'Yorkshire Ripper murders'. The Thunderer took other organs of the media; print and broadcast alike, to task:

> Much of the information contained in the contemptuous articles was interesting to the public. But it was not in the public interest to publish it. There are some circumstances in which a newspaper might justifiably believe that the benefits for society of publishing articles which would or might be in contempt of court outweigh the public interest in the defendants' being entitled to a fair trial. The thalidomide case was perhaps an example. But no such issues arise in the Sutcliffe case. Public curiosity cannot be an excuse for harming an individual's right to have the presumption of innocence applied to him and his right to a fair trial. *The Times* (7 January 1981).

- *journalists' privilege.* Hot on the heels of the WALRC report '*Privilege for Journalists*' (Project # 53, 1980) came the decision of the House of Lords in *British Steel Corporation* v. *Granada Television Limited* ([1980] 3 WLR 774), upholding an order requiring disclosure of a source within the corporation who 'leaked' confidences to the television company. The House of Lords conceded that the free flow of information and investigatory journalism may have benefits to the public. But Lord Wilberforce rejected the notion that journalists should have an absolute privilege against disclosure that would place them in a favoured and unique position as compared to other receipients of confidential information.
- *privacy.* Whilst the ALRC proceeds with its work under Associate Professor Robert Hayes towards a late 1981 report on Federal privacy protection in Australia, *The Australian* newspaper (14 January 1981) expressed the fear that 'Big Brother' had already arrived 'three years ahead of 1984'. The editor was referring to the NSW Consumer Protection Bill that would permit investigators of the Department of Consumer Affairs to enter the offices of doctors, dentists and lawyers, without search warrants, to copy records in the course of investigating consumer complaints. Though defended by the Minister, the proposal was criticised by professional bodies and by the NSW Privacy Committee. Meanwhile, a poll conducted by the *Age* newspaper at the request of the ALRC has indicated some interesting Australian perceptions of privacy:
  - 83% of the people surveyed nationally thought that those who were in a job should have the right to see their personnel file if they asked for it;
  - 89% thought that a person seeking a loan should have a right to see and comment on any report obtained by a lending body;
  - 83% believed that information gathered by government departments upon individuals was not universally treated as confidential, in the sense that it sometimes passed to other government departments or outside bodies. (the *Age,* 17 December 1980).

crime and punishment '81

> We are approaching the status of an impotent society — whose capability of maintaining elementary security on the streets, in the schools and for the homes of our people, is in doubt. At every stage of the criminal process, the system cries out for change.
>
> Chief Justice Warren Burger, Address to the A.B.A., 49 USLW 2522 (1981)

a passionate call. The Chief Justice of the United States, Warren E. Burger, in his annual report to the ABA, concentrated on the need to 'revitalise the criminal justice system'. He expressed fear that the system, with its protections, safeguards and guarantees for the accused, may have produced a dangerous imbalance:

> Is a society redeemed if it provides massive safeguards for accused persons, including pre-trial freedom for most crimes, defense lawyers at public

> expense, trials and appeals, retrials and more appeals — almost without end — and yet fails to provide elementary protection for its law-abiding citizens?

Hyperbole, certainly. But genuine concern, without doubt. The Chief Justice's address admitted a need for speedier trials, bail and other reforms. And he cautioned that the war on crime:

> will not be won simply by harsher sentences; not by harsh mandatory minimum sentence statutes; not by abandoning the historic guarantees of the Bill of Rights and, perhaps, above all, it will not be accomplished by self-appointed armed citizen police patrols. At age 200, as this country now is, we have outgrown the idea of vigilantes.

He was equally critical of overcrowded, understaffed prisons with no educational or vocational training. Among the priority reforms he proposed were:

- restoration to bail release laws of the criterion of 'future dangerousness';
- provisions for trial within weeks of arrest;
- priority review in criminal appeals;
- subsequent juducial review to be limited to 'genuine claims of miscarriage of justice';
- recognition of the 'reality that to confine offenders behind walls without trying to change them is an expensive folly';
- non-prison sentences for first, non-violent offenders;
- generous family visitation in decent surroundings to maintain family ties; and
- better counselling services after release.

Conceding that the steps urged would be 'costly in the short run and the short run will not be brief' the Chief Justice warned about the consequences for the next generation of a continuance of the 'dismal paths' of the past.

increase in crime. Sir Leon Radzinowicz also addressed 'the realities of crime' in an article, 'Illusions About Crime & Justice', in *Encounter,* Feb/March 1981, 31. Crime, he asserted, was rising at an annual rate between 5% to as much as 20%. It could not be explained away in terms either of population increase or of augmented police efficiency. Yet no more than 15% of crime comes into the open to be followed by penal sanctions. Having laid this ground, Sir Leon turned to 'failed penal panaceas'. Retreat from too large a discretion in the judiciary had occurred in the past decade, he said, for four reasons:

- growing evidence of our inability to identify accurately the offenders who are likely to prove dangerous;
- recognition of our inability to treat them effectively;
- the conflict between the uncertainty of indeterminate sentences and the attempt to reform or rehabilitate; and
- the repeated experience in different countries and under different systems that the indeterminate sentence results in injustice, especially to many minor, though persistent, offenders who come within its scope.

Radzinowicz then lists ten basic essentials of a decent criminal justice system. It is interesting to measure his list against current Australian standards:

- a clear and well-publicised criminal code;
- a police force with precisely defined powers and limitations, backed by independent investigation of complaints;
- openness in processes of prosecution, trial and sentence;
- the right of the suspect to keep silent; not to be forced to confess;
- strict rules of evidence, strictly enforced;
- an independent judiciary;
- appeal against conviction and sentence;
- independent complaints machinery for the rights of prisoners;
- independent inspection of prisons;
- careful selection, thoughtful training

and satisfactory remuneration of all involved: police, magistrates, prosecutors, prison and after-care staff.

return to the birch? A call for a return to the use of corporal punishment has been followed by the establishment in New Zealand of a Committee of Inquiry to Review Penal Policy. The setting up of the Committee was announced by the Minister of Justice, Mr. McLay. The Chairman of the Committee is Mr. Justice Maurice Casey, a judge of the NZ High Court. One member of the Committee is former Assistant Commissioner of Police, Gideon Tait. The Committee's terms of reference include:

- examination of existing means of dealing with criminals;
- consideration of the means to reduce incidence of imprisonment;
- establishment of clear criteria for imprisonment;
- investigation of non-prison sanctions;
- consideration of the position of victims of offenders in the criminal justice system.

The Committee has been asked to report by 31 December. But since its establishment, the Minister of Justice has said that he will seek an interim report 'towards about July 31, so that Parliament can pass any urgently needed legislation to deal with violent crime in the session before the NZ election'. Prior to the setting up of the Committee, the NZ Minister for Police, Mr. Couch, urged the reintroduction of flogging for a trial period of three years. the *Auckland Star* (10 February 1981) declared philosophically:

> The big need ... is for measures that will minimise violence by changing the environment for the better and by influencing lifestyles. But that, as the Select Committee on Violent Offending, set up in 1977, discovered, is much easier said than done. Mr. McLay ... will already know that there isn't an easy way — and that the urgent need is for more research into all aspects of violent behaviour.

Interestingly enough, a report from Moscow (9 December 1980) records that the crime rate is growing, even in Russia, where crime was once said to be a feature of the economic deprivation of Western communities. Picking up the point made by Radzinowicz and implied in the terms of reference to the NZ Committee, the Director of the Australian Institute of Criminology, Mr. W. Clifford, in a keynote address for a recent two-day seminar on Probation, declared that probation was the 'lynchpin' of penal reform. Its rate of success was 'no lower than with any other method in use and a great many of those placed on probation do not come before the courts again'.

Meanwhile, two other points on corporal punishment:

- In the judicial survey conducted by the ALRC in connection with its report, *Sentencing of Federal Offenders* (ALRC 15), only about a quarter of the judicial respondents were in favour of corporal punishment in any circumstances. The level of support was higher amongst magistrates (28.5%) than amongst judges (21.6%).
- The European Commission on Human Rights has found Britain to be in breach of the European Convention on Human Rights over the use of the strap in Scottish schools. The finding is to be referred to the European Court of Human Rights for an open hearing in which the Scots will have a chance to defend their use of the 'tawse', a leather strap used on the palm. The United Kingdom and the Irish Republic are now the only countries in Europe which retain as lawful corporal punishment in schools. The *Times,* 14 October 1980.

criminal investigation. 1981 opened with the publication in Britain of the major report of the Royal Commission on Criminal Procedure. The report proposes major changes in police powers of arrest and interrogation. Although not adopting for the time being a suggestion of universal tape recording of confessions to police, the report did urge experimentation with tape recording as a means of laying at rest disputes about confessions. Amongst other proposals were:

- provision of a detailed code of practice to replace the Judges' Rules;
- wider police powers to stop and search people in the street, the reasons to be noted and the person informed;
- wider powers to enter premises;
- preliminary power to hold a person without charges for up to six hours, extendable by a senior police officer to 24 hours, thereafter by a magistrate, appealable after a second 24-hour extension.

The failure to recommend comprehensive tape recording was denounced by the *Sunday Times* (11 January 1981) as 'timid'. The *Times* (9 January 1981) also described this decision as 'unnecessarily cautious', especially in view of the recognition of the need for protections against the suspect being 'verballed'. The cost involved (estimated to be £6.5 million annually) was declared to be 'relatively modest and would form only a very small proportion of the total budget for the administration of justice'.

The report (January 1981, Cmnd 8092) is supported by a series of impressive research papers, including empirical research, done for the benefit of the Royal commissioners. The prospect of legislation is uncertain. But it is notable that the Criminal Justice (Scotland) Bill, based in part on the Thomson Report, has completed its stages through the British Parliament. It introduces sweeping new powers for Scottish police to stop, search and detain 'suspects' without arrest, charge or formal caution. Suspects may be held up to six hours for interrogation. An analysis of the way in which the original and more liberal 1978 Bill, based more faithfully on the Thomson 'package', was turned into a 'new tough Bill' is outlined in an interesting commentary by R. Baldwin and R. Kinsey, 'Behind the Politics of Police Powers' in (1980) 7 *British Jnl of Law and Society* 242.:

> This article outlines how legislation of immense social importance was processed for long periods as if it were a matter of mere legal technicality. ... The Thomson Committee ... by and large represented a 'prosecution view'. It was to put an indelible stamp of 'legal technicality' on proposals dealing with police powers. Not only did civil liberties issues receive scant attention but proper debate of the social significance of extended police powers was conspicuously lacking. By the time the rst Bill emerged in 1978/79 an institutional momentum had built up. ... Some lessons stand to be learned from these events. A lawyers' Bill was considered by lawyers without reference to its full social context. It instituted powers that may gravely endanger police/public relations, that threaten liberties, that may make policing in Scotland more difficult and that may change our very methods of policing. ... If legislation of the widest social importance is disguised by reference to 'lawyers' Bills', 'legal technicalities', 'tidyings-up', 'regularising' or 'clarifying', then those with wider concerns must not hesitate to lift the legal veil. (p.264-5).

warrantless searches and a l r c 2. One of the recommendations of the parallel ALRC report, *Criminal Investigation* (ALRC 2, 1975), was the abolition of searches under a general warrant now permitted by the Customs Act and the substitution of a uniform regime of judicial warrants, except in very rare cases and then safeguarded by careful procedures. ALRC 2 led to the Criminal Investigation Bill 1977 introduced by Attorney-General Ellicott. The Bill lapsed in that year with the dissolution of the Federal Parliament before last. With the resumption of the current Federal Parliament, on 26 November 1980 the Chairman of the Senate Standing Committee on Constitutional and Legal Affairs, Senator Alan Missen (Lib., Vic.) asked the Attorney-General when the Senate could expect the reintroduction of the Criminal Investigation Bill. Senator Durack replied:

> Time certainly flies in this place. ... Despite the passage of time, the problem of the Criminal Investigation Bill has not escaped my attention or been ignored by me. ... When I came to reconsider the Bill after the last election — it appeared to me to have a number of difficulties about it, particularly in relation to drafting and so on. It was decided that the matter should be looked at again. That has been done. The Bill was gone through very thoroughly by a committee of officers in my department and of the police, as a result of which it was decided we would draft another Bill. That was to be drafted by the consultant, Mr. Comans. ... He has recently completed the drafting that I had sought. At this stage I have not had an opportunity of considering the draft or the next step to be taken, but I certainly propose to consider the draft

> in the near future and put to the Government a proposal as to what action should be taken in relation to it. I certainly agree that it is an important measure and I hope that we will be able to introduce some legislation in respect of it.

In the ALRC, an interesting division arose between a majority led by then Commissioner, now Shadow Attorney-General Gareth Evans, and a minority (Mr. Justice Brennan). The majority favoured a recognition of a police power to interrogate suspects, under appropriate safeguards. Mr. Justice Brennan, on the other hand, favoured maintenance of the current law, that a person in police custody who would not be released must be charged as soon as possible with an offence or let go. This difference of view was picked up in press commentary on Mr. Justice Brennan's appointment to the High Court. Special reference was made to his decision for the Full Court of the Federal Court of Australia in *Webster* v. *McIntosh*. In that case, which turned on a statutory obligation of the police normally to proceed by way of summons rather than arrest, Mr. Justice Brennan reverted to his view, clearly articulated in ALRC 2 and accepted by Attorney-General Ellicott in the Criminal Investigation Bill:

> Liberty ends where the power of arrest begins. There is a legal immunity from arrest and from the threat of arrest unless and until the conditions governing the exercise of the arresting power are fulfilled. The extent of this immunity, no less than the extent of the power of arrest, is fixed by the laws prescribing these conditions; for immunity and the power to arrest are correlatives, and laws which define the power measure the immunity. *Webster* v. *McIntosh* (1981) 32 ALR 603 at p.607.

With action on ALRC 1 and ALRC 9, and with the redraft of the Criminal Investigation Bill completed, it may be hoped that the redrafted Bill will be submitted to public scrutiny and debate. Otherwise, it may attract precisely the criticism so trenchantly expressed by Baldwin and Kinsey on the course of criminal investigation law reform in Scotland.

A small but important concession to the ALRC 2 approach was found in the decision of the NSW Government to drop proposals for warrantless searches by police in the case of the pursuit of certain suspected drug offenders. The proposal was criticised by civil liberties groups and in the Government Party and was withdrawn to uphold 'one of the most cherished principles of democratic states — the freedom of citizens from arbitrary searches, seizures and arrests'.

odds and ends

> Attempting to reform the law is like attempting to make a sheet of corrugated iron flat with a hammer.
>
> Former SA Attorney-General
> Peter Duncan, March 1981

- Delays in action in law reform in the Australian Capital Territory have once again led to editorial comment. The *Canberra Times* (27 January 1981) congratulated the new Minister, Mr. Michael Hodgman, for being 'so indignantly outspoken about the archaic state of the law in this Territory'. The Minister declared that the delays in law reform were 'quite unforgiveable'. To highlight the bottleneck of delay at the point of drafting legislation, Mr. Hodgman said that if necessary he would 'take a hand in drafting new laws himself' (*Canberra Times,* 25 January 1981). Mr. Hodgman is a Tasmanian barrister of 20 years standing. Commenting on the delays, the newspaper pointed out that 'much of the national work of the Australian Law Reform Commission has been based on the reformation of laws as they apply to the A.C.T. The hope has been and remains that where a model law can be drafted for the A.C.T. but relates to all Australians, the States should adopt the new law'. For example, ACT legislation on human tissue transplants is working its way to acceptance throughout Australia. That legislation was in turn based on an ALRC report. The *Canberra Times* also urged consideration of using the Australian National University Law School and the Law Society to help draft Canberra's 'local law'. In