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A CONTEMPORARY APPRAISAL

The Hon. Mr. Justice M.D. Kirby
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BARRY, LAW REFORM AND SENTENCING

This year marks the tenth anniversary of the death of John Vincent William Barry. Ten years is altogether too short a time to begin a proper assessment of the contribution of such a man to legal scholarship, criminology, history and other disciplines. I set myself a comparatively modest task by confining my attention to Barry's views on sentencing and criminal punishment. The Australian Law Reform Commission has been assigned the task of reviewing Commonwealth law relating to the punishment of Federal and Territory offenders in Australia. The reference is under the general direction of Professor Duncan Chappell, Commissioner. Work on the reference is proceeding and an interim report will be with the Attorney-General early in 1980. Already, a discussion paper has been issued, outlining tentative views on certain matters of criminal punishment.[1] In addition to this published document a series of in-house research papers has been prepared dealing with such matters as the uneven state of the Commonwealth Statute Book relating to penalties provided for by law,[2] minimum standards for the treatment of Federal offenders,[3] alternatives to imprisonment,[4] community work

orders,[5] jurisdictional problems of sentencing in a Federal country[6] and Federal parole.[7] Other subjects under specific study pursuant to the reference from the Attorney-General include the punishment of white collar and mentally ill offenders, uniformity in the disposition of Federal offenders, guidance for the sentencing discretion, the sentencing of Aboriginal Australians and deportation as a punishment.

In addition to all these projects, which will lead on to the Commission's report and recommendations for reform, a novel enterprise has been attempted. Jointly with the Law Foundation of New South Wales a survey has been addressed to every judge and magistrate involved in sentencing in Australia, 506 in all, seeking facts and opinions about sentencing, punishment and its reform. I am glad to say that more than 75% of the judicial officers of our country have returned the survey to the Commission. Most of them added thoughtful and forward looking comments designed to help us to improve this most painful and unrewarding of judicial tasks. Only in Victoria has the judicial response been poor, namely 9% of the County Court Judges and 35% of the Judges of the Supreme Court. The generally high response from busy men and women, in an exercise that would require an hour or more of their time, indicates beyond doubt the concern there is in judicial quarters in Australia about the present defects in sentencing. It also signals, I believe, the general acceptance amongst judicial officers, of a continuing responsibility for the state of the law they administer. The good judge, the good lawyer "strives for the reform of 'defective' law as part of his professionalism".[8] Gone are the days when judicial officers can divorce themselves from law reform and blindly administer, without demure or complaint, defective or unjust laws. I have no doubt that Barry would have applauded this change for he was, before all else, a forward looking lawyer with a deep concern for the state of the law and for its role in guarding and improving Australian society. He was moreover an early proponent of the utility of empirical research as the safe basis for lasting reform.

Within a day of receiving a reference on sentencing from the Commonwealth Attorney-General, a State Chief Justice, himself involved in the daily consideration of sentencing, took the trouble to contact me and to urge upon me the unique value of Barry's posthumously published lectures The Courts and Criminal Punishments.[9] This advice took me back to the pages of this thin, but remarkably perceptive work. Reading its pages, I concluded that Barry, had in truth, much to say to the reformer of 1979 in the lectures he prepared for delivery in New Zealand in 1968. These lectures were not the only pieces Barry wrote on sentencing and criminal punishments. Collected in the Victorian Reports are many telling judgments over the 22 years he sat on the Supreme Court of Victoria. In the Australian Law Journal and elsewhere he published commentaries and articles. He was an indefatigable reader. He repaid his reading by contributing articles, speeches, addresses, book reviews and reports to the treasury of man's scholarship. He wrote two major histories. For his study of Alexander Maconochie in 1958, he was awarded the degree of Doctor of Laws of this University.[10] So famous did this study of an early pioneer of penal reform become, and so closely associated with Barry's own attitudes and temperament, that it is not surprising that delegates to international criminology conferences took to referring to him as "Sir John Maconochie". Norval Morris tells us that the result was his "mingled pleasure and annoyance".[11]

Pleasure and annoyance, vanity and scepticism, pomposity on occasion and unreasonable where his amour-propre was concerned, but kind,[12] Barry emerges from the comments both written and oral about him, as an enigmatic man of contradictions. Let me tarry for a moment to sketch in his career, for a new generation of lawyers has come who may not know the tale of his life.

JOHN BARRY - THE MAN

Barry was born in June 1903 in Albury, New South Wales, the son of a painter and decorator of Irish descent. He won a bursary from the convent school and in 1921 came to Melbourne. He qualified as a lawyer through the articled clerks course. In 1926 he was admitted to the Bar and quickly established an extensive practice, principally before criminal and civil juries, in the daily practice of the Common Law. In the 1930s he contributed several articles, most of them dealing with the criminal law, to the Australian Law Journal. His second was titled "Punishments of the Criminal Law in Former Times".[13] It was published in 1934. During this time he also became an intimate of H.V. Evatt, then a Justice of the High Court of Australia.

In 1942 Barry's practice took him to appointment as King's Counsel and later in the year he was counsel assisting Mr. Justice Lowe in the Royal Commission inquiring into the Japanese air raid on Darwin. In 1943, he stood as the Labor Party candidate for the Federal seat of Balaclava. Though he polled well, he was not successful. He never again ventured onto the hustings.

In 1944 Barry inquired as Commissioner into the conflict of civil and military power in Papua New Guinea. It was at this time that he received many briefs in the High Court and before Royal Commissions generally in the Commonwealth's interest. Many expected that Barry would be appointed to the High Court at the time Sir William Webb received his commission. He was not appointed to the High Court. Sir Zelman Cowen has expressed the view that had he gone to the High Court, he would have -

> made a distinctive contribution to that Bench. He would have brought to it a capacity and a taste for legal learning and more besides - a prodigious breath of reading, an awareness of the social context within which the law operates, and a broad though disciplined approach to the very important constitutional tasks of the High Court.[14]

In January 1947 Barry was appointed to the Supreme Court of Victoria. He was a member of that Court until his death on 8 November 1969. In this time, not only did he read voraciously. He published the book on Maconochie and another on John Price. He published many articles and reviews, delivered many speeches on legal topics and earned by thesis, in turn, the Bachelor's and Doctor's Degree in Law. He also developed a keen interest in criminology, then even less fashionable in some quarters than it is today. He was Foundation Chairman of the Department of Criminology within this University from 1951. He is undoubtedly one of the "Founding Fathers" of the study of criminology in Australia. He was leader of the Australian delegations to the first and second United Nations Congresses for the Prevention of Crime and Treatment of Offenders held in Geneva in 1955 and London in 1960. In 1957 he was appointed Chairman of the Victoria Parole Board a post he held until 1969. To permit him to develop the new concept of parole and to establish it on a sound footing, after 1957 he confined his judicial activities very largely to matrimonial causes. His conduct of his court has been described to me by one judge as "murderous" at least so far as counsel were concerned. He was deeply absorbed in the success of the parole experiment and sometimes his interest in his curial duties appears to have waned. He took part as a member of the Chief Justice's Law Reform Committee and wrote several of the reports of that Committee. Although radical in many things, including politics, he surprised some supporters when in 1960 he accepted the traditional knighthood. In short, he was a man of many parts, some of them warring with others -

> (H)e had a taste for panoply and ceremony and a personal conservatism that took pleasure in established forms of community recognition. The truth is that he was a human, domestic, kindly, orderly, and thoughtful sort of man whose radical, questioning, sceptical utterance, and outlook, sat not too uneasily with a personal conservatism.[15]

One judge recollecting him for me said that his greatest significance was his known radicalism. After he arrived on the Supreme Court, there were no longer unquestioned assumptions. The Court of Criminal Appeal, especially, became more sensitive to the predicament and occasional tragedy of the accused. Courts and judges, in Australia most of all, tend to be cautious, traditional, conservative. Barry was always known as an intellectual liberal and though, in accordance with the firm traditions of our Bench, he severed his connection with party politics after his appointment he retained personal friendships with many who were associated with the Labor side of politics.

His book The Courts and Criminal Punishments contains lectures which he was to have delivered in New Zealand in 1968 before his mortal illness prevented him from delivering them. They revealed many insights into his personality and character. In the first of them, he describes himself as a "pragmatic idealist".[16] His attraction to what was pragmatic and what would work in operation can be felt on every page.[17] The lectures reveal him as one fully aware of the practical purposes and practical limitations of criminal law and of its sanctions.[18]

> The assumptions on which the courts act in imposing punishments owe more to practical considerations than to philosophical speculations.[19]

It should not be thought that he was a man whose intellectual horizons were limited to the criminal law and penology. In many of his essays and lectures, he displayed a most far-sighted perception of legal problems that are still with us as we approach the 1980s. One of the papers submitted for his LL.B. degree in 1963 was devoted to the protection of privacy in Australia, a matter now committed to the Australian Law Reform Commission. The paper concluded with this question -

> Can Australia .... learn in time from the frightening story of American experience and devise effective measures to preserve individual privacy from irresponsible intrusion?[20]

I like to think that he would have appreciated and applauded the recent report of the Law Reform Commission in which proposals are made for new remedies, enforceable in the courts, to guard individual privacy.[21] He had a deep concern about the law of evidence the latest task given to the Commission. In R v. Lee[22] he reflected on the balance that must be struck in excluding from the trial, confessional statements, however probative, where these have been unfairly or wrongfully obtained by police. He identified clearly the social balance at stake between the necessity of apprehending convicting and punishing offenders, on the one hand, and the necessity of insuring that the powers of criminal investigation should not be abused, on the other. This balance rarely so clearly stated has more recently been identified in the report of the Law Reform Commission on Criminal Investigation,[23] a consequent Bill of the Commonwealth Parliament,[24] and decisions of the High Court[25] and Privy Council.[26]

Barry's forward looking concern with the environment and its legal protection was evidenced many years before debate about this topic took the public's imagination, in his occasional address when awarded the LL.D. in March 1969.[27] Years before the Woodhouse report and no fault legislation he urged the abandonment of the common law action for damages for negligence and its replacement by social insurance methods of compensation not dependent upon the chance proof of fleeting momentary fault.[28]

Outside the law, he read widely, and he called on this reading often in his lectures and articles. At the close of The Courts and Criminal Punishments he takes his stand for the lawyer as civilized man. "It often happens" he asserts "that the wisest utterances about criminological matters come from thinkers in other disciplines". With that he closes his lectures with an apt and telling passage from the historian Lecky's Democracy and Liberty.

He lifted the sights of the Australian judiciary beyond technical craftmanship. His importance in the history of family law reform[29] and criminology will endure. It is only of his contributions to criminology and the punishment of offenders that I can speak. I propose to take a number of themes which were important to Sir John Barry in his lifetime. I will seek to demonstrate, by reference to what he then wrote and to more recent work (including that of the Law Reform Commission) how prescient and sensible were his views and how useful they remain, ten years on.

THE DEATH PENALTY

It is said that as an articled clerk Barry briefed Eugene Gorman as counsel for one Angus Murray accused of murder. He saw his client convicted. Later Murray was hanged, although he had not fired the fatal shot. This case left a indelible impression on the young Barry and fixed in his mind a passionate opposition to the taking of life as punishment.

It is as well to remember how far we have come in the business of punishment in a short time. Such recollection is a fitting backdrop to the study of criminal punishment today. Compared with earlier times, the variety of punishment has been reduced, awful imagination giving way to humanity. It was not until 1814 that disembowelling and burning were abolished in the English lexicon of punishment.[30] The last beheading took place in 1820. Not until 1870 was drawing on a hurdle and quartering abolished. Women, you will remember, were spared disembowellment for treason. Until 1814 they were liable to be burned instead. The bodies of pirates generally hung in chains on the banks of rivers until the law was altered in 1834. In 1811 Lord Eldon opposed "a dangerous Bill to take away the punishment of death for the offence of stealing in a dwelling house to the value of 40 shillings".[31] The Bill was, of course, thrown out of the House of Lords. Until 1824 persons who committed suicide were generally buried at the cross roads with a stake driven through the body. As we all know in

Australia, transportation was not abolished until 1857. The pillory was still being used in 1812 when the publisher of Paine's Age of Reason was punished in this way. Lord Thurlow said, when proposals were made to abolish it, that "the pillory was the restraint on licentiousness provided by the wisdom of past ages".32 The last recorded use of the ducking stool was in 1809. As late as 1817 a woman convicted of being a common "scold" was wheeled around a town in the ducking stool but could not be ducked, as the water in the river was too low. Whipping of females was not abolished until 1820. The law of some States of Australia still permits corporal punishment, although it has not been carried out for several years.

Public executions were not abolished in murder cases until 1868. They remained in other capital cases. The crowds were often so great that people were not infrequently crushed to death during the spectacle. Dickens in letters to the Times described the awful scenes which occurred of profanity, indecency and brutality. Yet it is less than a century since such public spectacles were terminated altogether.

It is as well to remind ourselves of the brutal punishments of the recent past when considering the proper limits of criminal punishments today. In the eye of history a century is nothing. Before his appointment as a judge, and even whilst a member of the court, Barry was a nagging, eloquent opponent of the death penalty.

> The advance of human compassion between the reign of Henry VIII when, if Holinshed is to be believed 72,000 or an average of 2,000 a year, were hanged, and the reign of Elizabeth II when society is satisfied with a monthly victim, or less, has been very great. In a little over a century the ghastly business of killing by the State has become the exception rather than the rule. This development has been due to many factors. Not the least of them has been the constant agitation by sensitive human beings who have subscribed to the belief that cruel punishments debase the society that uses them.33

Revealingly, Barry called in aid not only the opinions of sensitive men but empirical data such as the studies of Professor Albert Morris of Boston University who investigated over 2,700 murders in 1950.[34] He urged, writing in 1958, that the Australian community provided "an ideal field for research into the factors that give rise to homicide ... A sociological investigation, competently organised and conducted, should provide facts which may illuminate many dark places, both in regard to aberrant human behaviour and to firmly cherished misconceptions about criminal punishment".[35] What a fresh call to empirical research is contained in that suggestion. In 1958, coming from such a quarter, it must have appeared startling to some. In 1979 the call to empiricism in law reform still offends those who cling to the 'hunch' and guesswork as the proper basis of legal renewal.

The death penalty has now been abolished in the law of all States of Australia save Western Australia.[36] No execution has been carried out in this country since Ronald Ryan was hanged in 1967 in Pentridge Prison. Yet penal reformers do not always carry public opinion with them. Some informed writers[37] and the general lay community still ask the question whether there is not a justification in the case of some crimes for a return to capital punishment. A survey recently conducted by the Age newspaper for the Law Reform Commission disclosed a persisting public opinion in Australia in favour of the penalty of death.

TABLE 1

Australian Public Opinion on the Death Penalty[38]

Murder or killing	Total (2000) %	Male (998) %	Female (1002) %	Aged 18-20 (95) %	Aged 60 and over (374) %
Killing in the course of an act of terrorism	63	69	57	55	66

Killing a police or prison officer	49	55	44	36	62
Killing in a robbery or hold-up	48	53	42	38	56
Killing as a result of a domestic dispute	17	20	14	19	19
Killing in the course of a sexual assault	58	61	56	56	62
Killing a person dying from an incurable illness	12	13	11	5	16
In no circumstances	24	21	27	30	20
Don't know	3	2	4		3

Another opinion sampling a few weeks later disclosed the same result. Seventy percent of Australians favoured the death penalty in certain circumstances. Only 25% disagreed, whatever the case. The results may be compared with 57% favouring the death penalty for wilful murder in December 1975.39 A recent resolution of the Australian Police Federation is another sign. The public concern about reported violence, terrorism and perceived increases in the incidence of crime may explain this hardening of attitude.

In England the issue was recently committed to a free vote of the House of Commons, which by a large majority rejected a return to hanging. The debate continues in many countries including our own. It is significant not only for its intrinsic interest and for the way in which it fixes the confines of retribution to proper limits.40 It also raises the issue of the extent to which law reformers and law makers should, in the matter of criminal punishment, reflect transient or even stable community opinions or should "lead from the front .... to a markedly more rational level".41

In this debate, Barry evidenced an unswerving conviction. It was that hanging, flogging and the other criminal punishments of the past brutalise society. They were also ineffective. But the real reason they were to be opposed was that they denied humanity and thereby denied civilized society itself.[42] In the Commonwealth's sphere the death penalty was abolished as the first legislation of the Whitlam administration.[43] Despite public opinion, I cannot envisage the restoration of this punishment in Australia. There is a long tradition of abolition of capital punishment in Australia. We have executed fewer people in this country than most other English speaking countries. The death penalty was abolished in Queensland in 1922 and gradually thereafter in other States despite public support for it. This raises the question of the proper function of public opinion. If it is not to be obeyed here, is it ever relevant and, if so, according to what principle?

PUBLIC OPINION AND PUNISHMENT

Barry, as a realist, recognised the impact of public opinion on the sentencing process. "When it comes to the imposition of criminal punishments", he declared "judges are shaped by the spirit of their times, and are responsive to the outlook of the community to which they belong".[44] He cites decisions of the Australian courts in which favourable reference is made to the need for individual sentences, within the broad discretions reposed in judges, to "accord with the general moral sense of the community"[45] and to reflect "the view of the average right minded citizen".[46] Whilst calling for more scientific research to abate the illogicality and incoherence of sentencing[47] Barry repeatedly reminds us that punishment and sentencing can not yet be looked on as a science.[48] For all that, Barry clearly favoured the least retributive form of punishment appropriate to the case. He asserted that this was acceptable in our "more permissive and humane" times.[49] He cited with approval Churchill's aphorism that "the mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing

tests of the civilization of any country".[50] He condemned the repressive, pointless, degrading punishments then still fresh in human memory.[51]

The debate about the extent to which law makers and those who apply the law should reflect community opinion goes on today. Various views are asserted. Lord Denning contends that "the punishment inflicted for major crimes should adequately reflect the revulsion felt by the great majority of citizens for them".[52] Norval Morris contends that community support for severe punishments is based on widespread public ignorance.

> Most prisons have walls which serve both to keep the prisoners in and the public out. There is widespread public ignorance of prison life. This is true also of probation and parole ...[53]

Some commentators are sceptical that public opinion is as harshly punitive as it appears in the cold brevity of an opinion poll. Some consider it more relevant to distinguish the opinion of the "general public" from that of the "attentive public" or the "informed public", the latter two being a small minority of the former. In relation to criminal and penal law reform, opinion may be based on fear, sometimes fuelled by sensational journalism and ignorance born of the secrecy in which most of society's punishments are inflicted.[54]

Other recent writers on this subject are more blunt. M.L. Friedland, Dean of Law at Toronto, asserts that public opinion is transient and shifting, responding to the particular well publicised case, often mobilized by pressure groups.[55] Friedland points to the way in which pressure, more often against than for change, can be successfully exerted on politicians in key seats.[56] We have seen some of this in Australia and will doubtless see more.

Mr. Justice MacKenna has recently said that the general public does not favour more lenient sentencing. "Most penal reforms", he declared, "are made against the wishes of the people".[57] MacKenna calls for reform through the "opinion of the rational minority, provided it is represented strongly enough in Parliament".[58] To what extent is a law reform commission entitled to ignore the punitive majority for a so-called "rational" minority? In the recent discussion paper, we addressed this issue. In doing so we took comfort from a recent report of a British Parliamentary Committee which stated its position thus

> The organisation and use of the punishments of the criminal justice system must be such as to maintain public confidence. When we speak of the maintenance of public confidence we are not suggesting that those responsible for policy administration in the criminal justice system should simply follow swings in public sentiment - that would be a negation of responsible leadership and a dangerous and undemocratic course to follow. It is up to the leaders of public opinion to inform, educate and persuade the community.[59]

MacKenna is probably right. Most of the reforms which we now accept in the litany of cruel punishments were achieved against public and often "expert" opinion. The proper role of a law reform commission then can be to educate and bring the competing pressures out into the open.[60] Most people assume that severe punishments deter crime. But this view is quite unsupported by such evidence as is available. In our discussion paper we expressed it this way.

> The history of criminal punishment in the Eighteenth and Nineteenth centuries is a long record of deterrent and retributive principles in practice. But crime has not diminished; on the contrary it continued to increase. Evaluative studies which have been carried out in this century do not provide any support for the idea that a return to the penological principles and practice of the past would provide more effective protection for the public.[61]

The recent vote in the House of Commons demonstrates this truth: that in the long march of civilization towards the amelioration of brutal punishments, societies rarely go back. Reform once achieved, even against public opinion of the time is rarely undone. It is more frequent that former opponents come to embrace the reform. There are very many examples of this.[62]

BARRY AND THE PURPOSES OF PUNISHMENT

Barry's principal criminological work was done during the high noon of the rehabilitationist theory of punishment i.e. the notion that the basic purpose of punishment is the improvement of the offender and his restoration to society. This approach to punishment sprang from the humanitarian reaction against the cruelty of Nineteenth Century English punishments which, even by continental standards, were brutal. Evidence of the rehabilitationist doctrine can be found in many experiments, not least in prison reform and in parole. The International Covenant on Civil and Political Rights contains a plain statement of the doctrine in Article 10(3) -

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.[63]

Barry, in advance of his time, was very sceptical of the more extravagant claim for rehabilitation. In his view there was more to be said for the retaliatory features of the criminal law than "some humanitarian critics" were willing to concede.[64]

> [I]t is bad science and worse sociology to disregard social realities and the actualities of the criminal process ... the improvement of the criminal law and its inseparable adjunct, the punitive process, is not likely to be achieved if we delude ourselves about their essential characteristics the factors that bring them about.[65]

What in his view were those "essential characteristics"?

> I believe that the explanation of [the] expectation that in some way, though inevitably roughly and crudely, punishment will be proportioned to the gravity of the offence, is to be found in the circumstance that legal

> punishment is, in origin, vindictive, expressing the rooted desire of mankind that he who inflicts suffering unjustifiably and unlawfully should himself be made to suffer, and that it still retains that characteristic.[66]

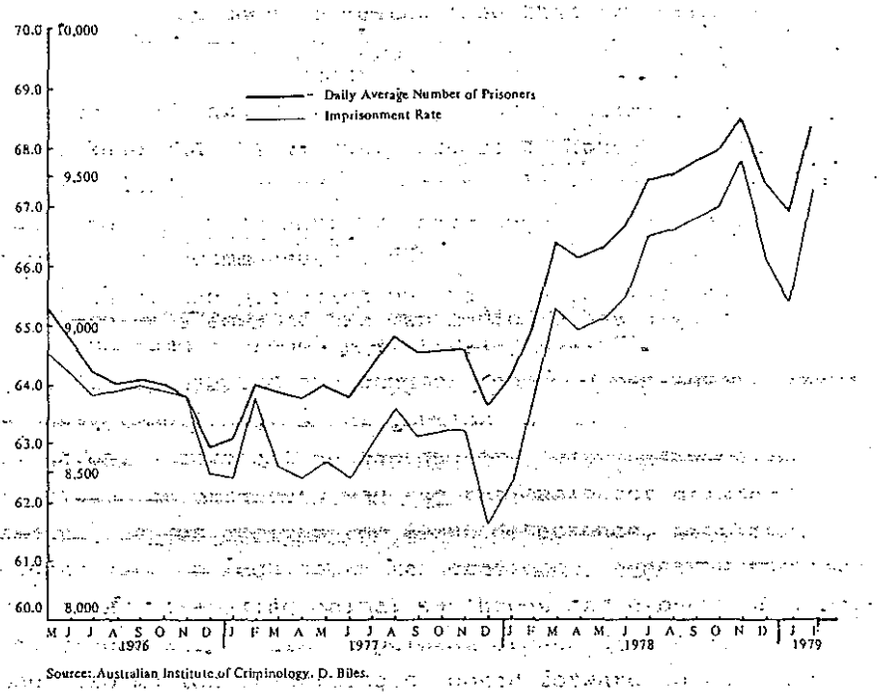
Barry thought it was a mistake to pursue a purely medical or psychological approach to punishment, as if crime were some kind of disease that needed only expert treatment to be cured.[67] Equally he thought it impossible to make punishment fit the crime in any scientific sense because the two were, in his view, truly incommensurable[68]

> However the prescription that the criminal should receive a dose of his own medicine has always possessed a dreadful attractiveness.[69]

In short, Barry rejected any single theory of punishment though he obviously leant towards retribution as its chief justification. Above all he was dubious that treatment and rehabilitation of offenders was the rationale for criminal punishment. He was dubious too about deterrence, believing that courts put too much faith in deterrence, ignoring the fact that man is a risk-taking animal who hopes and expects that he will not be caught.[70] His scepticism of and disillusionment with the reformation of criminals looked forward to this decade where disappointment at the lack of success of such rehabilitative programs as had been tried has led to a clearer recognition of the proper place of retribution or frank punishment as the main aim of sentencing of criminals. In the United States, this move has led to the so-called "just deserts" school. In Australia, a reflection of the same shift in judicial opinion may explain the apparent increase in the imprisonment rates that have occurred steadily over the past two years.

TABLE 2.

DAILY NUMBER OF PRISONERS AND IMPRISONMENT RATES IN AUSTRALIAN PRISONS, MAY 1976-FEBRUARY 1979[71]



Source: Australian Institute of Criminology, D. Biles.

DISPARITY IN PUNISHMENT

There is no doubt that one of the chief concerns of critics of the present system of criminal punishment is the disparity and lack of uniformity in the punishments meted out to criminals. Some escape punishment altogether because they are not found or, if found, are not prosecuted or if prosecuted are not put on their trial. More disparities still arise from the hotch-potch of the statute book, with its anachronistic, inconsistent and even irrational provisions for maximum penalties which exhibit a gross lack of consistency in the nature, level and equivalence of punishments. The Australian Law Reform Commission has presented the evidence in the

Commonwealth's sphere by a computer-aided analysis of the Commonwealth statute book and an examination of the Ordinances of the Capital Territory.[72] This study found -

> anachronistic penalties and offences ... lack of consistency in the setting of penalties for similar conduct, lack of consistency in the level of fines provided as an alternative to imprisonment, indiscriminate application of composite penalties, lack of uniformity in the setting of penalties of imprisonment for the default of payment of fines, positive discrimination in favour of corporations in the provision of penalties and inconsistency in penalties for similar offences under A.C.T. and Commonwealth law ...[73]

If the statute book is unconceptual in fixing penalties, it is scarcely a matter for wonder that judges (limited and guided by statute) impose sentences which strike the layman as inadequate or too harsh, by comparison to other known or reported punishments.

In the United States, former Attorney-General Griffin Bell, addressing the Committee on the Judiciary concerning the Criminal Code Reform Bill of 1978 put it well.

> Almost all of us in this hearing room know firsthand that existing Federal criminal laws are in serious need of revision. Their deficiencies are particularly apparent to those who must work with them on a daily basis. Two and a half centuries ago, an English judge noted that "an Act of Parliament can do no wrong, though it may do several things that look pretty odd". We have some things which look "pretty odd" in our existing Federal statutes. Side-by-side, we have statutes that are well drafted and statutes that are ambiguous; statutes that meet current needs and statutes that are outmoded; statutes that work as intended and statutes that are unenforceable. In some areas where there should be statutory coverage there is nothing; other areas are papered with overlapping and often inconsistent provisions.
>
> The sentencing process is a prime example of an area that needs reform. Under present law the punishment levels for similar offences vary irrationally thus raising questions about the rationality of the Federal criminal justice system itself.[74]

Disparity originating in the statute book is, however, less a matter of bitter controversy than alleged disparity in judicial treatment of like cases. This is the subject matter of much lay concern. It is a frequent target for editorialists. It has provoked the most earnest submissions to the Law Reform Commission by Federal prisoners in all parts of Australia. It is the issue which is being addressed most urgently in efforts for sentencing reform in many countries.

Few aspects of punishment have given rise to greater public criticism than disparities. Norval Morris declared to the Australian Legal Convention in 1953 that in Australia there were gross and unjust variations in sentences.[75] Returning 24 years later, he asserted -

> The passage of the years has not changed my mind and indeed the data have become quite overwhelming and will, I submit, convince anyone who takes the time to study them.[76]

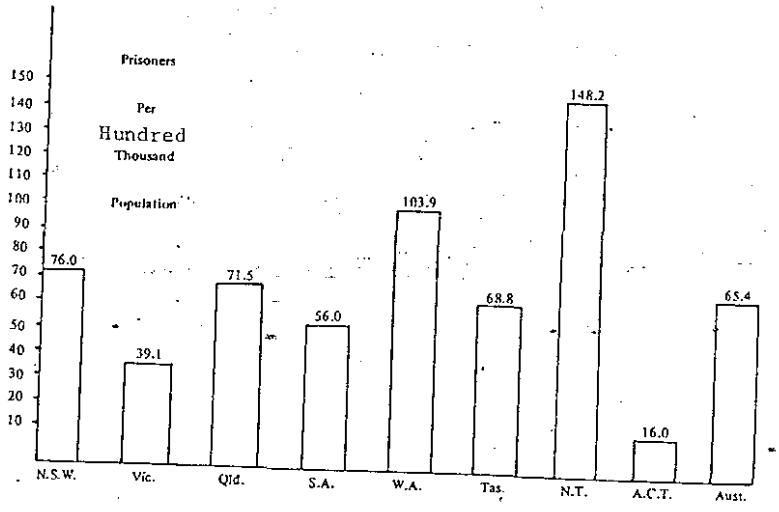
Morris asserts that this disparity should take nobody by surprise. Not only does it arise from legislative differences. It arises from the fact that the business of sentencing is left to the "caprice", as he puts it, of judges with varying characters and training dealing with crowded court lists and responsive to the whims of varying judicial and public attitudes to the activity they are engaged in.[77]

Problems of disparity are of special concern to the Australian Law Reform Commission because of its Commonwealth responsibilities and because to the variety caused by legislation and individual judicial officers, there must be added in our country the variety arising from disparate attitudes to punishment of federal offenders in different States. This is not the problem in the United States where Federal offenders are dealt with in Federal courts. Where, as under our Constitution, they may be tried and sentenced in State courts, an additional factor of disuniformity inevitably emerges. The per capita rate of imprisonment in the several jurisdictions of Australia differs markedly from 221.4 per 100,000 of the population in the Northern Territory of

Australia and 119.4 in Western Australia to 42.3 in Victoria and only 21.5 in the Capital Territory. Since these disparities were called to attention the Government of Western Australia has established an inquiry into the reasons for higher imprisonment in that State.

TABLE 3

AUSTRALIAN IMPRISONMENT RATES FEBRUARY 1979[79]



Source: Australian Institute of Criminology. D. Biles.

John Barry was plainly concerned by the fact that the public perceived unequal punishment in roughly like cases as "monstrous" injustices.[80] He was at pains to assert that in his experience flagrant disparities were a rarity in Victoria.[81] He felt this was due not only to the efforts of the Bench but to the discipline of the Court of Criminal Appeal which tended to reduce "the occasional discrepancies". He conceded that the hope expressed when the English Court of Criminal Appeal was established (that it would provide for "the revision of sentences ... to harmonise the views of those who pass them and so to ensure that varying punishments are not awarded for the same amount of guiltiness") had not been completely fulfilled.[82] But he resisted heartly the notion of standardisation of punishment because he accepted the view that judicial sentencing must address itself not only to the offence but also to the offender.[83] Again, he was sufficient of a realist to acknowledge frankly the human attributes of judicial sentencing.

> [I]f the hope of eliminating apparent discrepancies has not been completely fulfilled, it should be no matter for surprise. Crimes that bear the same legal designations vary greatly in their surrounding circumstances. Moreover judicial sentencing is essentially an idiosyncratic exercise which by its very nature cannot be controlled by rigid or precise formulae.[84]

The same thought was recently put by MacKenna J. when he asserted that "sentencing is a very approximate business".[85] There are many in the Australian judiciary who would argue vehemently that as an attribute of human justice, it should be kept thus.[86]

Despite these explanations and justifications of disparity, the public and critical malaise continues. Michael Tonry and Norval Morris, addressing disparities in the United States, where admittedly there is not the same measure of appeal review, claimed that "the empirical literature on sentencing disparities is enormous, growing and unanswerable". They cite a recent experiment in the Federal Second Circuit.

> (A)ll 43 active trial judges and seven senior trial judges rendered sentences in 20 identical

> cases described in pre-sentence reports (which contained information regarding criminal charges plea or trial, prior record, age, narcotic history, family background etc.). Sentences varied enormously. In one case the sentence varied from three to 20 years. In another the range was probation to seven and a half years. Substantial variation persisted even where extreme sentences were disregarded.. The norm was the absence of a norm. The average disparity from the mean was 48 per cent.[88]

Tonry and Morris are amongst the many in the United States who assert that the disparity, in the name of individual treatment, has gone too far. Conceding that equality in sentencing is not an absolute goal,[89] Morris' basic assertion is that our capacity for individualising treatment is so utterly imperfect and ineffective, a mere remnant of the discredited rehabilitationist ideal, that we should stop deceiving ourselves and make greater efforts to bring equal justice into criminal punishment.[90] Too often, he asserts, is amateurism and unscientific loose thinking on the Bench rationalized as the individualisation of punishment.

A study of what is happening in the United States is instructive. A strong school of thought has developed favouring mandatory minimum sentences or fixed sentences which permit the judge no discretion at all.[91] The other approach, that favoured by Morris and Tonry is reflected in Senator Edward Kennedy's Criminal Code Reform Bill.[92] That Bill suggests many reforms, including an obligation for judges to give reasons where their punishments go below or above settled guidelines, expanded rights of appeal review and the establishment of an independent Sentencing Commission to develop guidelines for judges and to collect data on the actual operation, in practice, of the criminal justice system.

> Better insulated from political pressures, passions and posturing than a legislature, the Sentencing Commission may be better positioned to make principled and dispassionate decisions about sentencing policy, and it will certainly be better situated to refine and develop policy, for legislatures both lack special expertise and are beset by myriad competing demands for legislative consideration of matters of politics and policy.[93]

The Kennedy Bill passed through the United States Senate in 1978 but it struck opposition in the House. Conservatives feared the guidelines would "homogenise" justice. Liberal critics of the judiciary feared that they would take no sufficient notice of advisory guidelines. Civil libertarians feared that the net result would be longer periods of imprisonment.[94] The Bill lapsed with the 95th Congress. It has recently been re-introduced. The suggestion of a body laying down detailed sentencing guidelines for judges, may well have lessons for Australia.

BARRY ON SENTENCING COMMISSIONS

The Sentencing Commission proposed in the United States is a very different creature to the Treatment Board frequently urged as a preferable alternative to judges imposing criminal punishments. But it is a response (admittedly of a different kind) to the same problem. Critics of judicial sentencing point to the lack of any specific training which judges receive, to the painstaking way in which they conduct the trial but the generally perfunctory way in which sentences are passed and the alleged failure of judges to develop a coherent and consistent theory and methodology of punishment.[95] Barry was a vehement opponent of those who urged that the judge's function should finish upon the finding of guilt. Only the courts, in his view, could be safely entrusted with the coercive functions of punishment. The notions of a "treatment tribunal" he dismissed with satirical contempt.[96] Never convinced that the criminal was just a "sick" person or that punishment could be reduced to some sort of scientific "treatment" Barry proceeded to deal with the criticism of judicial sentencing and to urge persistence with judges because they are trusted by the community to do this sensitive task as a result of the public and reviewable way in which they act and their impartiality and incorruptibility.[97] Apart from anything else Barry was unconvinced that there were any "experts" readily available to take over from judges.

> It would be a long step backwards to entrust the complex processes entirely to experts, even if their claims to expertness were more validly

> based than they are at the present day. In this, as in every other aspect of the activities of society as a going concern, the expert should be on tap but not on top.[98]

Having said this, Barry was not blind to the criticism of judges nor resistant to reform that would better fit them for the task of sentencing. He conceded that "judges should know more about the programs and resources of the penal institutions to which they sentence offenders.[99] They should be at pains to find out details about prisoners and to supplement evidence with pre-sentence reports.[100] They should visit prisons[101] and they should know something about criminology, psychology, sociology and the operation and the effectiveness of the punishments at their disposal.[102]

Barry was convinced that judges of this new breed would come and that they would be less likely than administrative treatment "tribunals" to fall victim to improper or erroneous considerations.

Barry's view, somewhat out of fashion at the time, is now generally conceded. Professor Howard, writing on the subject recently expressed the view -

> [T]here is no ground at all for supposing that a non-judicial tribunal would achieve greater consistency than existing judicial institutions. The human variables which are inescapably present in the courts would be present in at least equal degree in a panel of differently qualified experts. Indeed they would probably be more prominent because of the very variety of professional training likely to be present and the corresponding lack of common traditions and procedures.[103]

The call today for transferring the painful and unrewarding task of sentencing from judges to others is a call for legislative prescription of determinate sentences. For the time being, at least, this battle against the treatment tribunal appears to have been fought and won. Calls for reform are aimed at restructuring and guiding or disciplining the judicial discretion in sentencing rather than displacing it altogether. Many judges, far from opposing greater guidance, positively seek it. The remarkable response to the Law Reform

Commission's judicial survey demonstrates to my mind the supportive attitude of the Australian judiciary in the search for a more principled approach to criminal punishment than has hitherto been achieved.

THE DE-INSTITUTIONALISATION OF PUNISHMENT

The terms of reference to the Law Reform Commission call specific attention to the "costs and other unsatisfactory characteristics of punishment by imprisonment". The Commission is instructed to have particular regard to "the question whether legislation should be introduced to provide that no person is to be sentenced to imprisonment unless the court is of the opinion that ... no other sentence is appropriate". Attention is also directed to the provision of adequate alternatives to imprisonment.

The considerations behind these instructions (and similar conclusions in United Nations and other conferences) are not exclusively humanitarian. Governments, especially facing the rising numbers committed to prison, express a legitimate community concern in the relative costliness of punishment by imprisonment and its comparative ineffectiveness, when contrasted with other punishments. The Victorian Minister for Community Welfare Services, Mr. Jona recently claimed that the number of prisoners in Victorian goals was rising because courts were dealing with more violent offenders and consequently imposing longer sentences. This was in spite of a growing provision of probation and other outside-gaol options which the Government hoped would reduce the numbers and therefore the costs of prisons. The Minister claimed that each prisoner cost $10,000-$12,000 a year to keep. He said that it was the Government's policy to try to keep people out of institutions. Despite this, the numbers of prisoners appeared to be rising at the rate of about three per cent a year. The Government hoped that alternatives to imprisonment would reduce the numbers in gaol. But "following increases in violent crime and higher penalties" courts had begun to impose longer sentences.104

A decade before general acceptance that imprisonment, the black flower of our civilization,[105] was unacceptably expensive and ineffective, John Barry declared that imprisonment should only be imposed "where no other course is reasonably open"[106]

> The test of a civilized society ... is that it should exhibit restraint in the degree of suffering and humiliation it imposes upon offenders for, as Alexander Maconochie contended, there is no greater mistake than the studied imposition of avoidable degradation as a portion of punishment.[107]

For these reasons, Barry asserted that it was rare for judges nowadays to send a person to prison if any other course was available.[108] Furthermore, special efforts should be made to keep the young from the stigma of prison[109] and to segregate the specially dangerous.[110] Most prisoners did not return to gaol and suitable staff and buildings should be procured with this in mind.[111] Barry was clear that in our crowded prisons there were many who should not be there. He listed the alcoholics, the drug addicts, the vagrants and petty offenders who were nuisances rather than criminals.[112] The effort, he declared, should be to keep as many offenders as possible out of prison, to diversify prisons, reduce their size and improve their conditions.

These conclusions are generally as true today as they were when uttered. But so are Barry's assertions that it is difficult to get governments to spend money on prisons[113] and to overome political and popular fear, especially about prison escapes.[114] The fact that an escapee may be quite harmless and may last week have lived in the community or next week have been entitled to return to it, means nothing when sensational headlines whip up false terror about escapee "convicts".[115] The combination of parsimony and political pusillanimity are the principal reasons that we continue to house the bulk of prisoners throughout Australia in what Barry described so aptly as "masive monuments to penological theories long exploded and abandoned".[116] The efforts to impose repentance and to coerce rehabilitation by penitence shaped most of the prison buildings and prison systems that survive to this day.

Barry was sufficiently a realist to remind us of the other side. There are wicked people who prey upon society. They cannot escape just punishment but must be removed for a time. At least during this interval society will be relieved of their depredations. Furthermore, with the growing abolition of other, more brutal, punishments, imprisonment remains today the only "drastic" punishment left.[117] It is the only means available to society to retaliate in an emphatic and distinctly punitive way.[118] Barry did not see any inconsistency between the assertion that imprisonment should only be used as the last resort and the contention that it should be used unflinchingly if social retaliation was necessary. Given that practicalities require the use of imprisonment, he taught that the proper focus of attention (and the most fruitful target of reform) should be the identification of those classes of crime appropriate for imprisonment and the amelioration of the conditions of persons convicted to prison, so that physical debasement and inhumanity should be minimised.

In some respects, Barry's views on this subject appear now to be a little dated. For example, he was sometimes inclined to wash his judicial hands of conditions in prison

> The way in which a convicted person will actually serve his time in prison is beyond judicial control and rests entirely with the authorities administering the prison system. For the duration of his incarceration, the division of the prison in which he will be confined, the occupation to which he will be assigned, whether or not he will remain in a maximum security prison or be sent to an open institution, will be determined not by the judicial sentence, but largely by the decision of the penal system's classification committee.[119]

The insusceptibility of these considerations to judicial supervision or even public scrutiny of any kind, despite their critical importance to the quality of punishment actually inflicted, left Barry unmoved. His statement that nowadays the discomfort of prison was more psychological than physical[120] conflicts with the evidence ten years later, presented by the Nagle Royal Commission on Prisons in New South Wales and criticism even more recent of sections of the Pentridge Gaol.[121] His dismissal of the deprivations involved in

prison censorship, the limitation of contacts and visits and the deprivation of normal sexual satisfactions may also be out of tune with today's perceptions.

> [A]ccording to the conventions that are supposed to control Anglo-Saxon societies, sexual gratification is permitted only within the married state, and, in theory at any rate, the plight of a prisoner who is denied sexual intercourse during his sentence is not much worse than that of a bachelor living chastely in freedom.[122]

Nevertheless what Barry said about the need for non-institutional punishments and for limiting imprisonment to the last resort holds true in most criminological thinking today. The Law Reform Commission put its position in the following way.

> [N]either retributive, deterrent nor reformative principles of punishment justify the use of imprisonment except as a punishment of the last resort. This is not to deny that for some categories of offence imprisonment is necessary for the protection of society as, for example, in cases where a lesser sentence would depreciate the seriousness of the defendant's crime or where lesser sanctions have been applied in the past and ignored by the offender. Nevertheless, it is the view of the Commission that rational and humane sentencing would be best achieved if it were guided by the principle that the least punitive sanction necessary to achieve social protection should be imposed and that, as far as consistent with social protection, preference should be given to the use of non-custodial sentencing options.[123]

At present, Commonwealth offenders in Australia are received into State prisons pursuant to s.120 of the Australian Constitution. Capital Territory offenders are received pursuant to an inter-governmental agreement into New South Wales prisons. Conditions of those prisons have lately been severely condemned by the Nagle Report. In the High Court of Australia in Veen v. The Queen[124] Mr. Justice Jacobs relied extensively on this report in criticising the lack of medical and psychiatric facilities available in prisons. Principally for these considerations, but also for reasons of acceptance of the Commonwealth's own responsibilities to provide humane and just conditions in prison for offenders against its laws and to give a lead in prison reform, the Law Reform Commission has suggested that a range of detention institutions should be

constructed without delay in the Capital Territory.[125] Moreover, as alternatives to imprisonment, whether in New South Wales or in the Territory, the Commission has suggested that judicial officers should be equipped with a generous range of non-custodial options for sentencing. The sentencing options vary significantly from one jurisdiction to another in Australia. In no jurisdiction are there fewer alternatives to imprisonment than in the Capital Territory.

TABLE 4

SENTENCING OPTIONS IN AUSTRALIAN JURISDICTIONS[126]

	A.C.T.	N.S.W.	VIC.	QLD.	S.A.	W.A.	TAS.	N.T.	Cwth.
1. Absolute and conditional discharges	x	x	x	x	x	x	x	x	x
2. Good Behaviour Bond	x	x	x	x	x	x	x	x	x
3. Suspended Sentence	x	x	x	x	x	x	x	x	
4. Deferred Sentence		x		x					
5. Probation	x	x	x	x	x	x	x	x	x
6. Fine	x	x	x	x	x	x	x	x	x
7. Prison	x	x	x	x	x	x	x	x	x
8. Periodic Detention (week-end imprisonment)		x	x[1]	x					
9. Attendance centres (offering short-term work and guidance programs, normally during leisure hours)			x						
10. Work/community service orders			x[2]			x	x	x	
11. Work release (imprisonment during non-working hours only with release to enable employment)[3]	x	x	x	x		x			
12. Diversion programs (following court appearance, usually for drug or drink-driving offenders, who are required to undergo a program of training/treatment)	x	x	x		x	x	x		
13. Halfway House (following imprisonment, usually whilst on parole)		x	x[4]	x[5]					
14. Hospital orders (requiring the offender to be incarcerated in a treatment environment or hospital rather than a prison)							x		
15. Compensation orders	x	x	x	x	x	x	x	x	x
16. Restitution	x	x	x	x	x	x	x	x	x
17. Criminal Bankruptcy						x			
18. Capital Punishment						x			
19. Corporal Punishment			x	x					

[2] The Government has recently announced that this option will be introduced.
[3] Available at discretion of Prison Authorities.
[4] Privately operated for drug offenders.
[5] Used for prisoners on work release only.

Growing enlightenment among political leaders (encouraged by the cost considerations involved), comparisons with other countries, especially on the continent of Europe and comparison with our own statistics in earlier times have led to an increasing perception that the chief hope for deinstitutionalisation of punishment is not so much keeping people out of prison who should not have gone there in the first place but reducing the length of prison sentences. This was urged by a Home Office report in 1976[127] and by the more recent reports of the Advisory Council on the Penal System[128] in England. Lord Gardiner put the problem vividly exactly ten years ago -

> (B)roadly speaking it is true to say that whenever one finds three in a cell, one would have been there before the war, the second is there because of the increase in crime, and the third is there because of the increase in sentence.[129]

Mr. Justice MacKenna has acknowledged the difficulty of apparently reducing punishment at a time when crime rates are rising. He referred to the cautious and slow moving way in which judges can individually influence such things. But he urged one major, pressing reform: reduction in the length of prison sentences.[130] The Netherlands did this as an act of deliberate penal policy after the Second World War and there has been no significant change in lawlessness or rates of crime.[131] Rupert Cross puts the same plea more succintly: "Up short sentences".[132] But the newspapers disagree.[133] The rising numbers in our prisons suggest that the judges are imposing longer sentences. Recent Commonwealth legislation in the area of drugs suggests that some politicians are also unconvinced.

If we are serious about the costs and other disadvantages of prison, and are moved at all by the lamentable picture painted in the Nagle Report and other descriptions of the state of our gaols, we must, as a society, do two things at least. First, we must provide reformed institutions for those who must be committed to institutional punishment. Secondly, we must embrace shorter terms of imprisonment on the basis that where it is necessary, it is the fact rather than the duration

of deprivation of liberty that is the effective consequence of such punishment. MacKenna points out that a new level of imprisonment sentences will not come about on the initiative of individual judges. The lead must be given by the legislature. There is some evidence that some political leaders at least may be willing to grasp the nettle.[134]

BARRY AND PAROLE

As the first Chairman of the Victorian Parole Board and as leader for the first 13 years of an experiment which was substantially copied in other Australian jurisdictions, including the Commonwealth, it is scarcely surprising that Barry was an evangelist for parole[135] and for probation too.[136] In his lectures he described the operation of parole in a system where the judge retained the power to fix a period of minimum imprisonment which, remissions apart, the prisoner would serve before becoming eligible to be parolled.

Barry had many reasons, apart from his personal office, to be interested in the development of parole. Some contended that Maconochie was the father of parole and that his measurement of progress in prison by the allotment of marks was a primitive form of parole. More recent examination of Maconochie's experiments disputes this contention and even asserts that Maconochie's views were basically inconsistent with the discretionary element of modern parole.[137]

However that may be, Barry was led to support parole because it was a compromise which the public would acquiesce in to permit punishments which were less Draconian, in fact, than they otherwise appeared on their face to be.[138]

> The present trend is to avoid the imposition of imprisonment where it is possible to do so, and, where it is not, for prisoners to serve their sentences or portion of them, in medium or open penal institutions, and to be released on parole on conditional liberty ... [V]arious considerations have combined in the last 20 years to gain public acquiescence in a less repressive

> and draconian approach to the subject of imprisonment. This approach is in the nature of a compromise of a kind not uncommon in human affairs, and parole during sentence is an aspect of it.[139]

Barry was the first to admit that the Australian parole system was not the complete answer to improvement in the correctional field. He asserted, however, that it had met with acceptance and even approval both from the judiciary and the community generally.[140] It is easy, now that parole is increasingly coming under question, after ten more years of experience, to criticise Barry's views of parole and to question his assumptions about it, including on the basis of statements made in his own writings. No one can question, however, the sincerity with which he tackled this major social experiment or the motivation he had to reduce deprivation of liberty and sustain hope and self respect among prisoners.

In terms of his own writing, whilst Barry defended judges on the grounds that they acted publicly in imposing punishments,[141] he saw no equal necessity for parole boards to submit themselves to a like public scrutiny. Whilst a prisoner should be heard on the passing of sentence in open court, Barry disputed representation before a parole board as a well intentioned but muddled confusion of judicial and administrative functions.[142] That the Parole Board might make decisions critical to liberty was dismissed by a legal categorisation of what was judicial and what was not. Only in the former were open proceedings reasoned decisionmaking and public review necessary. What a mischief Montesquieu has done to our legal thinking. Barry condemned the proposed Treatment Tribunal as an alternative to judicial sentencing on the grounds that it was unlikely, as an administrative body, to give reasons as judges do.[143] He saw no need for parole boards, also administrative bodies affecting liberty, to give reasons in public and to have them admitted to review.[144] The presence of the judge, his own presence, was sufficient assurance of common sense and fairness.

The critics of parole are now vocal and persuasive. One by one, they list and seek to demolish the arguments advanced in favour of parole. They see it as an experiment that has failed and now does more harm than good to prisoners and to society. The notion that a parole board can predict the behaviour of a person in society on the basis of his behaviour "in a cage" is rejected. Three decades of research fails to reveal the greater predictive capacity of a parole board. Society sees constant evidence of this. As for the incentive for rehabilitation within gaol, it is said that this is a wasteful and unsuccessful use of limited resources that should be better spent after the release of a prisoner from his confinement. So far as from permitting long apparent sentences to reinforce the deterrent effect of apparent judicial punishment, Morris asserts that the game is up.

> For a few years, this charade may have been unnoticed, but by now every judge knows the practice, as does the public. Judges who wish to punish severely simply inflate their sentences to reflect anticipated deflation by the parole board. No one is deceived, but under the vagaries of parole decisions, subject to diffuse political and public pressures, some prisoners will suffer randomly, or worse, discriminatorily, to no social gain.[145]

According to Morris it also fails to keep down the general prison population. Parole boards have proved too sensitive to passing public pressure and accordingly too timorous in the release of prisoners. As for the parole boards reducing the injustice of disparate judicial sentencing, Morris acknowledges the disparity but rejects this way of fixing it up.[146] Certainly, in principle, it seems wrong to permit an administrative body, sitting in private, to "correct" the publicly declared and openly reviewable decision of a judge.

Such is the disfavour of parole in the United States that both major Federal Bills for the reform of sentencing include the prospective abolition of the Federal Parole Board. Senator Kennedy in the Congressional hearing asserted bluntly that in the United States parole had not been administered evenhandedly.[147]

Suggestions for the reform of parole have now been made in Australia. The report of the South Australian Criminal Law and Penal Methods Reform Committee in 1973 recommended the abolition of the South Australian Parole Board and the transfer of responsibility for parole to the court -

> In our view the obvious place for parole decisions is in the courts. It is the courts which decide to send an offender to prison; it is the courts which decide the maximum length of time he should remain there; and it is the courts, through their power to specify non-parole periods, which have the primary decision whether he should serve a minimum time also. In our opinion it is almost self-evident that it should be the courts which make the equally important decision whether to release him at a particular time on parole.[148]

A recent review of parole in New South Wales considered abolition of parole but the majority concluded that there was insufficient evidence and that resources did not permit the committee to collect the appropriate data.[149] A similar conclusion was reached by an inquiry in Western Australia.[150] A minority report of the New South Wales Parole Review Committee called for the abolition of parole and its replacement by a "determinate" system of sentences to which after-care recognisances could be attached.[151] It is significant that this minority report comprised the views of the Director of the Probation and Parole Service in New South Wales. The Probation and Parole Officers Association of that State has advocated the abolition of parole for many years.[152]

A research paper of the Law Reform Commission has concluded tentatively that parole for Commonwealth offenders in Australia should be terminated and that the opportunity should be taken to reduce Commonwealth prison sentences and to make them more determinate and consistent.[153] The paper acknowledges the dangers in this course, some of which have also been identified in the United States. The first is that State judicial officers would have to approach the punishment of Commonwealth offenders in a different way, so long as State parole systems survived. The second is that public opinion might react unfavourably to judicial fixing of actual sentences

which were apparently shorter than those fixed for State offenders, known to be subject to parole.[154] Morris' assertion is, however, almost certainly right. The "charade" of confusing sentences, falsely exaggerated and inflated in an artificial way nowadays deceives few and should deceive none. Many look on it with cause, as simply another case of a legal fiction. Where, by breach, it gains relevance, it may do so in an unexpected, unintended and excessively burdensome way.

It should be added that the Law Reform Commission has suggested as an alternative to the abolition of parole major reforms in Commonwealth parole. Conceding all the defects of administrative bodies, operating under great pressure, with little time, no special capacity of prediction and scant follow-up resources, the Commonwealth's system of parole is the most inefficient of them all in Australia. There is no Commonwealth parole board. There is no body of persons to whom Commonwealth prisoners can look for parole decisons. These are made by the Attorney-General of the Commonwealth, on the advice of departmental officers, amidst other pressing national decisions. There is no right to reasons for prisoners denied parole. There is no right to public or judicial review. There is no right to access to documents considered in relation to adverse decisions on parole, there is no minimum term applicable uniformly throughout Australia after which parole in Commonwealth cases may be considered. Short of abolition, the Law Reform Commission has put forward proposals to reform these many defects:

1. Commonwealth and Territory prisoners should on their conviction and thereafter on request be notified of their rights concerning parole.
2. Commonwealth prisoners otherwise eligible should be given full reasons where they are refused release on parole.
3. They should have a general right of access to documents considered in relation to parole release decisions made about themselves.

4. The provisions concerning minimum terms of imprisonment contained in the Commonwealth Prisoners Act 1967 (Cwth) should be amended so that they apply uniformly throughout Australia.
5. A Commonwealth officer should be designated in each State to assist Commonwealth and Territory prisoners in matters relating to parole.
6. Review of all parole decisions affecting Commonwealth or Territory prisoners should be available in a single Commonwealth court, the Federal Court of Australia.

Other and alternative suggestions for reform are made.

The basic issue remains whether palliatives of this order are enough or whether the time has come to acknowledge that the brave experiment in which Barry took such a leading part has become a muddled, inconsistent, unreviewed, secret administrative nightmare which denies fellow citizens the Rule of Law when it most matters, namely when their liberty is at stake.

CONCLUSIONS

What follows from all this for a contemporary assessment of John Barry and his views on criminal punishments? First, we must applaud his embrace of criminology and penology, his openmindedness and the vigour with which he argued for the continuing role of the judiciary in sentencing, but a judiciary alert and trained beyond the law books, in criminology, sociology, history and much else.

Secondly, we must marvel at his receptiveness to the need to base advances in criminal law and criminal punishment upon proper research: finding out what actually happens, often so remarkedly different from the law in the books and received

wisdom. I entertain no doubt that Barry would have embraced with enthusiasm the efforts of the Law Reform Commission to secure the perceptions of sentencing and punishment of judge, prosecutor and prisoner alike and their several suggestions for its improvement and reform.

He was steadfast in his opposition to the death penalty and corporal punishment for he saw these as denying the humanity of civilised society. He was not deflected in this view by popular opinion to the contrary. In criminal punishment, though the law and practice must reflect the general moral sense of the community, there can be no slavish adherence to brutal public opinion. Every major penal reform has been secured against public opposition and predictions of the gravest consequences. The abolition of disembowling, burning, chaining, flogging and transportation were all accompanied by predictions of doom for society and were generally opposed and lamented for a time by judges and others in authority. Barry was never of that mind and his views on this subject have new significance as efforts are mounted to turn back the punitive clock.

In advance of his time, Barry was sceptical about the more excessive claims of the rehabilitationists. Developments in criminological thinking since his death have tended to confirm the basis of his scepticism and to bear out his practical belief that the primary business of punishment is punishment. On disparity in sentencing, he was, perhaps, less perceptive and more complacent than we are now. This is a major issue and is reinforced by the debate about parole because it tends to increase disparity and inequality of punishment.

Nowadays, there are few proponents of handing sentencing over to a non-judicial "treatment tribunal". The United States suggestion of a Sentencing Commission, including judges, which could draw guidelines for the exercise of the judicial discretion, is very different. It is a predictable reaction to the concern (including amongst the judiciary) about the

inequalities of sentencing and our incompetence to deal with individual variance with a firm and fair hand. Barry's thesis that imprisonment should be the punishment of last resort, that we should increase the alternatives to imprisonment and do what we can to keep people out of prison, is now generally accepted in theory. But it is not being implemented in practice either by Parliaments or by the courts. Various suggestions have been made to cure this, most especially by the legislative provision of shorter sentences. It is going to prison rather than the length of time spent inside, that is the effective function of custodial punishment.

On parole, the objectors are in full attack. There is little doubt that Barry's flawed innovation will come under increasingly critical scrutiny in the immediate future, with strong moves to abolish the "charade" of parole and substitute shorter but determinate periods of imprisonment.

Barry's writings have survived ten years and provide many insights into sentencing reform that are still perceptive, practical and forward looking. He was a judge whose mind was always open to new ideas and to a more scientific approach to the law and its enforcement. He was a civilized and notable Australian. We do well to remember him.

FOOTNOTES

1. The Law Reform Commission (Cwlth), Sentencing: Reform Options (Discussion Paper No. 10), 1979 (hereinafter referred to as DP 10).

2. ibid., "Sentencing - An Analysis of Penalties Provided in Commonwealth and Australian Capital Territory Legislation" 1979 (Research Paper No. 1) (hereafter referred to as RP 1).

3. ibid., "Sentencing - Minimum Standards for Treatment of Federal Offenders", 1979 (Research Paper No. 2).

4. ibid., "Sentencing - Alternatives to Imprisonment: The Fine as a Sentencing Measure", 1979 (Research Paper No. 3).

5. ibid., "Sentencing - Community Work Orders as an Option for Sentencing", 1979 (Research Paper No. 4).

6. ibid., "Sentencing - Sentencing the Federal Offenders: Jurisdictional Problems", 1979 (Research Paper No. 5).

7. ibid., "Sentencing - Federal Parole Systems" 1979 (Research Paper No. 6) (hereafter referred to as RP 6).

8. R.Y. Jennings, "Glanville", in P.R. Glazebrook (editor), Reshaping the Criminal Law, 1978, 4. This book is hereafter referred to as "Williams Essays".

9. Sir John Barry, The Courts and Criminal Punishments, 1969 (hereafter referred to as "Barry".)

10. J.V. Barry, Alexander Maconochie of Norfolk Island, 1958.

11. N. Morris, "Corrections and the Community" in N. Morris and M. Perlman (editors), Law and Crime, 1972, 133. This book is hereafter referred to as "Barry Essays".

12. Cited by Z. Cowen, "J.V. Barry: A Memoir", in Barry Essays, 222, 245.

13. (1934) 7 ALJ 341.

14. Cowen in Barry Essays, 228.

15. ibid., 235.

16. Barry 8.

17. ibid., 48-49.

18. ibid., 14.

19. ibid., 16.

20. Cowen in Barry Essays, 222.

21. The Law Reform Commission (Cwlth), Unfair Publication: Defamation and Privacy, 1979 (ALRC 11).

22. [1950] VLR 413.

23. The Law Reform Commission (Cwlth), Criminal Investigation, 1975 (ALRC 2), 137 ff.

24. Criminal Investigation Bill 1977 (Cwlth), cl. 73.

25. Bunning v. Cross (1978) 52 ALJR 561.

26. Wong. v. The Queen [1979] 2 WLR 81.

27. Cowen in Barry Essays, 231.

28. Sir John Barry "Compensation Without Litigation". (1964) 37 ALJ 339.

29. Sawer, 14; Cowen 237 in Barry Essays.

30. H.B. Poland, "Changes in Criminal Law and Procedure since 1800" in A Century of Law Reform, 1901, 43, 44.

31. ibid., 45.

32. ibid., 47.

33. (1958) 2 Syd. LR 401, 411.

34. ibid., 412.

35. ibid., 413. Cf. Barry, 11 and Barry in Maconochie, op. cit., 241.

36. W.A. Criminal Code 1913, s.18.

37. R. Else-Mitchell, "The Criminal and the Law: A Judicial View" in D. Chappell and P. Wilson (editors), The Australian Criminal Justice System, 1972, 807, 817.

38. Age Poll published in the Age, 20 June 1979. The respondents were given a list of various types of killings or murders and asked whether they felt the death penalty should be imposed for any of them.

39. Gallup Poll published in the Advertiser, 24 July 1979, (The question asked was "Do you agree or disagree that the death sentence is ever justified?", 70% of all respondents agreed, 25% disagreed and 5% did not know.)

40. Barry, 6-7.

41. R.J. Buxton, "The Politics of Criminal Law Reform: England" 21 American Journal of Comparative Law, 230, 244 (1973).

42. Barry, 6.

43. Death Penalty Abolition Act 1973 (Cwlth).

44. Barry, 24.

45. R. v. Geddes (1936) 36 SR (NSW) 544, Jordan CJ (N.S.W.) cited Barry, 37.

46. R. v. Cuthbert (1967) 86 WN (Pt.1) (N.S.W.) 272, 275 cited Barry, 18.

47. Barry, 11.

48. ibid., 45.

49. ibid., 24.

50. Churchill cited ibid., 66-7.

51. Barry, 78.

52. Lord Denning Report of the Royal Commission on Capital Punishment, 1953, Cmnd. 8932, 18.

53. Morris in Barry Essays, 126.

54. G.J. Hawkins, The Prison: Policy and Practice, 1976, 164.

55. M.L. Friedland, "Pressure Groups and the Development of the Criminal Law" in Williams Essays, 202, 207. See also N. Morris, "Sentencing and Parole" (1977) 51 A.L.J. 523, 527 ("sweeps of varying judicial and public attitudes to crime and punishment").

56. Friedland, 219.

57. B. MacKenna, "A Plea for Shorter Prison Sentences" in. Williams Essays 422, 431.

58. loc cit.

59. 15th Report of the Expenditure Committee (GB) The Reduction of Pressure on the Prison System, 1977-8, vol. 1, xxiv, para.33 cited DP 10, 7-8.

60. Fieldland in Williams Essays, 234.

61. DP 10, 8.

62. See examples cited Friedland in Williams Essays, 208, Hawkins, 165, Sawer Barry Essays, 5.

63. International Covenant on Civil and Political Rights, Article 10:3 (emphasis supplied).

64. Barry, 22.

65. loc cit.

66. ibid., 20.

67. ibid., 10.

68. ibid., 74.

69. loc. cit.

70. ibid., 56.

71. From figures compiled by D. Biles, Australian Institute of Criminology. Australian Prison Trends, No. 37 31 July 1979.See DP 10, 6.

72. R.P. 1 (J. Gilchrist).

73. ibid., 41.

74. Statement by the Hon. Griffin B. Bell, Attorney-General of the United States to the hearing before the Sub-committee on Criminal Laws and Procedures of the Committee of the Judiciary, United States Senate on S1437 (June 7, 1977), Reform of the Federal Criminal Laws, US GPO, 1977, 8593-4;

75. (1953) 27 ALJ 186.

76. (1977) 51 ALJ 526.

77. ibid., 527.

78. For illustrations see DP 10, 18.

79. Figure 9 in DP 10, 18.

80. Barry, 47 citing Lady Wootten.

81. Barry, 36.

82. loc cit.

83. Barry, 51-2 citing the English Interdepartmental Committee (The Streatfield Committee), 1961, Cmnd. 1289.

84. Barry, 36-7.

85. MacKenna in Williams Essays, 429.

86. See e.g. Bowden v. The Queen [1968] Tas. SR 192 (NC 15), cited Barry, 26; Else-Mitchell in Chappell and Wilson, 818 and A. Roden, "Sentencing - a Judges Viewpoint" in Institute of Criminology Proceedings (Sydney), No.35, Sentencing, 1978, 43.

87. M.H. Tonry and Norval Morris, "Sentencing Reform in America" in Williams Essays, 434.

88. ibid., 438 (emphasis added).

89. N. Morris, "Punishment, Desert and Rehabilitation", 1976, reproduced in Reform of the Federal Criminal Laws, op. cit., n.74, 9307, 9309.

90. (1977) 51 ALJ 527.

91. See e.g. A. von Hirsch, Doing Justice - The Choice of Punishments, 1976, 98 ff; A.M. Dershowitz, Fair and Certain Punishment (Report of The 20th Century Fund Task Force on Criminal Sentencing), 1976, 19ff.

92. S.1437 95th Cong., 1st Sess. (1977) (The Kennedy-McClellan Bill. See Tonry and Morris, 434 for a history of the legislative background to the Bill.)

93. Tonry and Morris, 443.

94. Congressional Quarterly, Weekly Report, vol. xxxvi, No. 28, 1808 (15 July 1978).

95. N. Morris in (1953) 27 A.L.J. 186; D. Chappell, "Sentencing - An Unrewarding and Painful Task" in Chappell and Wilson, 527. It was Sir James Stephen who complained of the perfunctory attention by judges to the sentencing function.

96. Barry, 33.

97. ibid., 9, 44.

98. ibid., 66.

99. ibid., 88.

100. ibid., 25.

101. ibid., 41.

102. ibid., 41 citing with approval Norval Morris.

103. Colin Howard, "An Analysis of Sentencing Authority" in Williams Essays, 404, 412.

104. As reported in the Age, 27 July 1979, 3.

105. Nathaniel Hawthorne. See Hawkins, viii.

106. Barry, 6, 81.

107. ibid., 21-22. See also Barry, Maconochie, 185.

108. Barry, 57.

109. ibid., 81.

110. ibid., 65.

111. ibid., 82.

112. ibid., 81.

113. ibid., 51.

114. ibid., 83.

115. P. Wilson, "The Two Faces of Crime and Deviance: The Role of Society and the Media in Penal Reform", an address to the Penal Reform Council of N.S.W., 25 June 1979 mimeo esp.9.

116. Barry, 83.

117. ibid., 21.

118. ibid., 54, 65.

119. ibid., 40.

120. ibid., 49, 74.

121. Report of the Royal Commission into N.S.W. Prisons, Mr. Justice Nagle, Royal Commissioner, 1978. See DP 10, 22 ff; Cf. Charles Colson in the Canberra Times 18th July 1979.

122. Barry, 86.

123. DP 10, 8.

124. (1973) 23 ALR 281, 297.

125. DP 10, 26-28.

126. Table 7 in DP 10, 34.

127. Home Office (England), Review of Criminal Justice Policy 1976, 1977, para. 17; MacKenna, 430.

128. Advisory Council on the Penal System (England) (Baroness Serota, Chairman), Sentences of Imprisonment, 1978. Cf. MacKenna, 428.

129. Lord Gardiner cited MacKenna 431 fn. 21.

130. MacKenna 422.

131. ibid., 426.

132. Cross cited by MacKenna 427.

133. The Times, 28 June 1978. ("This is a bad time for the public's penological tolerance to be tested, especially as the consequences of the proposed reform cannot be assessed with any certainty. .... Judges understand the existing system well. So, on the whole, does the public.")

134. Other provisions are proposed to reduce the mean term of imprisonment e.g. the Kennedy-McClellan Bill provides that a judge must give reasons as part of the public record for sentencing a person to imprisonment. See N. Morris (1977), 51 ALJ 523, 531.

135. Barry, 6.

136. ibid., 56.

137. S. White, "Alexander Maconochie and the Development of Parole" 67 The Journal of Criminal Law and Criminology 72 (1976).

138. Barry, 57.

139. loc cit.

140. ibid., 63.

141. ibid., 8, 14, 47.

142. ibid., 85.

143. ibid., 48.

144. ibid., 63,85.

145. N. Morris (1977) 51 ALJ 523,52.

146. ibid., 526.

147. Senator Kennedy in Reform of a Federal Criminal Law op. cit. n.74, 8579. See also M.R. Gottfredson "Parole Board Decisionmaking: A Study of Disparity Reduction and the Impact of Individual Behaviour" 70 The Journal of Criminal Law and Criminology 77 (1979).

148. Criminal Law and Penal Methods Reform Committee of South Australia (Chairman, Justice Roma Mitchell), First Report "Sentencing and Corrections", 1973, 46. See RP 6.

149. Report of the Committee Appointed to Review the Parole of Prisoners Act 1966 (N.S.W.) (Chairman, Judge Muir), 1979, 11.

150. Report on Parole, Prison Accommodation and Leave from Prison in Western Australia (K.H. Parker, Q.C.), 1979.

151. The Minority Report of the Parole Review Committee of New South Wales, 3.

152. Probation and Parole Officers Association of New South Wales, Paper on Sentencing presented at the Institute of Criminology (Sydney) Seminar, 10 May 1978.

153. RP 6, 58.

154. A similar fear has been expressed in respect of the United States Bill. See Congressional Quarterly Weekly Report op. cit. n.94, 1814.