The contributions that Victor Mishcon, Lord Mishcon, has made to public life are as varied as they are numerous. That he was able to be the founder of one of the leading law firms in the country indicates his contribution to the law. Before becoming a member of the House of Lords, he made a significant contribution to the local government of Greater London. The fact that he has received honours from three countries as different as Sweden, Ethiopia and Jordan, is confirmation of his role in furthering international relations. What, however, makes this an intimidating evening for me is the fact that, when I became a member of the House of Lords, I witnessed and admired the eloquence, courtesy and style of his contributions to debates. He invariably was listened to with the greatest of respect. I, therefore, regard it as a singular privilege to be asked to give this year's lecture at my old college in his honour. I am particularly delighted that he is with us tonight. I know that his presence gives us all great pleasure. We wish him the best of health for many years to come.

It is, however, the health of the criminal justice system which is at the centre of what I have to say tonight. It is not possible to have a healthy society without a healthy criminal justice system. A healthy criminal justice system gives the public a sense of security. Crime will still be with us, but an effective criminal justice system will mean that a healthy society can accommodate this. Members of the public who have the misfortune to suffer the anguish of being victims of crime will, at least, have the reassurance and comfort of knowing that there is a real prospect of those responsible being arrested, prosecuted and appropriately punished.

Unfortunately, it has to be accepted that, for many years now, the public have had little confidence in the ability of our criminal justice system to ensure that justice is done. Regrettably, each part of the system has appeared to be failing the public. Far too few of those responsible for crimes were being detected and, of those who were detected, the percentage who were successfully prosecuted to conviction was regrettably low. When they were convicted, the sentences of the court, at least judged by the reoffending rate, were singularly ineffective. The whole system gave the impression that it was crying out for fundamental reform. In particular, there was a desperate need for the different agencies engaged in the system to work together to achieve the improvements which were needed. However, turning round a failing public service is notoriously difficult.

That this should be the position was particularly surprising since when I cast my mind back over the 40 years and more since I commenced practice, the criminal justice system seems to have been continuously the subject of organisation and reorganisation, starting with the Dr Beeching reforms. I am not sure these were any more effective in relation to the criminal justice system then they were in the case of the railways. They certainly meant that some of the most charming courts in England and Wales met the same fate as some of our most attractive rural railway stations.

Over the last few years a real effort has been made to achieve the urgently needed co-ordination between the different criminal justice agencies that is a key to meaningful reform. More criminals are being arrested and the prosecution process has been significantly improved as a result of the Crown Prosecution Service working in close support of the police. This improved co-operation is reducing the number of trials that have to be adjourned or worse still abandoned. The late delivery of prisoners to court is being tackled. The needs of witnesses are being considered in a more constructive manner and more frequently met. The different services now realise the need for concerted action and this is being taken at all levels from the very top downwards.

A Criminal Justice Board has been established to drive forward the co-ordination that is necessary. Each agency is represented at ministerial and at the highest official level and a senior judge, Lord Justice Kay, is a member of the Board.

There are reasons, therefore, for quiet confidence that there is about to be an increasing flow of criminal trials which result in the conviction of those who have committed crimes. This, in itself, should act as a deterrent to criminal conduct. My distinguished predecessor, Lord Taylor, was quite rightly convinced that the best deterrence to the commission of crime is the knowledge that there is a serious prospect of your being arrested and convicted if you indulge in crime.

The more direct objective of achieving the conviction of the guilty is of course so that they can be sentenced for the crimes they commit. Sentencing has been and still is a highly political subject. This is because it is of immense importance to the public and, in particular, to those who have the misfortune to be victims of crime. It is every bit as important that those who commit crimes should receive appropriate sentences as it is that they are convicted. An appropriate sentence is one that will not only punish the offender, but will also protect the public by reducing the incidence of re-offending.

There has been no shortage of reviews of penal process. There has been the enlightened report of a senior civil servant, John Halliday, *Making Punishments Work* . There has been a report by the Social Exclusion Unit of the Cabinet Office and a report by the All Party Parliamentary Penal Affairs Group among others. Finally, there is the report of Patrick Carter of 11 December 2003, *Managing Offenders, Reducing Crime* , to the Prime Minister.

Each report reveals a mind-blowing situation involving vast expenditure with little if any long-term improvement in the protection of the public. Tonight, my concern is not so much where we are, but where we should be going. But in order to identify the progress that is necessary you need to know something about the position from which you are starting. So let me remind you of some of the worrying facts about the present position. I do so from the valuable information that the Prison Reform Trust makes regularly available to achieve its admirable objective of improving the present position.

On 5 March last the prison population stood at its highest ever figure of 74,960. This figure is the result of a continuing increase in the prison population over a period of at least the last 10 years. When I produced my report of the Strangeways Inquiry in 1991 the prison population was 42,000 and falling.

But worse is to come. By the end of the decade the Home Office projections predict a prison population of anything between 91,400 and 109,600. The Home Office are doing what they can to provide additional prison accommodation. Since 1995, over 15,000 additional prison places have been provided at a cost of more than two billion pounds. There is, despite this expenditure, a huge gap between planned useable operational capacity and the forecast prison population. At the end of February 2004, 85 of 138 prisons in England and Wales were overcrowded. At the end of November 2003 over 16,500 prisoners were doubling up in cells designed for 1.

The average cost of keeping a prisoner in custody is over £36,000. But prison is ineffective in reducing reoffending. 59% of prisoners are reconvicted within two years of being released. The Social Exclusion Unit came to the conclusion that reoffending by ex-prisoners costs society at least £11 billion a year. Ex-prisoners are responsible for about 1 in 5 of all recorded crimes. All sections of the prison population are increasing. The worst figures are in relation to women where there has been an increase of 151% over the last ten years.

Both the number of prisoners serving short sentences and the number of life-sentence prisoners have increased. By 31 July 2003 there were 5,427 prisoners serving life-sentences, as compared with 3,000 in 1992. At any one time there are on average more than 10,000 prisoners serving sentences of 12 months or less. This is despite the fact that there is a uniform acceptance that sentences of this sort make little or no contribution to the reduction of crime.

I could go on providing you with more figures to a like effect but I have given you sufficient information to understand the position that we are now in. The inescapable conclusion is that, unless there is a dramatic change in the way that we deal with offenders, there is every likelihood of the position getting worse.

I emphasise that the poor results that are being achieved at present are not any reflection on the effort that is being made by the prison service and the probation service to tackle the problem. They are being given an impossible task. While considerable progress has been made in reducing escapes and the number of assaults, in other areas little has been achieved because of the direct and indirect consequences of overcrowding. Effort is being diverted into seeking to manage numbers at the cost of imaginative programmes to address reoffending. There is a continuous churning of prisoners. If it had not been for the Home Office adopting an early release programme involving ever-increasing numbers of prisoners leaving custody under electronic surveillance, the numbers of prisoners would be even greater. The period of

sentences of imprisonment actually being served, now bear little relation to the sentences imposed.

It is, however, the sentences which are imposed which still result in the continuous rise in the prison population. In the Carter Report it is stated "the key explanation for growth in the use of prison and probation over the last decade is the increased severity in sentencing". He gives as an example that in 1991 15% of those found guilty of an indictable offence received a custodial sentence; by 2001 it was 25%. There has been a similar increase in the use of community sentences. But Patrick Carter's conclusion is that:

"The increased use of prison and probation has only had a limited impact on crime. The deterrent effect of tougher sentences is weak: more important is the fear of being caught. Prison does reduce crime, but there is no convincing evidence that further increases in the use of custody would significantly reduce crime. Rehabilitative work can reduce the chance of reoffending but by only 5-10%".

It is the judiciary, including magistrates, who pass the sentences that produce the situation where, despite vast resources being expended, both the prison and probation service are overwhelmed. However, it must be remembered that there has been continuous pressure upon the judiciary to increase sentences and - until recently - little, if any, effort in the opposite direction. Initiatives which might be justifiable in themselves are taken without regard to their knock-on effect on the situation as a whole.

There is no doubt that the Government has made a huge commitment to trying to reduce crime and increase public confidence in sentencing. Its efforts have been thwarted by the chronic problem of overcrowding and, more recently, by a severe lack of morale and resources within the Probation Service. With the Probation Service, the trouble has been too much change that has been badly managed.

My primary concern in painting this sombre picture is not with the offenders who often find their regimes undermined by overcrowding, but with those who will be the victims of crimes because of our inability to tackle offending behaviour. We are not being sufficiently tough on the causes of crime.

Notwithstanding the gloomy statistics with which I have been peppering you, I do see what could be a bright light shining at the end of the tunnel. In responding to the report of Patrick Carter, the Home Secretary, Mr Blunkett, stated and I quote:

"I believe that we now have a once in a generation opportunity to reduce crime by radically transforming the prison and probation services and those working in partnership with them".

Let me give the reasons why I think Mr Blunkett could be, and I fervently hope he is right:

1. First of all, as a consequence of the Carter Report, another geological fault in the criminal justice system is about to be bridged. The Prison Service and the Probation Service are being combined into a National Offender Management Service (NOMS as it is already known). This change is important and given time could be extremely positive, although the Probation Boards Association fear the immediate effect will be further damage to morale, loss of staff and recruitment problems. As against this, a chief executive of NOMS has already been appointed. He is Martin Narey, who is undoubtedly the individual best qualified to make NOMS a success. He has been an outstanding head of the Prison Service and has a firm grasp of what is needed.
   NOMS should be able to tackle one of the most intractable problems involved in offender management - bridging the return of an offender into the community after the end of a custodial sentence. The sentence needs to be a seamless whole, partly served in custody and part in the community. It is only if this happens that the benefits of programmes within prison can be made effective in the community. It is, for example, well established that the prospects of re-offending will be reduced if arrangements are made which enable the ex-prisoner to have accommodation and a job on release. Gallant efforts have already been made in some prisons such as Canterbury to ensure that prisoners will be released with these advantages, but the task will be made much easier with the establishment of a single service. NOMS will also be responsible for youth justice. Here the Youth Justice Board and Local Youth Offending Teams have already demonstrated how national leadership coupled with local delivery can produce results. I am confident that the lessons which are to be learnt from the way the Youth Justice Board worked with local offending teams will not be lost in the new

organisation. I have also every expectation that NOMS will be receptive to the constructive comments that the Probation Boards Association has made. You cannot build prisons overnight and it takes time to train new probation officers, but the new service should turn out to be the foundation upon which an effective penal policy can be based.

2. The second positive change has been the introduction by the Criminal Justice Act 2003 of a spectrum of new community punishments. Community Orders can include an array of requirements.
   The problem with community sentences in the past was that both the public and the courts were sceptical as to their efficacy. If the necessary preparation work is done to ensure that the new community punishments will be effective and properly monitored, they should inspire confidence in the public and the courts. This will have the advantage of the courts using them as an alternative to prison.
3. There are also new powers in relation to fines. Fines have the advantage over other sentences in that, if they are paid, they are not resource intensive. But their use by courts has dropped dramatically. Partly because enforcement has proved ineffective and partly, because there have only been limited sanctions available in the event of non-payment. As a last resort failure to pay a fine can lead to a result the court was seeking to avoid; namely imprisonment. However, the Courts Act 2003 provides for the introduction of an innovative new fine system which has already been launched in many parts of Europe. Offenders can either pay the fine by instalments or by a lump sum or have to do unpaid work instead. This, combined with wider powers of enforcement, should reduce the need to resort to imprisonment in default.
4. The third positive step is an innovation for which the Criminal Justice Act 2003 is the source. This is the creation of a power in the police and others to make the offender the subject of a conditional caution. It is important that the use of this power should be properly monitored because one of its virtues, namely that the courts are not involved, means it is capable of being a source of abuse. Used appropriately, it has many advantages.First, it avoids the complexities and the delays of the court process for the less serious offender. Secondly, if an offender complies with the conditions he will not be left with the disadvantage of a criminal record. Finally, there is the fact that the Act requires the conditional caution to be used for the commendable purposes of facilitating the rehabilitation of the offender and ensuring that he makes reparation for the offence.
5. The next positive step is the establishing of a unified administration for the courts. The management of the magistrates' and Crown courts are being integrated to create a single court system. This is already resulting in closer relations between magistrates and the more senior judiciary. It should assist us decide how best to use available resources to punish offenders effectively.
6. Then there is encouragement to be had from the many constructive initiatives that are taking place to achieve positive outcomes once an offender's crimes have brought him to the attention of the authorities. An example is provided by restorative justice which can not only assist the offender to be rehabilitated, but also (to an extent which is surprising to those who are unfamiliar with the process) the victim as well.
7. There are also the positive things that are happening in our prisons, notwithstanding the difficulties caused by overcrowding. I refer in particular to the provision of education and training which means that a large percentage of prisoners who were unemployable when they entered prison have more hope of gaining honest employment when they leave.
8. The next and final point is the establishment by the Criminal Justice Act 2003 of the Sentencing Guidelines Council. The Council has the potential of being a most important development. It deserves a lecture of its own. I do not say this because its Chairman is, ex officio, the Lord Chief Justice. I do so because it is the key to achieving a sentencing framework in this jurisdiction that will protect the public from the immensely damaging consequences of crime. Assisting the Council to embark on the huge challenge with which it is faced is a daunting task. I regard as one of the most critical responsibilities of my terms of office. For reasons I will explain, the Council must develop a more constructive penal policy while at the same time obtaining the confidence of the public, the judiciary, the other agencies in the justice system, the government of the day, the politicians and at least a large section of the media.

The Sentencing Guidelines Council is just beginning its work. Prior to the creation of the Council, guidelines were given by the Criminal Division of the Court of Appeal. Guidelines are needed because, subject to exceptions that in practice have not met with success, Parliament does not fix the actual sentence to be served by a prisoner, but limits its role to setting the maximum penalty for an offence. In other words

Parliament establishes the framework within which a judge or magistrate imposes the appropriate sentence. This allows the judge or magistrate to tailor the punishment to fit the crime and in doing so to achieve, in the words of the Mikado, "an object sublime".

While a sentence should be tailored to fit the crime, it must also bear an appropriate relationship to the sentences being imposed for the same offence and for other offences in other cases. This is the principle objective of the guideline judgments that have been given by the Court of Appeal in the past.

In recent times, the Court of Appeal has been assisted in its task by advice from the Sentencing Advisory Panel, under the chairmanship of Professor Martin Wasik. Now the Panel is to fulfil a similar role in relation to the Council. Both the Panel and the Council have a membership that is highly qualified to perform their respective roles. They, of course, include judges but also lawyers and non-lawyers whose collective experience means that they should be able perform this task in a manner that commands respect.

The advantage of the Council over the Court of Appeal is that it is in a position to adopt a more proactive approach to the preparation of guidelines. Unlike the Court of Appeal, the Council is not constrained by the need to deliver its guidelines in the form of a judgment in a particular case. It can work systematically to produce a comprehensive code of guidelines for all courts that have to punish offenders.

Patrick Carter proposes, as one of his recommendations, a new role for judiciary. He says:

"There needs to be greater emphasis on judicial self-governance, ensuring compliance with guidelines. In the short term, when capacity is fixed, the Sentencing Guidelines Council needs to provide guidance that takes account of the capacity of prison and probation. Over the medium term, the Sentencing Advisory Panel needs to provide evidence of what works to reduce crime and increase public confidence. This will form the basis for adjusting the capacity of prisons and probation".

The Government in its response to the Carter report accepts this suggested approach. In *Reducing Crime and Changing Lives* it states, "the change in sentencing practice depends critically on the role of the SGC and the judiciary. They have a pivotal role in helping ensure we can align the capacity of correctional services to deliver, with the demand placed upon them by sentencers".

In these remarks there is more than a suggestion that the judiciary need to change their practices in relation to sentencing. This can only happen with the full support of the Sentencing Guidelines Council. It will be for the Council to decide the extent to which it can seek to ensure that the sentences imposed by all levels of the judiciary not only "fit" the circumstances of the individual crime for which they are imposed, but do so in a way which uses available resources in an effective manner?

Carter adds that:

"each year the Council should discuss the priorities for sentencing practice with the Home Office. It would then issue guidelines that ensure offences are treated proportionately to their severity, are informed by evidence on what reduces offending and makes cost-effective the use of existing capacity".

In addition Carter states that "the Council needs to have responsibility for using the existing capacity of correctional services to the best effect". He also refers to the Panel producing for magistrates and judges up-to-date information on their sentencing practice and the impact on reoffending.

Having set out by no means all the promising signs that are at least on the horizon of the criminal justice system. I turn to consider whether my optimism is soundly based.

I have not forgotten the guideline which was given by the Court of Appeal over which I presided on 18 December 2002, that is just before the Christmas vacation. The date was to prove not unimportant. It was a guideline judgment as to the sentencing of burglars and burglary is an offence that would be particularly distressing for house holders at that time of the year. It was also the offence used by Carter as his example of upward drift in the average sentence. In view of this upward drift, and basing itself upon a recommendation of the Sentencing Advisory Panel, the Court suggested only a marginal downward

adjustment to the then existing sentencing pattern. The guidelines caused an explosion of protest in the media. It was clear from the reports that my judgment had been misunderstood.

Looking back on the situation now, I stand by the judgment and I would not alter what I said. However I do regard the media reaction a public relations disaster of a high order. It is to be hoped that in the case of guidelines introduced by the Council there would be no repetition. The problem was that the media thought the burglary guidelines were being surreptitiously issued when attention would be diverted by the approach of Christmas. If the guidelines had not been contained in a judgment, the misunderstandings could have been more easily explained. In the case of guidelines issued by the Council, there will be less risk of misunderstanding. If, however, this is not the case, an information office could help to make the position clear. More importantly, in the case of the Council the guidelines will be subject to a consultation process which should prepare the public for what is proposed and enable the public's views to be taken on board.

However, the lessons to be learnt from what happened should not be forgotten since any repetition would be extremely damaging for confidence in the Council. The experience emphasises the sensitivity of issues involving sentencing.

Part of that sensitivity is attributable to fact that our penal policies have not been more successful. If they had been I would expect the public and media to be less critical. Though I would stress the importance of the media informing themselves of the facts before they embark on vituperative attacks on individual members of the judiciary. In addition they must appreciate that we give judges the task of passing a just sentence and, if they impose the wrong sentence, then it can be put right on appeal. The judge has to consider, not only the victim, but other issues including what is in the interests of the protection of the public as a whole.

The father of criminology, Sir Leon Radzinowitz, wrote a book at the age of 92 in which he stated, "No meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern". He was right. It is my hope that the breadth and the distinction of the membership of the Council representing the police, the prosecution and the defence as well as the victims of crime will assist in making penal policy less of a political issue. There is also the fact that Parliament will have an involvement through the Council's relationship with the Home Affairs Select Committee.

It is critical that the Council, when exercising its wide discretion, should always frame its guidance within the principles of sentencing which are now to be found in the Criminal Justice Act 2003. This will ensure that the legitimacy of the guidance is not in doubt. The principles include five purposes of sentencing. The punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to a persons affected by their crime. These statutory purposes provide a broad, one could almost say visionary, approach to sentencing that has not been previously so clearly identified.

Then, importantly, there is the fact that court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence. Finally there is the fact that the Council is required to have regard to:

a. the cost of different sentences and their relative effectiveness in preventing re-offending, and
b. the need to promote public confidence in the criminal justice system.

These statutory provisions ensure that it is well within the Council's area of discretion to make guidelines that will ensure that each of the principles to which I have referred form part of a new and more constructive penal policy. The Council cannot ignore the resources that are, and can be made, available for dealing with offenders - these resources are intimately linked to the effectiveness of sentences. While the Council has to live in the real world, it is independent of the government of the day and it must perform its role in the manner which it considers will best assist the courts. If there is a failure to make resources available where their provision is clearly possible, that failure will no doubt be given little if any weight by the Council. But the Council can be expected to accept that generally it is for the government of the day to

determine how resources are allocated.

At the present time it is uncontroversial that there is a need for restraint in the use of prison and community sentences. The Council may take the view that NOMS should be provided with the time it needs to prepare for the community sentences and the other initiatives to which I have referred. If NOMS is given this opportunity, and is provided with the necessary resources, then the new community sentences should provide a brake on the increased use of prison in cases where custody is not necessary. If the brake can be applied, then - over a period of time - the gains should be massive. Increased public confidence in the criminal justice system and more effective use of the resources should follow. We will then have grasped the opportunity currently available to us and developed a new penal policy designed to tackle the grave problems that we currently face.

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