BOOK REVIEWS

Proceedings of the Institute of Criminology, University of Sydney, No. 1, 1969: Judicial Seminar on Sentencing; The Sydney Project on Sentencing. The University of Sydney, Faculty of Law, 1970, 127 pp. ($4.00).
Proceedings of the Institute of Criminology, University of Sydney, No. 3, 1969: Seminar on Bail. The University of Sydney, Faculty of Law, 1970, 119 pp. ($4.00).

To an American reviewer what is most interesting is that the Institute of Criminology exists and that it is carrying out such a significant program. What makes this Institute especially important is that it represents a collaborative effort in New South Wales by the judiciary, government officials, police and probation officers, and the dean and faculty of a great law school. It is no simple matter to maintain cordial relations among those who work in these different and sometimes competing fields and disciplines, and it is even more unusual to have active and fruitful collaboration among them. A good deal of the credit must go to the Honorable Sir Leslie Herron, Chief Justice of New South Wales, who uses the prestige of his office, as Chief Justice Burger does in the United States, and as Chief Justice Arthur T. Vanderbilt did before him, to overcome inertia and to harmonize the rivalries and the disparate traditions of the various services. Special credit is also due to Dean Kenneth O. Shatwell, Challis Professor of Law and Director of the Institute, for developing over the years the confidence and respect of judges, practitioners, and government officers. He deserves additional credit for convincing the administrative officers of the University of Sydney to permit him to employ such an impressive staff of professors, lecturers and research assistants who have as their main academic interest the administration of criminal justice. Very few American law schools have an equal amount of academic talent devoted to this long-neglected area of the law.

Volume No. 1 on Sentencing, of which Mr. R. P. Roulston is the general editor, includes a transcript of a judicial seminar on sentencing and progress reports on the Sydney Project on Sentencing. The seminar was convened at the request of the Minister of Justice, the Honorable J. C. Maddison. The participants in the seminar were the judges in the various courts of criminal jurisdiction and also Crown prosecutors, defense counsel and probation and parole officers.

The opening addresses were delivered by the Chief Justice and by the Minister of Justice. Other papers were presented by Mr. Justice R. L. Taylor and Mr. Justice P. H. Allen of the New South Wales Supreme Court, by Judge A. Levine, District Court Judge and Chairman of Quarter Sessions and by Mr. W. J. Lewer and Mr. M. F. Farquhar, Stipendiary Magistrates. Mr. G. J. Hawkins, Senior Lecturer in Criminology, contributed a scholarly

paper entitled "Deterrence: The Problematic Postulate",[1] in which he focused the attention of the seminar on the well-known and yet often-forgotten difference between general deterrence and individual or special deterrence.

Seminars on sentencing are not uncommon in Great Britain and in the United States. They are unquestionably useful to judges who seek the advice of their colleagues, and they are also important in minimizing the public criticism that arises from disparate sentences in what seem to the lay mind to be similar cases. The objects of such seminars were very well stated by the Minister of Justice to be: "1— to bring to the sentencing process an enlightenment and challenge to preconceived ideas; 2— to improve the procedures and techniques of the criminal process; 3— to stimulate criminological research; 4— to communicate to the public at large the complexity of the task which confronts the courts in imposing appropriate sentences."[2]

One of the most interesting exercises during the Seminar on sentencing was to pose six cases to all of the judges for consideration. Each case involved a realistic problem in sentencing, complete with concrete details and with many variations in human motivation. The judges were divided into six panels and each panel was asked to impose a sentence in each of the six cases. There were, of course, variations, indeed somewhat substantial variations, in the sentences imposed by the different panels, but the exercise was thought by the participants to be stimulating and helpful.

From a scientific point of view the most important part of the volume on Sentencing is the Sydney Project on Sentencing,[3] which is a survey conducted by two members of the faculty of law, Mr. R. P. Roulston and Mr. P. G. Ward, under a grant from the Walter E. Meyer Research Institute of Law in New York. The study is a demographic survey of 3,700 men who received presentence reports prepared by the Adult Probation Service. Although the study is not yet complete, there are some interesting conclusions about the sentencing practices of various courts, depending on the age of persons, their prior records, the amount of education, family status, religion and country of origin. For instance, it is interesting that the rate of conviction for migrants is less than that for native-born Australians, although as more time elapses the rates for the two groups become approximately the same. Some of the conclusions at this stage of the study relate to the allocation of the resources of the Probation Service, and raise questions about whether judges receive adequate information to enable them to compare their practices with those of other members of the courts. The progress report concludes as follows:

> Setting aside the difference between courts, the major determinants of sentencing practice appear to be the age, previous record, family history, and habits of the offender. These factors are of course complexly inter-related. For this reason the next stage of the investigation of these records will be over the preparation of a discriminant function based on these factors by which it is hoped that the relative importance of various inter-correlated factors may be sorted out.[4]

Of the two volumes under review, No. 3, reporting on the Seminar on Bail, is of greater current interest, at least in the United States, because of

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[1] *Proceedings of the Institute of Criminology, No. 1, 1969* (hereafter *Proceedings No. 1*) 38.
[2] *Ibid.*
[3] At 31-127.
[4] At 127.

its relevance to the controversy over "preventive detention".[5]

The law of bail in common law counries, although dating back to Anglo-Saxon days, has evolved slowly and with surprising ambiguity about its precise function, as pointed out in a scholarly article by Mr. R. P. Roulston.[6] Although the dominant object of bail, at least in modern times, is to secure the appearance of the prisoner at trial, various criteria have been considered relevant, including the seriousness of the offence, the probability of conviction, the severity of punishment, the probable delay in a hearing and the likelihood of the prisoner committing further offences while on bail or tampering with witnesses or destroying evidence.[7]

In the United States contemporary interest in bail is focused on the federal and state statutes[8] reforming bail practices, especially for prisoners who could not afford to post bail, and on the District of Columbia Court Reform and Criminal Procedure Act of 1970 adopted by Congress.[9]

The reform of bail in the United States goes back to controlled experiments in releasing prisoners on their own recognizance if they could meet certain tests relating to their probable appearance for trial. The report of the Seminar on Bail contains a thorough coverage of the experience in the United States, the statutory reforms, and the relevance of the reforms to Australia.[10]

As Miss Susan Armstrong stated:

> The Manhattan Bail scheme was pioneered by the Vera Foundation, the New York University and the Institute of Judicial Administration, as an attempt to devise a basically objective test which might guide the application of discretion. Verified information concerning the defendant's relationship to the community is scored according to predetermined values, with a certain number of points qualifying for a recommendation that he be released on his own recognizance.[11]

Miss Armstrong sets out the five categories and the system of scoring. The principal items relate to prior record, family ties, employment, residence, and time in the area. When Miss Armstrong applied the test to prisoners who had absconded in New South Wales. and to a similar group who had not been granted bail, she found substantial validity to the Manhattan Bail test.

Mr. P. G. McGonigal in his paper, "Bail in Foreign Climes" writes:

> Since 1961 no discussion of bail could ignore the procedures and results of the Manhattan Bail Project and its numerous spiritual progeny scattered throughout the United States. However, any consideration of these projects must proceed within the context of the bail situation in the U.S.; any other consideration will certainly be misleading if applied to the situation in New South Wales.[12]

He then proceeded to call attention to the Eighth Amendment to the United

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[5] Dershowitz, "Imprisonment by Judicial Hunch" (1971) 57 *A.B.A.J.* 560 and article cited nn. 26-28.

[6] *Proceedings of the Institute of Criminology, No. 3, 1969* (hereafter *Proceedings No. 3*) 17.

[7] *Id.*, 19-29.

[8] H. S. J. Ervin, "The Legislative Role in Bail Reforms" (1967) 35 *Geo. Wash. L.R.* 429.

[9] D. C. Code §§ 1322, 1323; Pub.L.No.91-358, 91st Cong. 1st Sess. § 210.

[10] S. Armstrong, "An Application of the Manhattan Bail System to New South Wales Offenders", *Proceedings No. 3*, 39; P. McGonigal, App. I, "Bail in Foreign Climes", *Id.*, 87.

[11] At 39.

[12] At 87.

States Constitution, which provides that excessive bail shall not be required, and pointed out that bail is mandatory in most states except for capital crimes and discretionary in such cases.

The law and practice relating to bail in the Supreme Court in New South Wales is authoritatively stated by Mr. Justice J. H. McClemens,[13] and in Quarter Sessions and in Petty Sessions by Mr. J. K. Ford[14] and Mr. W. J. Lewer.[15] Judge A. Levine contributed a paper on the narrow but important problem "Bail for Persons on Parole".[16]

Several papers have a direct bearing on the controversy in the United States on "preventive detention" but the two that are especially provocative are the papers by Detective Sergeant F. Krahe[17] and Mr. H. F. Purnell,[18] Senior Public Defender.

Detective Sergeant Krahe has had thirty years of experience and is in command of a 36-man squad especially charged with the control of heavy crime. He has been concerned with "the confirmed and consistent criminal". He states in his paper:

> In our community today there is a highly skilled, well-educated, dedicated criminal class who have chosen as their way of life the commission of crime. These people think differently. . . . They are as dedicated as you are, as thorough as you are, as meticulous as you are. Praiseworthy as these qualities may be when found in the normal law-abiding citizen, they are qualities which ought to be feared when found in the criminal.
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> The law-abiding citizen is the victim and if the law is to be our protection, then it must place the professional criminal in a category of his own. We must recognize the existence of the professional criminal and apply a different legal standard to him. It is very well to say that we have freedom under the law . . . but the law is too lenient to the active criminal who constantly takes advantage of it.[19]

With reference to the usual criterion of whether or not the prisoner will answer his bail, Mr. Krahe says:

> I submit that this is no longer the only criterion to consider when the question of bail is raised. . . . The real question to be asked is *what is the probability of the accused committing further crime whilst on bail?* In other words, can we afford to allow the professional criminal his freedom while awaiting trial, when his very background strongly suggests that he will continue to commit crime whilst he is free?[20]

If there is a professional criminal class (Dean Shatwell thinks there is, and Mr. McGeechan, the Director of Corrective Services, estimates that between 20% and 40% of the prison population are hard-core professional criminals)[21] then how can a judge distinguish them? If in addition to professional criminals there are persons who have compulsions to commit crime, because of addiction to drugs or alcohol, or because of psychic disorders, how can they be recognized?

Mr. Purnell, as an experienced defense counsel, takes the view that is espoused by most persons who are primarily concerned with civil liberties

[13] At 43.
[14] At 51.
[15] At 57.
[16] At 73.
[17] At 65.
[18] At 79.
[19] At 65.
[20] At 66.
[21] At 7.

and the welfare of prisoners in general. He points out how difficult it is for a prisoner who is not granted bail to receive adequate legal assistance, how detention seems to increase the likelihood of conviction, what the adverse effects are on the prisoner's private life, and how it results in the denial or impairment of the presumption of innocence.

The difference of opinion that runs through the papers in this seminar is evident in the literature in the United States, especially in connection with the District of Columbia Act of 1970. There is little dissent about the desirability of the release on their own recognizance of prisoners who can meet the test developed in the Manhattan Bail Project,[22] and the Bail Reform Act of 1966 has adopted this principle.[23] The problem now is not about the release of the indigent or the disadvantaged. The argument is over the prisoner who is thought likely to be a recidivist and a danger to the community if he is released.

An Australian reader of the American literature must keep reminding himself, as Mr. McGonigal suggested,[24] that the Eighth Amendment severely restricts a judge in the United States. The Australian courts have considerably more freedom to detain prisoners thought to be a risk to the community if granted their freedom before trial.

The current attempt in the United States to differentiate between the run of prisoners who must be released on reasonable bail and the others who are likely to abuse the privilege is, as suggested earlier, in the preventive detention provision of the District of Columbia Court Reform and Criminal Procedure Act of 1970.[25] Unfortunately the debate is highly partisan. The present administration is trying to exploit the "law and order" theme, and hence Attorney-General John Mitchell is a defender not only of the constitutionality of the statute but also of its policy.[26] Prominent members of the opposition (such as Senator Sam J. Ervin[27] of North Carolina) and professors and lawyers with a civil liberties point of view argue that the statute is probably unconstitutional and certainly regressive.[28]

The Eighth Amendment has generally been construed to mean that bail must be allowed in an amount reasonably calculated to assure that the defendant will appear for trial. The District of Columbia statute[29] permits a judge to detain a prisoner before trial but only for certain dangerous or violent crimes and only after a hearing and a finding that the safety of the community cannot be reasonably assured if the prisoner is released. The finding must be based on clear and convincing evidence not only with respect

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[22] Ares, Rankin and Sturz, "The Manhattan Bail Project" (1963) 38 *N.Y.U.L.R.* 67; B. Botein, "The Manhattan Bail Project: Its Impact on the Criminal Law and the Criminal Law Process" (1965) 43 *Tex. L.R.* 319.

[23] H. S. J. Ervin, *op. cit.* n. 8.

[24] *Proceedings No. 3*, 87. *Cf.* D. Chappell, "Preventive Detention and the Habitual Offender" (1969) 2 *ANZ Journal of Criminology, No. 3.* See also, "Preventive Detention", *Report of the Advisory Council on the Treatment of Offenders*, London, 1963.

[25] *Supra* n. 9.

[26] J. N. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention" (1969), 55 *Virginia L.R.* 1223.

[27] "Preventive Detention—a Step Backward for Criminal Justice", Foreword to "Preventive Detention: An Empirical Analysis", 6 *Harv. Civil Rights—Civil Liberties L.R.* 291 (Reprinted in Law Review Research Series, American Bar Foundation, Chicago, Ill., 1971). (Hereafter, *Harvard Study*).

[28] Dershowitz, *op. cit.* n. 5; Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell" (1970) 56 *Virginia L.R.* 371; Dobrovir, "Preventive Dentention, The Lesson of Civil Disorders" (1970) 15 *Vill. L.R.* 313; Craig and Dobrovir, "The French Experience with Preventive Detention" (1971) 57 *A.B.A.J.* 565; Hickey, "Preventive Detention and the Crime of Being Dangerous" (1969) 58 *Geo. L.J.* 287.

[29] The D.C. Act, *supra* n. 9, is analyzed in the *Harvard Study*, *supra* n. 27, 303-4.

to the safety of the community but must also establish substantial probability that the prisoner committed the crime of which he was accused. The detention under this act is for a period of 60 days and unless a trial has been commenced within that time (or has been delayed at the request of defendant) the accused has the same rights to bail as any other person charged with crime.

In the United States there is very little statistical proof of how likely various types of accused persons are to commit a crime, especially within a limited period. Professor Dershowitz calls preventive detention "Imprisonment by Judicial Hunch".[30] One empirical analysis has just been attempted by a group of Harvard law students and the results have been printed in the *Harvard Civil Rights—Civil Liberties Law Review*[31] and reprinted by the American Bar Foundation. There is no doubt that the young men made their study of the limited sample with an obvious attempt to be fair and scientific. Nevertheless, their point of view is so patently civil libertarian that it might be hard for criminologists (or for law-and-order partisans) to give the report full credibility. For example, little point is made of the fact that money bail is no problem to many professional criminals who have ready access to almost unlimited sums of money. Although there may be little doubt of their appearing for trial, they may, as Mr. Krahe suggests, continue their criminal careers while at liberty. Nor is there adequate consideration of the cases where heroin addicts must resort to muggings, armed robberies, and burglaries to sustain their habit.

The Harvard study concedes that "defendants with indications of hard drug use . . . recidivate nearly twice as often as defendants with no indication, confirming to a limited extent the expected higher recidivism rate of those who support expensive drug habits". The report, however, concludes smugly: "Although preventive detention has been offered as a means of protecting the community from the addict, addiction is a disease and should be treated medically rather than criminally."[32]

If nothing else, the Harvard study and various other studies of predictability of future criminal activity[33] demonstrate how much we have yet to learn about collecting crime statistics and how great the need is for objective and impartial studies. Professor Dershowitz recommended to the Justice Department that it undertake a controlled experiment by releasing a certain sample of the persons who were subject to the provisions of the District of Columbia statute so that predictability could be tested scientifically. It seems difficult, however, to get prosecutors or judges (or psychiatrists) to take such a chance on the theory that it is easier to be safe than sorry.

It would be possible in New South Wales to experiment with various tests calculated to detect the prisoners who are a genuine danger to the community. The Harvard study suggests that tests might be devised to predict that about a third of the sample (not as many as one-half) would commit

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[30] *Supra* n. 5.

[31] *Harvard Study*, 300-396.

[32] *Id.* at 326.

[33] National Bureau of Standards, Technical Note 535, "Compilation and Use of Criminal Court Data in Relation to Pre-trial Release of Defendants: Pilot Study", 1970. (U.S. Gov. Printing Office, SD Catalog No. C13.46:535).

a crime while on bail—but not necessarily a violent crime and not necessarily within 60 days.[34]

The policy question is this: should two or three or even more persons in custody be detained (at least for a period of 60 days) if one of them by statistical probability is destined to commit a crime while on bail? An accused person is presumed innocent, of course, and a hearing and a finding by a judge are not equal to a trial. Nor is the order of detention a conviction. Is it better to subject certain groups of high risk prisoners to detention (with the safeguards of the D.C. statute) than to have some completely innocent members of the public be the victims of a fraction of them? The D.C. statute will soon be tested in the courts.[35]

Alternatives have been suggested, both in Australia and in the United States, to preventive detention. One suggestion is conditional release.[36] Another is to have the surety be responsible for the accused person's conduct while on bail.[37] All agree that the best solution is a speedy trial.[38]

All through both volumes there is a recurrent demand for better, more accurate and more compatible criminal statistics. The need is even more obvious in the United States with its more numerous and diverse juris-

[34] The *Harvard Study* attempts to determine scales of "dangerousness" and to devise possible tests that would predict which defendants would probably be recidivists. No test was found which would not have detained more who would not recidivate than those who would. Using an intermediate cut-off point of 30 on a range from 1 to 45, 70 of a sample of 427 would be detained, of whom 18 did recidivate and 52 did not.

Professor Dershowitz, *supra* n. 5, makes these assumptions: "I am willing, in order to avoid any charges of understatement, to quadruple the 5 percent figure found by the government study and to assume that 20 percent of the defendants charged with violent or dangerous offenses would commit violent or dangerous offenses if released on pretrial release. I think that is an accurate reflection of the realistic situation. If we postulate 1,000 defendants awaiting trial, and we imagine a predictive device that is 60 percent accurate in spotting the violent crimes and also 60 percent accurate in identifying defendants who would not commit these crimes, then we find that in order to prevent 120 of 200 crimes of violence, we must confine 440 defendants, 320 of them erroneously. If we are content to prevent only 50 percent of the target acts—only 100 of the 200 crimes—we would still have to confine 340 defendants, 240 of them erroneously." (1971) 57 *A.B.A.J.* 563.

The Bureau of Standards Technical Note 535, *supra* n. 33, summarizes its findings as follows: "Raw data relating to all 712 defendants who entered the District of Columbia Criminal Justice System during four sample weeks in 1968 were collected, evaluated and analyzed. From this sample, 11 percent of those released charged with misdemeanors or felonies were subsequently re-arrested on a second charge during the release period. Of those charged with 'crimes of violence' essentially as defined in the recent legislative proposal (Reference 112) and released, 17 percent were re-arrested. Of those charged with 'dangerous crimes', 25 percent were re-arrested while released on pretrial release. However, only 7 percent of those initially charged with a felony were re-arrested for a second felony, only 5 percent of those initially charged with a violent offense were re-arrested for another violent offense, and only 5 percent of those initially arrested for a dangerous offense were re-arrested for a dangerous offense.

In one respect these figures of re-arrest while on pretrial release presumably underestimate (to a degree not determinable from our data) the extent of crime committed while on bail, since not all crimes are reported and since the majority of reported crimes (during our study period) did not lead to arrests. On the other hand, not all re-arrests correspond to guilt. Therefore, this study's definition of recidivism—namely re-arrest while on pretrial release—is a quite imperfect proxy for the commission of crime during such release."

The Bureau of Standards study is based on bailed defendants who are re-arrested; the *Harvard Study* is based on defendants who were convicted for crimes committed while on bail. National Bureau of Standards Technical Note 535, *supra* n. 33, 2-3.

See also: "The Case of the Dangerous Defendant, A Study and Proposal", New York Judicial Conference 1969, 124. (*14th Ann. Report*).

[35] *Dash* v. *Mitchell* (Fed.D.Ct.D.C.).

[36] *Proceedings No. 3*, 10, 63, 68; *Harvard Study*, 362; A.B.A. Project on Minimum Standards for Criminal Justice, Approved Draft Aug. 1968, § 1.2.

[37] *Proceedings No. 3; Harvard Study*, 365.

[38] Tribe, *supra* n. 28, 316.

dictions. The Proceedings of the Institute of Criminology will almost surely result in improved statistics in New South Wales. May the Institute long continue its good work.

RUSSEL D. NILES*

Proceedings of the Institute of Criminology, University of Sydney, No. 2, 1968: Computers and the Lawyer. University of Sydney, Faculty of Law, 1970, pp. 251. ($5.00).

The subject of computers has been getting increasing attention from the Bar in recent years. The growing prevalence of computers in the scientific and the business world has become a matter of notoriety and has given rise to numerous impressions, many exaggerated, of both the achievements and failings of computers. It is apparent that the computer has had a widespread impact on many aspects of our industrial and business life and thus it is inevitable that lawyers should become interested and attempt to become informed in the field. The present work is the publication of about two dozen papers that were presented at a seminar on the topic "Computers and the Lawyer", sponsored by the University of Sydney. The papers comprising this collection cover most of the field of relevance to the topic although they are somewhat uneven in approach and clarity.

An exposition of the field involving computers that is relevant to the law should cover enough of the technical background to give lawyers some understanding of the technology involved and in addition explore the major areas of practical application and theoretical development. This would seem to involve particularly the following specific areas:

(a) Law office bookkeeping and accounting;
(b) Legal data retrieval;
(c) Problems arising from client usage of computers;
(d) Evidentiary problems of computer generated evidence;
(e) Jurimetric implications of computer technology.

This collection tells virtually nothing about computer hardware and its operation. This may be the result of the fact that the papers seem to be printed as they were prepared for oral presentation with little effort made to adapt them to the somewhat differing needs of readers, as distinguished from listeners. There is one very brief paper on how a computer functions which was apparently illustrated by slides that are not reproduced. However, the book does include a brief but rather detailed and lucid exposition of computer software or programming. This is probably more important from a lawyer's viewpoint than an explanation of the hardware, although some understanding of the latter would make the limitations and requirements of software more understandable.

Strangely enough there is nothing in the collection that relates to the most immediate and practical application of computers to the practice of law, which is their utilization in law office accounting. Relatively few lawyers in the United States employ computers for more sophisticated uses, but a substantial number of large firms do use computers for bookkeeping and accounting purposes. A related practical application that is not mentioned is the use of computer controlled typewriters for specialized applications, such as writing a brief which may go through a number of drafts, or

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