LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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Crime and Punishment

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The topic that I have selected for this afternoon is one that is particularly appropriate for the High Sheriff's lecture. In medieval times the High Sheriff was the officer responsible for keeping the King or Queen's peace. His job was to apprehend miscreants and commit them to gaol. This was not by way of punishment, but to keep them secure until they could be tried and punished. Initially he had judicial functions, but these were taken over by the Justices of the Peace and, in the more serious cases, the King or Queen's justices, who went out on circuit charged with 'gaol delivery' – the trial and punishment of those in gaol.

It was, and still is, the duty of the High Sheriff to wait upon the judge and look after his needs. Today this is very much a social function, and one that the judges greatly appreciate. One High Sheriff who deemed it his duty to do more than look after the judge was John Howard, a Bedfordshire landowner, who became High Sheriff of that county in 1773. He felt compelled to visit the gaols in which the defendants were imprisoned. He was horrified by what he found, and devoted himself to a study of prisons both in Britain and on the Continent.

In 1777 he published a major work: The State of the Prisons in England and Wales, in which he made many recommendations for prison reform, which were subsequently adopted. The Howard League for Penal Reform is named after that High Sheriff.

In this lecture I propose to attempt a condensed historical survey of punishment in this country, before turning to consider some lessons which can, I believe, be drawn from this. I use the word punishment loosely to describe the treatment of those condemned of criminal conduct and, in the early days, such condemnation did not always follow due process of law. The exercise is not a pleasant one. Many of the punishments imposed on criminals are today recognised as utterly barbaric. Many of them were not abandoned without a struggle and I am ashamed to say that the most reactionary in resisting changes that we can now see were desirable were often the judges.

Section 142 of the Criminal Justice Act 2003 sets out the following purposes of sentencing:

-the punishment of offenders;
-the reduction of crime (including its reduction by deterrence);
-the reform and rehabilitation of offenders;
-the protection of the public;
-the making of reparation by offenders to persons affected by their offence.

These have long been recognised as the elements in the theory of punishment. For centuries, however, the paramount objects of punishment appear to have been a sadistic desire for vengeance coupled with a belief that severe penalties were necessary to deter offending, when the reality was that they did no such thing. One punishment did prevent re-offending and that was, of course, capital punishment, but as we shall see, even the risk of capital punishment does not seem to have acted as a significant deterrent. Before looking at capital punishment, however, let me describe some of the other punishments, which were not designed to take the life of the offender but which sometimes had this effect none the less.

I said that in the middle ages the purpose of gaol was to detain the criminal until he could be tried and punished – imprisonment was not considered as a punishment in itself. This remained the position until late in the 18th century. Up to that time, punishment tended to be either death or some form of corporal punishment – death where the offence was a felony and corporal punishment where it was a misdemeanour. Perhaps the least unpleasant
form of corporal punishment was the stocks – the appropriate sentence for the comparatively trivial offence. The offender would sit on a bench with his legs locked into the stocks so that he could not move.

Less comfortable was the pillory which required the offender to stand, with his neck, or his neck and arms, clamped, or sometimes with his ears nailed to the pillory. The object of putting offenders in the stocks or the pillory was not simply to expose them to ridicule. Members of the public were free to pelt them with rotten vegetables or other unsavoury matter, or even stones, which could result in the death of the miserable offender. The severity of the
punishment thus depended very much on how the local community viewed the offender's conduct. The pillory was abolished in 1837.

Where a more severe punishment was considered to be necessary, whipping was likely to be the choice. This was the customary sentence for petty larceny, and it could be imposed by a Justice of the Peace. The offender was sentenced to be stripped to the waist, tied to the back of a cart, which would typically proceed along the street where the larceny had taken place, while he was flogged "until his back be bloody". I say he, but this punishment was also administered to women.

In Tudor times, under the Whipping Act of 1530, you could be sentenced to be whipped simply on the ground that you were a vagrant. Christopher Hibbert, in his classic work: *The Roots of Evil; A Social History of Crime and Punishment,* published in 1963, records:

> "*Throughout the sixteenth and seventeenth centuries, men and women were sentenced to be whipped at Quarter Sessions for an immense variety of offences. Not only rogues and vagabonds, but the mothers of illegitimate children, Scottish peddlers, beggars, drunkards, sex offenders and even*

lunatics were all flogged for their crimes or misfortunes".

The early part of this lecture owes much to Hibbert's work, and also to the latest edition of the very useful book: *Understanding the Law*, by my colleague and fellow member of the Middle Temple, Judge Jeffrey Rivlin.

Let me give you some idea of what flogging involved. It was administered by a 'cat-o'-nine-tails', each tail being a lash of whipcord about an eighth of an inch thick and 33 inches long. This, so one observer described it, reduced white clean skin into a "pulpy, blood-smeared lump of living human flesh". The cat had to be changed every few strokes as the wet tails flicked blood over the spectators.

Slowly and spasmodically there was a revulsion against this form of punishment. In 1791 the whipping of female vagrants was forbidden; in 1812 the number of strokes was limited to 300 and in 1817 the public flogging of women was brought to an end. Public flogging came to an end in 1862, but the Security from Violence Act, passed the following year in response to public panic about garrotters, authorised flogging as the penalty for that offence and for robbery or attempted robbery committed with violence. Flogging effectively came to an end at the passing of the Criminal Justice Act 1948, which restricted its use to the offences of gross violence to prison officers, mutiny and incitement to mutiny by prisoners.

Each step of the abolition of flogging was made in the face of opposition, both from the public and from some judges. My predecessor Lord Goddard argued 'for years past we have thought too much of the criminal and not enough of the victim' – a familiar refrain. Even in 1960 his successor as Lord Chief Justice, Lord Parker, urged the extension of flogging in certain circumstances and added that 'the great majority' of the 'persons concerned with the administration of the criminal law' whom he had consulted agreed with him. At each step it was argued that if flogging was not permitted, necessary deterrence would be removed and the relevant crime would soar and, on each occasion, this forecast was confounded.

Women had a particularly hard time of it. It was an offence to scold or nag. This was originally punished by placing over a woman's head a scold's bridle, which had an iron bit that fitted into her mouth and prevented her from talking. This punishment was later replaced by the ducking stool, which was in use between the early 1600s and the early 1800s. The woman was strapped into a chair at the end of a wooden beam, placed over a pivot, so that she could be ducked in a pond or river. Over-enthusiasm on the part of the operator sometimes resulted in the woman drowning. The ducking
stool was also imposed for prostitution and, in some cases, for witchcraft, albeit that serious witchcraft was treated as a capital offence.

Today criminal records are kept on computer. Up until the end of the 18th century they were recorded by branding the criminal, in the courtroom, after conviction, 'T' for thief, 'F' for felon, 'M' for manslaughter and so on. The letters were burned on the thumb, the hand or the wrist. For a brief time at the beginning of the eighteenth century thieves were branded on the cheek, but when it was realised that this made them un-employable, they reverted to the hand.

So far I have been dealing with punishment for misdemeanours. I now turn to

felonies. For these the punishment was death, and not a pleasant death either. Witches were either hanged or burnt at the stake. Between 1643 and 1661 over 4000 people were executed for witchcraft. Women convicted of treason were sentenced to be burned alive at the stake. Men convicted of treason were sentenced to be drawn to the place of execution on a hurdle, hanged, cut down while still alive, disembowelled, castrated, beheaded and quartered.

These were, however, exceptional cases. The normal method of execution was hanging in the case of a commoner, whereas a nobleman was entitled to the privilege of decapitation. Neither was necessarily a swift end. Until technical improvements in the gallows mechanism in the mid-nineteenth century, a short drop left the convict dangling, but alive, to die from strangulation. This improved the spectacle for the spectators, for hangings took place in public, as this was believed to be important in order to deter others from crime. There is no reason to believe that they did so. Rather they brutalised the spectators. Hangings were considered a major form of entertainment – so much so that important executions were treated as the occasion for a public holiday, attracting as many as 20,000 spectators. On one horrific occasion in 1807, when a crowd of some 40,000 had gathered to watch the execution of two murderers of a lavender merchant, the press of people led to a panic and, as people tried to escape, about a hundred died as a result of being trampled under foot.

Noblemen would pay the executioner to ensure that the axe was sharp, but they did not always get value for money. The Duke of Monmouth, who had mounted an unsuccessful rebellion against James II, had to be struck five times with the axe before he expired. In the reign of Henry VIII there were well over 70,000 executions, including two of his wives, and executions continued, though on a lesser scale, for the next 300 years. At the beginning of the nineteenth century, under what had become known as 'the bloody code', there were some 220 offences that carried the death penalty. You could be hanged for stealing a sheep, or indeed stealing anything of the value of five shillings or more, shooting rabbits, or appearing in disguise on a public road. Children could be hanged, and were. In 1801 a 13 year old boy was hanged for stealing a spoon and in 1807 a girl aged only seven was hanged. Sentences of death continued to be passed on children until as late as 1833.

Some judges appeared to derive a sadistic pleasure from imposing a death penalty, not least my predecessor Judge Jeffreys, who sentenced hundreds to death at the 'Bloody Assizes' in the West country, after the revolt against James II. One of Jeffreys' favourite leisure activities was watching the execution of pirates at Execution Dock near Wapping New Stairs from the balcony of the *Prospect of Whitby*, a famous pub which still does good business, but for less ghoulish reasons. But in general, judges and juries revolted against the imposition of the death penalty for comparatively minor offences, and found ingenious ways to avoid offenders being sentenced to death.

In the 12th century it was the practice that any member of the clergy charged with an offence would be tried by the ecclesiastical courts. These courts did not impose the death penalty. This privilege, known as the 'benefit of clergy', was then extended to employees of the clergy, and it became the practice for judges to accept that an offender was employed by the clergy if he could read a passage from the bible, usually the opening words of Psalm 51, "*Have mercy upon me, O God, according to thy loving kindness; according unto the multitude of Thy tender mercies, blot out*

my transgressions." This benefit required literacy, which most criminals lacked, but most of them did not lack the ability to learn the verse off by heart and to pretend to read it. That this was a pure formality was recognised in 1706, when the reading test was abolished and benefit of clergy was made available to everyone, save where statute decreed that it was not to apply to a specific offence. During the 16th century, murder, rape, highway robbery, burglary, horse-stealing and theft from churches were offences in respect of which benefit of clergy could not be claimed. During the 17th and 18th centuries other categories of theft were added to that list, including theft of goods worth more than 40 shillings from a dwelling house. Juries responded by perversely finding that the value of goods stolen was less than that sum.

In 1810, Samuel Romilly, an ex-Solicitor General and a great campaigner for penal reform, sought to get Bills through Parliament limiting the offences which attracted the death penalty. The Lord Chancellor, Lord Eldon, and the Lord Chief Justice, Lord Ellenborough, attacked these Bills with venom. This was Lord Ellenborough's reaction:

> "*I trust your Lordships will pause before you assent to an experiment pregnant with danger to the security of property and before you repeal a statute which has so long been held necessary for public security. I am convinced with the rest of the judges that public expediency requires there should be no remission of the terror denounced against this description of offenders. Such will be the consequence of the repeal of this statute that I am certain that depredations to an unlimited extent would immediately be committed...Repeal this law and see the contrast-no man can trust himself for an hour out of doors without the most alarming apprehension that, on his return, every vestige of his property will be swept off by the hardened robber*".

When Robert Peel became Home Secretary, however, he was more susceptible to Romilly's arguments and, thanks largely to Peel, between 1823 and 1827 the criminal law was rationalised. Benefit of clergy was abolished and certain offences were specified as being capital offences. By 1843 the number of capital offences had reduced to 15, and in 1861 it was reduced again to four: murder, treason, arson in royal dockyards and piracy with violence. Of these, murder was of course the most significant. The last public execution took place in 1868. Thereafter, the death penalty was executed privately in prison.

The next century was one of conflict, not merely in this jurisdiction but in Europe, between those who advocated abolition of the death penalty and those who were bent on its preservation. Some of those who sought its abolition argued that it was immoral for the state deliberately to take life. As Cesare Beccaria put it as early as 1764: "*Is it not absurd that the laws which detest and punish homicide, in order to prevent murder, publicly commit murder themselves.*" Other abolitionists argued on more pragmatic grounds. There was always the risk of defendants being wrongly convicted of murder. To this should not be added the risk of wrongly executing them. Abolitionists also challenged the argument of those in favour of the death penalty that it operated as a salutary deterrent. The deterrence argument was customarily put at the forefront of those advanced in favour of capital punishment. The ultimate deterrent was essential in the case of murder. Abolition of capital punishment would lead to an explosion of life-threatening criminal violence. It would also bring with it the risk that the population would take the law into its own hands by lynching those

suspected of murder. Ethical arguments were also advanced in favour of the death penalty. No less a person than Lord Denning argued that '*the ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by a community of a crime*'. Some crimes '*in the present state of public opinion*' *demand the* '*most emphatic denunciation of all: namely the death penalty*'. Until the mid- 20th century this attitude was shared by the leaders of the Anglican Church. In 1956, the Archbishop of York, in supporting the death penalty, observed that 'retribution was a moral necessity within our penal code'.

Meanwhile, in many other countries in Europe the death penalty was being abolished. In 1905 in Norway, in 1921 in Sweden, in 1930 in Denmark, in 1942 in Switzerland, in 1948 in Italy, in 1949 in Finland and West Germany and in 1950 in Austria. Statistics showed that in these countries the abolition of the death penalty was not accompanied by any increase in what had previously been capital crimes, but this cut little ice with those opposing abolition in England. The vast majority of murders are committed by those who are not otherwise of criminal tendency, but who react to stress arising out of an emotional relationship. These offenders were usually the subject of a reprieve of the death penalty, under the application by the Home Secretary of the Royal Prerogative of Mercy, to be replaced by life imprisonment, from which most were subsequently released on parole. Between 1930 and 1949, 183 murderers were reprieved and subsequently released, and a further 76 were released between 1956 and 1960. Not one of these was guilty of a subsequent murder. Nonetheless, in a debate in the Lords on the Criminal Justice Bill of 1948, Lord Goddard, who threatened to resign if capital punishment was abolished, and who claimed to have the support of all but one of the judges of the King's Bench Division, expressed the view that there were 'many, many cases where the murderer should be destroyed'.

But the tide was turning slowly, but inexorably, against the death penalty. In 1956 the Commons passed a Bill to abolish it, but this was thrown out by the Lords. The following year, however, the 1957 Homicide Act was passed, limiting the death penalty to specified categories of capital murder:

(a) murder done in the course or furtherance of theft;
(b) murder done by shooting or causing an explosion;
(c) murder done in resisting lawful arrest or helping someone to escape from custody;
(d) murder of a police officer acting in the course of duty;
(e) murder of a prison officer by a prisoner;

This Act also introduced the partial defence of diminished responsibility, which reduced the crime of murder to manslaughter.

It was only in 1965 that capital punishment was effectively abolished by a Labour administration, largely as a result of the personal intervention of the Lord Chancellor, Lord Gerald Gardiner.

We have now seen how, with the development of a sophisticated democratic civilization with respect for individual rights and human dignity, sentences involving capital and corporal punishment have been progressively ruled out as being forms of punishment which are not compatible with such respect. In so far as the object of

these forms of punishment has been deterrence, experience has shown that they have not been effective. In so far as it has been retribution, society has decided that these forms of retribution are too brutal to be tolerated.

I now turn to imprisonment, which remains, throughout the world, an accepted form of punishment for criminal conduct.

I have already said that, up to the eighteenth century, imprisonment was not used as a punishment, but rather as a means of detaining offenders until trial. This is not entirely true. Sentences of imprisonment could, in theory, be imposed as an alternative to fines for minor offences, but in practice this rarely happened. People were, however, imprisoned for debt, in prisons where the basic conditions were horrific. Many of these were privately owned and run for profit. The Bishop of Durham and the Bishop of Ely each owned a prison. Prisoners who had a source of funding could pay for improvement of their conditions – the first improvement being 'easement of irons' – the removal of iron fetters that prevented all movement. In the Bishop of Ely's prison, prisoners were chained down to the floor on their backs with spiked collars round their necks and heavy iron bars over their legs, unless they were able to pay for their removal. Food could be purchased and, in some prisons, prisoners died of starvation if they did not have the means to buy food. In some prisons no food was provided, prisoners being left to rely on charity. If food was provided, it might be no more than bread and water, or food confiscated in the markets as unfit for human consumption. In 1729 a Parliamentary Committee discovered that 300 inmates of Marshalsea prison had died of starvation in the space of 3 months.

In prisons today there is concern about corrupt prisoner officers selling drugs to the prisoners, or turning a blind eye to others smuggling them into the prisons. In the 18th century the problem was gin. Prison keepers were prohibited by statute from selling alcohol, but this did not stop them. 120 gallons of gin a week were sold in the King's Bench prison. Let me read you this account by Hibbert of prison life at this time:

> "*With insufficient water and ventilation, without proper food or light or sanitation, shivering half naked in the winter and suffocating in the summer heat, most prisoners lived out the days and nights in unutterable misery. Others who could afford it got drunk and stayed drunk, oblivious to the stumbling lunatics, to women giving birth to babies who were left to die in the piles of filthy straw, to rats burrowing in the dirt and excrement, to fellow prisoners suffering from gaol fever, that virulent form of typhus which killed a high proportion of prisoners every year.*"

But it was not imprisonment that was used initially as a substitute punishment for those who escaped the death penalty under benefit of clergy. In 1717 the first Transportation Act made provision for such offenders to be transported to America – in effect as slaves. By the time of the Declaration of Independence in 1776, 30,000 men and women had been transported to Maryland and Virginia, at which point the Americans objected to the receipt of any more. In 1779 the Penitentiary Act was passed, under which convicts who previously would have been transported to America were sentenced to performing arduous, and often pointless, tasks in prison. These included the treadmill and the crank. It is an irony that those you see working

out in health clubs today are voluntarily submitting themselves to a pale imitation of the torture inflicted on prisoners in the 18th century, except that the latter were forced to keep walking on the treadmill, or turning the crank for six hours or more each day.

In 1787 prison overcrowding resulted in the renewal of penal transportation, this time to Australia, and it was not until 1853 that penal servitude replaced transportation as the preferred method of dealing with felons. By this time there had been a growth in prison capacity. Up to the 19th century most prisons were small local establishments, many of them privately owned and run as businesses. They suffered from the horrific conditions that I have already described. But in 1821 the first national penitentiary, Millbank, opened and this was followed in 1842 by the opening of Pentonville. By 1848 no less than 54 other prisons had been built on the same model, with rows of single cells arranged in tiers and in separate blocks radiating from a central block like the spokes of a wheel.

This flurry of prison construction laid the physical foundations of the prison system that we have today. Instead of living in promiscuous communal squalor and degradation, individual cells and sanitary facilities were provided. In 1877 a Prison Act was passed which placed all prisons in the country under the central control of 5 Prison Commissioners, answerable to the Home Secretary. There was a change of emphasis as far as the purpose of imprisonment was concerned. Offenders were imprisoned not simply to punish them, but with the object of bringing about their rehabilitation.

Unfortunately, the theory of what was required to rehabilitate prisoners was almost as barbaric in effect as the conditions to which they had been subjected under the old regime. Solitude, with no contact with fellow prisoners, or indeed with anyone else, was considered desirable in order to give the offender time to reflect on his wrongdoing and resolve to lead a law-abiding life in the future. Nine months' separate confinement was the initial prelude to being sent to do hard labour under a sentence of penal servitude. This solitude was liable to cause a condition of mental breakdown and often did so. This is the description of a prison visit made to Dartmoor, an institution built at the beginning of the 19th century to house French prisoners of war, but subsequently a notorious prison:

> "*As I walked along the endless landings and corridors in the great cellular blocks I saw something of the 1,500 men who were then immured in Dartmoor. Their drab uniforms were plastered with broad arrows, their heads were closely shaven....Not even a safety razor was allowed, so that in addition to the stubble on their heads, their faces were covered with a sort of dirty moss, representing the growth of hair that a pair of scissors could not remove...As they saw us coming each man turned to the nearest wall and put his face closely against it, remaining in this servile position until we had passed. This was a strictly ordered procedure, to avoid assault or familiarity, the two great offences in prison conduct*."

I have now reached the end of the 19th Century, and this saw something of a sea change in the attitude both to imprisonment and to punishment in general. In 1895 a Committee chaired by Herbert Gladstone published a report on the prison system. He concluded that the nine months' separate confinement at the beginning of a sentence of penal servitude was no longer justified on the basis that its effect was

reformative, but it was intended to be “the most formidable and coercive part of the punishment of penal servitude”. The Committee recommended that confinement in cells should be limited to short periods, that useless labour should be abolished and the severity of the prison regime relaxed. Thereafter there was a series of legislative instruments that slowly but steadily gave effect to these recommendations.

In 1886 a rudimentary form of probation had been introduced, available to courts in the case of young first offenders. Courts made little use of this, but in 1907 a Liberal administration passed the Probation of Offenders Act, which introduced probation in a form that we can recognise today. An offender could be discharged, conditionally upon entering into a recognizance for up to two years, and could be placed under the supervision of a person named in the order. Magistrates were given authority to appoint probation officers for this purpose. Probation was designed to ensure the reformation of offenders and the prevention of crime through befriending, advising, assisting, and supervising the offender. Adults would be assisted to find employment and, where children were involved, their supervision at school would be monitored. Magistrates were to take a close interest in the work of supervision by setting up local committees, and courts would keep records of the outcome where probation orders were made. Probation officers were expected to report misbehaviour to the courts.

In 1908, a year after the introduction of probation, imprisonment for children under 16 was abolished and a Borstal system established to provide an alternative to lengthy terms of imprisonment for youths of 16 to 21.

In 1910 Winston Churchill was made Home Secretary. He at once demonstrated an enthusiastic interest in punishment in general and imprisonment in particular and set about criticizing individual sentences, usually on the grounds that they were over-severe, with a disregard for judicial independence that would be astonishing today. He sought to establish himself as a one man Sentencing Guidelines Council, laying down a scale of punishments for different offences, but had failed to achieve this when he relinquished his office. His basic theme was that sentences imposed upon offenders were too harsh. In a notable speech in July 1910 he said this:

> “*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 civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if only you can find it, in the heart of every man- these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.*”

If those words were uttered today, the author would risk being accused by elements of the media of being soft on crime and more concerned for the criminal than for the victim. And, indeed Churchill received much criticism of this nature, which he rebuffed with characteristic robustness. His approach marked an appreciation that an important aspect of sentencing was rehabilitation of the offender and this, despite

significant changes in emphasis, has remained the position up to the present day.

I have found comparatively little written by penologists in relation to the 40 years that followed Churchill's tenure of the Home Office. The numbers of those in prison remained relatively modest. I am inclined to believe that one reason for this was the First World War, followed twenty years later by the Second World War. Many of the young men who might have found themselves the object of the criminal justice system were called up, subjected to military discipline and given a legitimate outlet for any tendency to violence that must in some cases have earned them medals rather than imprisonment.

At all events, in the period before the Second World War there were usually about 10,000 prisoners in England and Wales. In 1946 there were about 15,000 and, since then prison numbers have risen steadily and inexorably, so that in 1961 there were nearly 30,000 in prison, in 1990 the figure was approaching 46,000 and today there are nearly 80,000 in our prisons. Prison building has striven to keep pace. But much of this period has seen serious overcrowding, leading to understandable resentment by prisoners at their living conditions and problems of prison discipline. It also renders much more difficult, or even impossible, the implementation of current policy which, by treatment usually described as 'intervention', aims to rehabilitate prisoners so that they will not re-offend when released into the community.

At the entrance to every prison, there has, for many years, been this Statement of Purpose published by the Prison Service:

> '*Her Majesty's Prison Service serves the public by keeping in custody those convicted by the courts. Our duty is to look after them with humanity and to help them to lead law abiding and useful lives in custody and after release.*'

More recently the Prison Service has added this more specific objective:

> '*Reduce crime by providing constructive regimes which address offending behaviour, improve educational and work skills and promote law abiding behaviour in custody and after release*'.

I have visited a number of prisons and have been impressed by the dedication with which the Prison Service attempts to give effect to this objective. Their efforts include education, usually with the help of the local education authority, and drug treatment, for the need to get money to feed drug addiction is a major cause of crime. A large proportion of the prison population suffers from some form of mental illness or disability, and treatment is provided by the National Health Service. It is the aim of the National Offender Management Service -NOMS- that each offender will receive individual and tailor-made management that will extend seamlessly from the time that he is imprisoned to the time after he is released. This is the way that the recently published Home Office paper: 'Working Together to Reduce Re-offending', puts it:

> '*The new model of offender management recognises that one-size-fits-all is not effective and that each offender needs a tailor-made sentence plan to help them to 'go straight'. This means bringing together a variety of expertise to deal with the wide range of issues that offenders must address. The sentence plan will identify how a range of interventions will contribute to making the*

offender turn away from crime.'

This statement applies both to intervention in prison and outside, whether after imprisonment or in the context of community sentences. But these excellent aspirations will be destroyed if prisons are over-crowded. Overcrowding results in prisoners finding themselves incarcerated wherever there is a vacancy – often far away from their social and family links. Overcrowding results in prisoners being shuffled from one prison to another, so that if they leave for a court hearing they may be returned to, not merely a different cell, but a different prison from that which they had left. Overcrowding puts immense difficulties in the way of the management of individual prisoners, which is NOMS' ideal. What is the cause of it and what can be done about it?

The causes of the horrifying rise in prison numbers since the last war are not all that easy to analyse. In 2002 the Social Exclusion Unit produced a report titled 'Reducing Re-offending by Ex-prisoners'. Tony Blair wrote a foreward in which he stated: 'Many [prisoners] have very poor skills, are unemployed on entering prison, and have a history of homelessness, drug addiction and mental health problems'. In fact the report showed that for 'many' one can substitute 'most'. Half of all prisoners are at or below the level expected of an 11 year old in reading; in numeracy two-thirds reach that level; two thirds were unemployed before imprisonment. Nearly half of sentenced prisoners were excluded from school; the same proportion ran away from home. The majority of men and almost three-quarters of women in prison have no qualifications. A quarter of men and a third of women admit to using heroin or crack cocaine in the year preceding their imprisonment. 72% of men sentenced to prison have two or more mental disorders. The prison population is largely made up of men and women who, from childhood, have been socially deprived. One way to reduce prison numbers is to deal with that deprivation, and this indeed is government policy.

But there is another factor that contributes to prison overcrowding. We send more people proportionally to prison, and for longer, than any other country in Western Europe. Furthermore, over the last 20 years there has been a marked increase in the length of the average sentences imposed for the more serious offences: drug offences, criminal damage, violence and burglary.

Finally, there has been a massive increase in sentences of under 12 months. In 1994 these totalled approximately 39,000, whereas in 2004 the total was nearly 62,000. Of these, the vast majority- 53,676- were of less than 6 months in length.

I have two personal concerns about these statistics. The first relates to the increasing length of sentences imposed for serious offences. The Criminal Justice Act 2003 requires a court, when imposing a sentence of imprisonment, to impose the shortest term that is commensurate with the seriousness of the offending. This requires the court to evaluate, in terms of length of sentence, the particular offence for which a defendant is convicted. This is no easy matter. If you have never experienced imprisonment it is very difficult to estimate the punitive effect of a month, or a year, or ten years deprived of one's liberty in such an institution. Some elements of the media are inclined, however, to make light of sentences of imprisonment – to speak of defendants being permitted to 'walk free' after only five years inside. I am inclined to think that to be confined in prison for 5 years is a very weighty punishment

indeed. That is not to say that I do not recognise that there are certain crimes which require a sentence of that length or longer to protect the public, but I detect on the part of such publications an incitement to the public to exact vengeance from offenders that is not dissimilar from the emotions of those who thronged to witness public executions in the eighteenth century. Such is the atmosphere that sentencers are criticised for failing to lock offenders up for longer, but without examination as to the explanation given by the judge for his sentence or the statutory framework in which it was imposed. Media pressure such as this cannot fail to have effect on the public, on politicians and on judges. The 2003 Act lays down a scale for determining the minimum time that those convicted of murder will serve in prison and, in accordance with that scale some murderers are being sentenced to a minimum of 30 years, or even full life terms. Lengths of sentence reflect, to a degree, public sentiment and, as chairman of the Sentencing Guidelines Council, I am in part responsible for them. But I sometimes wonder whether, in 100 years' time, people will be as shocked by the length of the sentences we are imposing as we are by some of the punishments of the 18th century.

My other concern is about the short sentences of imprisonment, passed in relation to the less serious offences. I have the statistics in relation to the 53,676 offenders who received sentences of 6 months or less in 2004. The largest group of these had committed offences in relation to property, 14,614 of theft or handling stolen goods, 2,831 of burglary and 1,619 of fraud and forgery. 12,515 had been convicted of motoring offences, 8,210 of offences of violence against the person. The offences of the remainder were unspecified. Statistics show that about two thirds of those who receive a short sentence of imprisonment are re-convicted within 2 years.

It is government policy that imprisonment should be reserved for serious offenders, in particular those who pose a danger to the public, and that other forms of punishment should be meted out to the less serious offenders. Fines and community sentences are the most common alternatives to imprisonment. The Criminal Justice Act 2003 provides that a court must not pass a custodial sentence unless the offending was so serious that neither a fine nor a community sentence can be justified. This reflected the views of David Blunkett, who was the Home Secretary responsible for that Act. This is what he said, the year before it was passed:

> "*I want to ensure that what works is actually put into practice. And if we have a situation where larger and larger groups of people are committed to custody for less than six months and if that displaces existing long term prisoners in jails around the country whose programmes of training, adult literacy and numeracy in preparation for release are then completely disrupted and if by musical cells, because that's what it is, we dislocate the programmes that are taking place on tackling drug offences and drug misuse and if we make it more difficult to manage the prisoners who are in there, then we are crazy. This is a daft way to operate.*"

David Blunkett's successor, Charles Clarke, was also opposed to sending offenders to prison when a community sentence was a viable alternative. He said:

> "*We have to make preventing reoffending the centre of the organisation of our correctional services. We have to make reducing the number of reoffenders the central focus of our policy and practice. We have to understand, and act on the*

> *fact, that cutting reoffending is essential if we are to cut crime... We have to create a package of support and interventions for each and every offender, and we have to do this in a totally methodical way. We need to make sure that for every person within our prison and probation services we have a realistic programme for their time in the system, with clear goals right from the start. Community sentencing, with the flexibility and focus it offers, can be an important support for this approach ...The truth is that a well-planned and properly supervised community sentence is both tough on the offender and far more valuable in indicating a constructive future for the individual. Moreover, such sentences allow offenders to perform reparation in a more visible way, which the community is better able to shape and understand*."

The National Offender Management Service's plans for the future show a continued commitment to rehabilitation, both in prison and in the community. But some of the media, and some sentencers, are sceptical as to whether community sentences provide adequate punishment and whether they are any more effective in preventing re-offending than imprisonment.

I am well known as supporting community sentences as an alternative to imprisonment in the appropriate cases. I have witnessed 'community payback', drug treatment and domestic violence courses. They are not a panacea, but I believe they offer a better chance of preventing re-offending than short spells of imprisonment and can leave room in the prisons for effective intervention for those whose crimes require detention. But if community sentencing is to work it must be underpinned by adequate resources and the public must be educated to accept that the demands made by it on the offenders do indeed constitute punishment.

I hope that the years to come may see a general appreciation of the importance not merely of punishing criminals but of attacking the causes of their criminality.