to modern demands. Even though for many years courts have adopted 'alternative' ways of dealing with convicted criminals, the prison population has grown far above the capacity of the prisons to house them.

Lack of innovation in punishment methods has undoubtedly contributed to the over-use of prison punishment, and the growth in punishable offences itself may be a contributory factor. Whatever the causes, the prison system suffers from three faults inherent in all government: high cost; inadequate supply; and a shortage of capital investment. Each can be examined in turn.

Cost - much of the debate on costs has concentrated on peripherals such as unnecessarily high security precautions, or the special 'community homes' for young offenders. However, the high cost of prison services is far more pervasive: prisons cost over £40,000 per intern to build new. Add debt service on that sum to a running cost of some £11,500 per intern a year, and the yearly cost per head must be around £17,000 - three times the most expensive public-school fees, and every penny paid for by the state.⁵⁷ The current programme, when complete by the early 1990s, will provide some 6,000 extra places, at a cost of more than £250 million.

Table 3
Average Daily Population in Prisons, Hostels
and Detention Centres

	1974	1979	1980	1981	1982
Males	35,823	40,762	40,748	41,904	42,381
Females	1,044	1,458	1,516	1,407	1,326
Total	36,867	42,220	42,264	43,311	43,707
Certified Normal Accommodation (CNA)					38,653

Source: Prison Statistics, England and Wales, 1982 (HMSO: Cmnd. 9027)

Inadequate supply - trends suggest that the prison population 'will rise, perhaps to nearly 45,000 in 1984-85',⁵⁸ which is much

57. The Economist, November 26, 1983, p. 36.

58. Britain 1983 (London: HMSO, 1983), p. 112.

higher than the 37,000 held in 1974. Considerable prison overcrowding followed and came to a head in the late 1970s when the prison governors sent an open letter to the Home Secretary, arguing that 'Total breakdown is imminent in the prison service... The Home Office has produced no initiative'.⁵⁹ This was because the prison population became (and still is) larger than the certified normal accommodation - which has therefore resulted in cell-sharing.

Table 4
Highest Numbers of Inmates Sleeping Two or Three to a Cell

Year	Three in a cell	Two in a cell
1972	6,609	7,128
1974	4,122	10,024
1979	4,833	11,752
1980	5,847	11,940
1981	5,610	11,294
1982	4,377	12,374

Source: Report on the Work of the Prison Department, (London: HMSO, Cmnd. 9057, 1982)

Shortage of investment - Overcrowding and cell sharing are the by-product of a system influenced by political considerations and subject to political forces that allow capital investment to suffer and which reduce flexibility to change. Clearly, a system that permits this sort of overcrowding and needs a crisis before any action is taken, merits reform. In the foreseeable future, continually increasing expenditure is unlikely, and is hardly a solution in itself. Any realistic solution is likely to involve greater capitalization, or more effective use of manpower, wider uses of technological innovation, and new alternatives to imprisonment, perhaps based in turn on technological improvements.

Ultimately, new managerial ideas have to be introduced. This is unlikely to occur with the context of the present, politically-managed system, and some more radical solution is therefore attractive.

New methods of providing prisons

In the last decade, concern has grown in the United States over the cost to the taxpayer of imprisonment. 'Imprisoning a criminal cost the taxpayers a fortune, fails to rehabilitate, Reason, June 1978.

59. 27th October 1978. Reason, 21, 1984, p. 5.

ignores the victim, and frequently leads to improving the inmates' criminal skills, from contact with other inmates'.⁶⁰

The new solution has involved two main proposals: the use of independent firms to build, own, and operate prisons and detention centres; and competitive bidding amongst outside firms to provide real work for inmates.

Management. The idea of independently-managed prisons, operating under contract to the government, was constructively aired in the United States in 1978,⁶¹ when a plan was outlined for these new installations to take over some of the work done by state prisons. They would complement, not supplant them; and both would exist, in competition, side-by-side. The private prisons 'would incarcerate prisoners on contract from the state government, receiving a base annual rate per inmate with upward and downward adjustments depending on how well it protected inmates from violence, the quality of training and rehabilitation it provided, and its success in discouraging inmates from returning to crime upon release'.⁶²

The idea is being put into practice in a variety of locations. The pioneer company in private correction is Behavioural Systems Southwest of California, headed by Ted Niessen. Behavioural Systems is presently operating several minimum-security facilities for the US Immigration and Naturalization Service. It also has pre-release sections, as well as some minor contracts to hold short-term federal prisoners. Another of its activities is its joint operation of the juvenile detention facility in Kansas City with the local probation department.

The company seeks to expand into prison operation and in a study, categorically states that California's San Quentin should be bulldozed. By importing innovative prison industry programmes, Niessen asserts that he could house maximum-security prisoners in a medium-security prison. Violence begets violence, and creative non-bureaucratic training and rehabilitation programmes could ameliorate much prison violence.

Another dynamic entrant into private correction is the Correction Corporation of America, located in Nashville, Tennessee, headed by Tom Beasley. CCA currently operates a juvenile residential programme in Memphis, Tennessee, and the 350-bed minimum-security detention facility for the Immigration and Naturalization Service in Houston.⁶³ It is thirty per cent cheaper to run

60. Reason, May 1979, p. 11.

61. Richard L Mitchell, A New Idea: Private Enterprise Prisons, Los Angeles Times, February 7, 1978.

62. Reason, June 1978.

63. Daily Telegraph, May 21, 1984, p. 8.

than a comparable state-owned institution. And as its manager was quoted as saying, 'the company not only finances the construction and running costs of the complex, but it also assumes total responsibility for detention and supervision'.⁶⁴ It was recently awarded the contract to operate a 175-bed facility for the Immigration and Naturalization Service in Laredo, Texas, and also manages Hamilton County's, Tennessee, minimum-security 300-bed workhouse/penal farm, which includes operation of what is probably the nation's first private, adult correctional facility, housing inmates under multi-sentences.

Another significant development is the entry of Wackenhut, the nation's largest independent private security company, into the field. Wackenhut has submitted two proposals for the construction and operation of Immigration and Naturalization Service facilities. It is also working with several states in regard to the possible operation of adult, medium-security facilities with Wackenhut's being employed to finance, design, construct, and operate the facilities. But it looks as if a small independent firm, Buckingham Security Ltd, located in Louisburg, Pennsylvania, will be the first private firm to actually design, construct, and operate a minimum-security penitentiary for adult offenders, subject to the anticipated passage of enabling legislation in Pennsylvania. Buckingham, headed by Charles Fenton, a former warden at several of the nations largest penitentiaries, expects as many as seventeen states in the East to sign contracts to send protective custody inmates to the prison. A \$15 million prison to be constructed in North Sewickly Township in Pennsylvania, will handle protective custody for 'special inmates' only. The company already have letters of intent from a number of states for 1200 spaces while only 720 beds will be available when its Riverhaven prison opens its gates some time in the first half of 1986. The company plan a similar project in the West, probably in Idaho.

It is surprising that the idea of independently built and managed prisons has not had a wider audience in Britain nor gained acceptance. Both security firms and hotel operations are commonplace in the private sector: it may be an oversimplification but a prison, borstal, or detention centre involves little more than a combination of these two talents. We suggest that the innovative methods of the private sector have a very important role to play in the provision of prisons in Britain, and that the government should take urgent steps to initiate private sector involvement.

Employment. The second proposal involves how best to employ those in prison. One idea having the advantage of assisting in the rehabilitation of inmates involves replacing the work that prisoners are normally given, with more rewarding and responsible tasks. Again, it is an idea successfully introduced in the United States; going by the name of Free Venture, its basic

64. Ibid.

idea is that 'inmates ought to engage in productive labour, reimbursing the prison for their care, paying restitution for their victims, and leaving prison with developed work habits and skills'.⁶⁵

Much prison work today suffers from three faults: only nominal wages are paid; the work is usually unrelated to the marketplace and is more of a time-filler to keep inmates busy, rather than to be constructive; and criminals are given little or no opportunity to develop work habits or to manage money.

The Free Venture project involves actual profit-making ventures operating inside the prison walls. 'Among the businesses are a telephone reconditioning shop (subcontracting to Western Electric), a lawnmower and mowmobile components shop (Tord Co), a computer systems analysis and programming company (Control Data), and a food service company that provides the prison's food. Inmates work a regular forty-hour week, under normal industry supervision... Inmates are charged for room and board on a sliding scale, as their incomes increase. Their wages also go towards family support payments, restitution payments, plus state and federal taxes.'⁶⁶

New systems. There is a role for 'halfway houses' with limited freedom to operate alongside the prison system, not only as a stepping-stone to full liberty, allowing prisoners to acclimatize gradually, but also as an alternative form of punishment. Thus, the court may sentence a criminal to a sentence that is much like a suspended sentence in its effect, but which would preserve the option of imposing a sentence to another institution with much less liberty if a subsequent offence occurred. These installations are likely to be far cheaper to build and operate than conventional prisons, so their use might help to reduce the prison budget as well as being of greater benefit to a number of prisoners.

How well these ideas would work in Britain must be assessed. We therefore suggest that this idea be introduced into a number of prisons as an experiment to assess its viability and to overcome any working problems. There is little doubt that a British version of Free Venture could not only permit a criminal to truly 'pay his debt' to society, but could provide the basis for a new positive outlook by prison inmates. Even if such a new idea is not fully adopted, there may well be an opportunity for a better, more rewarding use of the pool of prison labour that would generate an income for the prison service and would foster better work attitudes among inmates. Savings could also come from private management, and psychological benefits to transitional prisoners could spring from the construction of completely new types of prison to replace the existing ageing stock.

65. Reason, May 1979, p. 11.

66. Reason, May 1979, pp. 11-12.

The arguments about contracting out management and using manpower more effectively also apply to all prisons, regardless of the security level, and to institutions used to punish young offenders. The main differences, such as levels of security, the amount of association permitted, types of discipline, etc., can easily be allowed for by the government issuing standards to the contracting prisons in the same way that local authorities set out standards with private refuse firms - in the contract conditions. It would require government (or independent) monitoring to ensure that agreed standards are kept to, but this would not really pose any great problem.

Being 'on probation' needs the convicted offender's consent. He is released on the condition that he behaves well and follows directions given by the court or by a probation officer. The probation officer by his assessment of the social background of the offender can advise the court upon the wisdom of putting the offender on probation. It is seen as being applied to those who would not threaten the safety of the security of the rest of society, while at the same time, saving the taxpayer the cost of funding the incarceration of another criminal.

Probation 'is designed to rehabilitate an offender, who continues to live an ordinary life with supervision, advice, and assistance of a probation officer'.⁶⁷

The duties of the service

Its main functions have been outlined as:⁶⁸

- (a) maintaining contact with a probationer, and the giving of advice to overcome general difficulties, e.g., employment, housing etc;
- (b) reports;
- (c) the supervision of juvenile offenders aged 13 to 17;
- (d) supervision of offenders receiving suspended sentences;
- (e) after-care;
- (f) prison welfare;
- (g) marriage guidance;
- (h) supervision of children requiring care and protection; and
- (i) divorce work involving access to, or custody of, children.

Is probation effective?

This is not as easy to answer as it may seem. Maurice North⁶⁹

67. Britain 1983 (London: HMSO, 1983), p. 111.

68. Maurice North, 'Probation: Cheap at the Price?', in Criminal Welfare on Trial (London: Social Affairs Unit, 1951), pp. 71-2.

69. Ibid.

10. PROBATION AND AFTER-CARE SERVICES

Probation has its roots in the English common law tradition that the courts had the power to suspend sentences temporarily, but was first legally established in nineteenth-century America. The 1907 Probation of Offenders Act in Britain laid down the **maximum** period of probation as being three years (and is still in force); a **minimum** of one year in Scotland or six months in England is also now set down in the 1948 Criminal Justice Act. The only significant amendment to this legislation was a 1971 reform replacing probation orders for under-17s with supervision orders.

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69. Ibid.

explains why:

'How effective is probation? It is extremely difficult to know. In the first place, it is not certain what probation is supposed to do. It might have considerable benefits to the 'client' even though he or she is reconvicted. If he or she is not reconvicted there is no way of knowing whether this is because of probation or not.'

Perhaps the most obvious way of evaluating the effectiveness of probation is how it contributes to reducing crime. But this requires us to assess what it does to reduce the levels of reconviction, how the rest of society sees the inconvenience and costs that probation poses to anyone committing a crime, and how efficiently it fulfills these two aims.

Evaluating how much the probation system can be credited with preventing crime is extremely difficult: it is very hard to isolate its effects. For one-off offenders it is doubtful whether it contributes anything; in fact, it would not be unfair to hypothesize that it has little deterrent effect whatsoever. The person contemplating a particular crime 'only this once' may believe that even if caught, he has a very good chance of being let off with a period of probation.

Furthermore, in 1976 the Home Office 'Intensive Matched Probation and After-Care Treatment' survey (otherwise called IMPACT), concluded that there was no noticeable difference in the reconviction rate of those under probationary supervision and other offenders. Setting aside the limitations of the sample, the clear conclusion was that social workers were not able, as commonly believed, to reform offenders. If so, it suggests the need for a serious re-evaluation of the continued existence of the idea.

In financial terms, there can be no doubt that probation has led to a lower level of expenditure on an expensive prison system. Even though the system grew quite considerably during the 1970s, with 3,233 probation officers in 1969 rising to 5,304 by 1979, the cost, where it can be calculated, was not considerable. Nevertheless, if probation actually is not achieving anything, then the costs, however small, are unjustified.

Even if investigation did reveal that after-care services should continue, there is no reason not to shop around for the least-cost option. It is quite likely that the probation system is much like the rest of the government sector, and would benefit from a measure of competition. Private charities already operate schemes of a similar nature to community work and assistance projects, and by looking around and shifting funding towards new alternatives, some of the advantages of competition can be given to the system.

Proposals

Probation does little to deter, or prevent the reconviction of criminals. At best it saves money, by removing the burden of unnecessary imprisonment from the taxpayer. But it also can be accused of shifting costs from the general taxpayer (who funds the prison services) to the individual citizen who may have to pay for any increase in 'one-off crime', or even re-occurring crime.

We suggest that probation be discouraged with a view to its replacement with alternatives. To this end we propose that a series of experiments should be conducted where a variety of punishments, perhaps the technological developments already mentioned, would be tested. Those that were successful, namely those that had some effect on either the conviction rate (or the reconviction rate) could be implemented nationally.

By moving away from just a probationary period, where a convict agrees to be good, and towards greater limitation on his freedom, or increased inconvenience, more effective forms of inexpensive punishment could be discovered. It might also allow a reduction in the already overcrowded prison population, while at the same time maintaining sufficient deterrent to prevent any increase in crime.

The Children and Young Persons Act

If a particular event is to be regarded as fundamentally shaping juvenile welfare, then it would be the passage of the Children and Young Persons Act 1969. The Act, and its Scottish counterpart, the Social Work (Scotland) Act, sought to shift the manner in which crime was dealt with; away from 'crude' concepts of punitive disposals based on deterring individuals, and towards more 'caring' and 'understanding' methods based on the treatment of the offender. Northern Ireland, which never had a Children and Young Persons Act, has separated the criminal jurisdiction from the expressly welfare side of the juvenile justice business. In general, this has produced an alternative operating system which is said to be working effectively and well received by the majority of those involved.

The 1969 Act allowed an under-14 to be dealt with in care proceedings. This meant that, a youth could not be prosecuted, since an extremely lengthy and costly process had to be followed. Once a conviction was obtained, the philosophy took over and the only disposals were care or supervision orders.

In Scotland, the only disposal is to place the child on social work supervision, and the grounds for this have to be proven (although a challenge to the grounds is possible).

11. WELFARE ASPECTS

Juvenile and child welfare is in a troubled state. Fashionable ideas suggesting the treatment of offenders based on the individual's particular circumstances, such as his background and family rather than the crime committed) has led to much confusion and feelings of injustice. On the other hand, the system of care jurisdiction has failed to reach the necessary balance between protecting children and respecting the privacy of the home. Social workers are caught between complaints when they fail to intervene to save a child, and more complaints of how they meddled in areas that 'did not concern them'.

At the very heart of these problems are the juvenile courts, which handle welfare cases, including those where children are alleged to be abused and mistreated, and juvenile criminal cases. The resulting confusion between a welfare role and what is basically a punishment role has not helped its successful operation.

The situation in the juvenile courts and the confusion over family legal matters (which are spread over many other courts and areas of the legal institutions) indicates the urgent need for a court devoted solely to family matters. A closer examination of the legal and welfare aspects of these areas of the law will explain why this is so important.

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The 1969 Act allowed an under-14 to be dealt with only through care proceedings. This meant that, a youth would rarely be prosecuted, since an extremely lengthy and complicated procedure had to be followed. Once a conviction was assured, the inherent philosophy took over and the only disposals available were either care or supervision orders.

In Scotland, the only disposal is to place the youth under social work supervision, and the grounds for referral do not have to be proven (although a challenge to this from the parents can

go to the Sheriff for a decision). But the systems are generally similar.

The introduction of these systems seriously reduced the possibility for punishing juvenile offenders in the normal way, since most would be treated by social workers (or probation officers). The Leeds Truancy Study⁷⁰ involved the setting up of a comparison between those who were, and those who were not 'treated' after committing a crime - in this example the initial crime was truancy - and it was found that it did not seem to have any appreciable effect on either school attendance or the truants' petty criminal activity.

Another experiment illustrated how more conventional methods can prove to be more successful. The Leeds juvenile bench⁷¹ decided to carry out an experiment in what can be called 'inconvenience punishment'. Not being satisfied with the treatment of school truants by social workers, the magistrates 'started to deal with a proportion of the truancy cases by repeated adjournments so that the offending child had to return to court, usually with his parents, at frequent intervals'.⁷² Those who persisted in playing truant were also brought back more frequently. It was found that this inconvenience prompted parental pressure at home, such that 69% of the group improved on their school attendance, and committed only one-fifth of the petty crimes of a control group.

These results suggest that the good intentions of the 1969 Act do not work in practice and should be the subject of serious review. Alternative methods need to be found to deal with offenders - including, if necessary, a form of 'inconvenience punishment'. The prime intention behind an investigation should be to examine the possibilities for punishing young offenders quickly and effectively, while at the same time preventing younger and one-off offenders getting caught up in the system, and being tarnished by the influence of persistent criminals.

The juvenile court

For children under 14 and for young persons between 14 and 17, there exists the juvenile court. It is concerned also with criminal action and care proceedings. The procedure follows that of other courts, the main difference being that considerable emphasis is placed on using clear and easily understood language, and providing sufficient assistance to guarantee that whenever possible, the child knows what it is doing and what it is about

70. I Berg, British Journal of Criminology, 18 May, 1978.

71. For greater detail refer to Colin Brewer, Criminal Welfare on Trial.

72. Ibid.

to do. Care order. This involves proceedings between the local authority which is effectively the applicant, and the child who

'As regards the way in which the court treats young offenders, the Children and Young Persons Act, 1969, is relevant. Section 4 prohibits criminal proceedings for offences committed by children under 14. Section 5 restricts criminal proceedings for offences committed by young persons under 17, and Section 7 raises the minimum age qualification for a Borstal sentence from 15 to 17, and plans the phasing out of detention centres and attendance centres. However, differences between the political parties in Parliament have resulted in these sections of the Act remaining unimplemented'.⁷³ Recent changes have meant that a step away from treatment and towards punishment and or reparation by young offenders; but there is still much room for development.

Care proceedings - the court can dispose of a child in 'his own best interests' based on a number of factors, but heavily influenced by the Social Enquiry Report (SER). During the 28-day notice period the local authority could attempt to

A Social Enquiry Report is compiled by social workers who outline brief histories of parents and relations, the accommodation lived in by the family, medical record, school and employment record, an analysis of present and expected future behaviour, plus the circumstances surrounding the present conviction. Proceedings. This involves the authority attempting to make the child a ward of the court, which effectively means

The most worrying aspect of the system is that the vagueness of the language leaves much of the decision-making, not to the law as represented by the courts, but to the discretion of social workers who alone decide when an offender has 'worked through his problems', 'matured' or 'self-actualized'. It is this lack of accuracy and objective accountability of those making the decisions that requires examination of care jurisdiction.

Amidst the confusion and intricacy of care law there are five main types of care order, to which attention should be drawn and are spread over three different courts:

The place of safety order. These are primarily for emergency use to help children who it is believed are in immediate danger, and is obtained by applying to a magistrate who rarely refuse a request. Two out of every three do not lead to a full care order, so it would not be unfair to say that they are overused, but they allow do a child to be removed away from its parents for 28 days without any appeal.

The interim care order. These are allowed for up to 28 days, but do have a means whereby they can be challenged - by applicant to a Judge in Chambers in the Queen's Bench Division. They are usually used as a stop-gap while awaiting for a full care order.

73. K Smith and D J Keenan, English Law (London: Pitman Publishing Ltd, 1979), p. 20.

The care order. This involves proceedings between the local authority which is effectively the applicant, and the child who is the respondent. 'Unless the order is varied, it remains in force until the age of 18, or, if he [the child] has already reached the age of 16 when it is made, the age of 19'.⁷⁴

Concern has been aroused because parents do not have the right to receive in advance any details of the case they are about to fight, and the child's representatives can concede the case to the local authority, in total disregard of the parents' views. Parental appeal is also restricted, and in certain cases is not permitted. The parents are sometimes excluded from the case at every major stage.

Assumption of parental rights. The 1975 Children Act changed the system of returning a child back to its parents, from an automatic return upon request after six months to giving notice after the child had been in care for at least six months. During the 28-day notice period the local authority could attempt to assume parental rights through the council meeting. Parents do, however, have a right of appeal to the Family Division of the High Court to fight the juvenile court's confirmation of the council's resolution.

Wardship proceedings. This involves the Authority attempting to make the child a ward of the court, which effectively means that the parental rights and powers vested in the court are transferred to either an individual or an authority nominated by the court as its delegate. Unusually, the method is more along the lines of an enquiry than a court case, since the judge takes a far more active role. Even though the child's parents are a party to the case it is surprising to discover that they have no right of appeal in wardship proceedings.

Balance in the system

From this brief appraisal the unfair balance of the system is clear. At the very least, a re-evaluation of the fairness of the care order system is needed, with a shift that is not away from children's interests but towards legality and fairness.

Care orders are there to protect young people from themselves and from their parents or guardians. Such an aim is the correct one but there is evidence to suggest that the balance has tipped too far against the parents. The law appears not to accept the commonly held standards of morality about the treatment of children - one that permits a smack to maintain discipline, but recognizes that there is a divide between that and brutality to a baby (though some people would argue that smacking and battering are all forms of impermissible acts of violence).

74. P M Bromley, Family Law (London: Butterworths, 1981) p. 393.

When 'children or young persons are found guilty of a criminal offence in a juvenile court the magistrates may still make a care order, even though the proceedings are not care proceedings. However, there are other possibilities open to them'.⁷⁵ Usually, there are fines available, but supervision orders and borstal treatment are alternatives that the magistrate can use.

Supervision orders have generally replaced probation orders and involve the child or young person still living at home but 'under the supervision of the local authority social services department, though in the case of persons of 14 years and over, the Probation Service carries out the supervision'.⁷⁶ Borstal treatment is in the main intended for young offenders who are over 17, but can be used to punish younger people with bad records.

Towards reform

The primary reform we suggest is the splitting up of the Juvenile Court along the lines of its two main functions: the first would require reforming the court to become a criminal court for juveniles, so that its sole task would be the punishing of young offenders; the second would require the setting up of a new 'family' court whose remit would involve taking over all the care proceedings which are presently dealt with in the juvenile court, and all other related family matters that appear to be spread across other courts - and would include areas such as divorce, wardship, family provision, adoption, guardianship, custodianship, miscellaneous domestic and matrimonial proceedings, and maintenance orders.

Along similar lines to those laid out by the Finer Committee, all intervention by local authorities could come under the jurisdiction of a single court whose sole responsibility would be the handling of family matters. The aim would be to preserve child welfare, but not, as at present, by weakening or shortcutting the normal safeguards of the judicial process. Furthermore, much of the existing notions of 'welfare' are in direct conflict with those of justice, and while this may have carried some benefits, its risks are great.

By creating a specifically judicial institution to deal with family matters while at the same time respecting the due process of the law, this area of criminal welfare could be vastly improved, not only in the way it operates, but also in the way it was seen to operate by those using it, i.e., the families being dealt with.

The best system would be a two tier one: the first would be a

75. English Law, op. cit., p. 43.

76. Ibid.

local court presided over by a County Court judge and the second would be a Family Division of the High Court, functioning as the link to the Court of Appeal and the House of Lords. As now, all cases would start at the local level (which would be drawn from the County Court judges and lawyers specializing in particular branches of family law) with the possibility of problem cases and appeals being referred to the High Court. The whole emphasis would change, with the individual being the 'subject of rights' and not the 'object of assistance'. This, in turn, would have implications for the way the system operated. There would be a presumption in favour of parental autonomy, with exceptions where there was specific harm or neglect, before there was any disruption or severance of parental ties.

The cost of establishing a separate court would have to be established. However, it may be possible to make savings elsewhere by shifting the burden of cases.

The Community Service Order (CSO) mechanism might be more effective if it were no longer run by the 'caring' profession, since a role conflict can be said to exist, preventing them operating effectively. Because of their aim of caring for those on a service order, there is a conflict in monitoring those that do not turn up to complete their tasks. This can quite easily be removed by placing the monitoring of those on CSOs to another group, while still retaining the option of social work involvement, on a voluntary basis, if the criminal requests it.

The emergency removal of a child from his home would be on the basis of a warrant granted by the Family Court judge. The applicant should be required to make out a reasonable case for action, presenting evidence where necessary, which could be challenged by other relevant parties. The significant difference between an emergency order and the present PSO would be that anyone would be permitted to apply for one, whether they were a social worker, policeman, or even just a health visitor or neighbour. The emergency order would only last for, say, a seven-day period, whereupon it would be reviewed. This would have the advantage of opening up a part of the British legal system that has been quite inaccessible to the layman.

In cases where children have been in voluntary care for six months, the case would be referred to a court for a hearing on their future, so that all non-judicial resolutions for assuming parental rights would be ended.

All local authority 'at risk' registers must be opened to parents, who at the moment they have no right to know what is being said about them and their children. The decision to place a child on the register is made at a case conference - but it is estimated that up to nine out of ten parents do not know that this has occurred. Parents at present cannot challenge their being placed on a list open to inspection by doctors, police and teachers, even if the reasons can relate only to emotional and medical factors, which may be unrelated to actual neglect or

abuse.

Linked with this point, the law society went as far as arguing that the decision about the placement of children in care should be taken from secret case conferences, and for the 28-day PSO to be replaced in favour of a 48-hour order. Then it could be followed by a complete review in the juvenile court (family court).

An acceptable solution must embody the principle that law should concern itself only with the relevant aspect of the individual, namely his criminal acts: otherwise, there will be a continuation and growth in the sense of injustice felt by offenders and non-offenders alike. The two juvenile Acts are examples of the tendencies of rehabilitative systems to erode legal rights and spawn injustices by segregating a large measure of society's crimes into the realm of impunity. Intrinsic to our proposals is the idea that all discretionary powers of local authorities over the nature of care orders would be subject to some form of judicial overview. All this change must be seen for what it really is: a shift away from executive discretion towards legality, and not a shift from children's to parents' interests.