

CENTRE FOR CRIMINAL JUSTICE STUDIES

FIRST ANNUAL REPORT

1988-89

Table of Contents

Introduction.

The Work of the Centre.

A Research projects.

B Postgraduate study.

C Relevant papers and publications by members of the Centre during 1988/9.

D Seminars, Conferences and Continuing Education.

Appendices

Appendix 1 - Constitution of The Centre.

Appendix 2 - Membership of The Centre.

Appendix 3 - Centre Papers.

- Submissions to the Law Commission Law Commission Working Paper No. 103 - Binding Over
- Law Commission Working Paper No. 110 - Computer Misuse

INTRODUCTION

The Centre for Criminal Justice Studies was provisionally established in 1987 and was formally approved by the University in March 1988. Its object, as set out in its Constitution (see Appendix 1), is the pursuit of research and study into all aspects of criminal justice systems. This remit, as undertaken by the Executive Committee (see Appendix 2), has in practice included the encouragement of postgraduate students and research projects, and the arrangement of seminars and conferences. The Centre's

members comprise both lawyers and non-lawyers, and its work is generously assisted by an Advisory Committee, which consists of academics and practitioners in relevant fields of experience (Appendix 2).

Professor Clive Walker

**Director
Centre for Criminal Justice Studies
University of Leeds
Leeds LS2 9JT**

- Tel: +0044 (0)113 233 5033
- Fax: +0044 (0)113 233 5056
- email: law6cw@Leeds.ac.uk

10th July 1989

THE WORK OF THE CENTRE

A Research projects

Two research projects are currently in hand.

(a) Reporting of Crown Court proceedings and the Contempt of Court Act 1981.

This project is funded by the Leverhulme Trust and is directed by Dr. Clive Walker with the assistance of Debra Brogarth. The aim is to investigate the frequency and nature of orders under sections 4 and 11 of the Contempt of Court Act 1981 which in some way restrict or postpone the publication of Crown Court proceedings. It is hoped to issue a report of the findings of this research by the end of 1989.

(b) Research into the work of the Leeds Magistrates' Courts.

Imogen Brown is currently researching into various aspects of the work of the magistrates in Leeds in association with Dr. Roy Hullin (Dept. of Biochemistry) and Mr. Peter Seago.

Future research topics, in various stages of preparation niched: police efficiency, a young offenders treatment scheme, false confessions and criminal legal aid.

B Postgraduate study

(a) Postgraduate research degree schemes.

The Centre wishes to encourage applications from anyone wishing to pursue research

into the criminal justice system. This subject may be taken to include, for example, the judiciary, the prosecution system, the police, the prison and probation services, and police authorities. Any relevant research topic in these or related areas will be considered. A number of possible areas of research have been considered with our Advisers and can be suggested on request, but applicants are not precluded from devising their own proposals. Comparative studies are also welcome. The relevant degree schemes on offer (all by research and thesis only) are as follows:

The relevant degree schemes on offer (all by research and thesis only) are as follows:

- *Master of Arts (M.A.)* -

one year full-time or two years part-time;

- *Master of Philosophy (M.Phil.)* -

two years full-time or three years part-time;

- *Doctor of Philosophy (Ph.D.)* -

three years full-time or four years part-time.

The entrance requirements common to all three schemes are that applicants must normally possess a good honours degree, but those with professional qualifications or substantial professional experience will be considered.

The detailed ordinances and regulations governing the above degree schemes are set out in the prospectus of the Faculty of Law which is available on request.

(b) Current postgraduate research students

Lindy C. Ford, M.Sc, B.Sc. - Homelessness and persistent petty offenders (Ph.D., October 1988)

Christopher O'Gorman, LL.B. -Rights in police custody (Ph.D., October 1989)

C. Relevant papers and publications by members of the Centre during 1988/9

G. J. Bennett - Criminal Law Procedure and Sentencing (in the 1988 All England Annual Review)

I. D. Brownlee - Superior Orders. Time for a new realism? (1989) *Crim.L.R.* 396
-Dropping the Charges (1989) 97 *Police Review* 1066

S. Cooper - True Confessions (1988) 96 *Police Review* 2400
- Confessions and section 78 (1989) 153 *J.P.* 412

- Retreating from Lawrence and recklessness (1989) *L.S. Gaz*

Professor B. Hogan (with J.C. Smith) - *Criminal Law* (6th Ed., 1988)

Professor B. Hogan, P.J.Seago, G.J. Bennett - *A Level Law Textbook* (2nd ed., 1988)

M. Macnair - The early development of the privilege against self-incrimination (Ox, J.L.S., pending)

C. M. G. Ockelton - Robot Witnesses: Can North be Right? [1988] Road Law 95-101,

- 'Spy-Camera Evidence - Your Questions Answered [1988] The Magistrate, 195-197

- Proving Drink-Driving - Recent Developments [1989] Road Law 6-12

P.D. Rush - Review of Pornography and Violence: Evidence of the Links in International Journal of the Sociology of Law (1989)

P.J. Seago - Report on the Law Commission Working Paper No. 103 on Binding Over on behalf of the S.P.T.L. Criminal Law Reform Sub-Committee (1988)

- Criminal Law (3rd ed., 1989)

C. P. Walker - Elected representatives and the democratic process in Northern Ireland (1988) 51 M.L.R. 605

- Book Review: Y. Alexander - The 1986 Annual on Terrorism (1988) 37 I.C.L.Q. 1021

- Army special powers on parade (1989) 40 N.I.L.Q.1.

C. P. Walker and D. Brogarth - Court reporting and open justice (1988) N.L.J. 909

C. P. Walker and C. M. Graham - The continued assault on the vaults (1989) Crim. L.R. 185

C. P. Walker and G. Hogan - Political Violence and the Law in Ireland (1989)

D. Seminars, Conferences and Continuing Education

STAFF, STUDENTS AND VISITING SPEAKERS

The following events were arranged by The Centre:

- Seminar on Law Commission Working Paper No. 103: Binding Over, September 1988. Speaker: Martin Wasik (University of Manchester).

- Conference on the Criminal Justice Act 1988, November 1988 (Leeds), January 1989 (Newcastle). Speakers: Dr. David Thomas (University of Cambridge), Professor B. Hogan, C.M.C. Ockelton, P.J. Seago, C.P. Walker

- Seminar on Law Commission Working Paper No. 110 - Computer Misuse, December 1988. Speakers: Professors B. Hogan and M. Wells (Computer Service)

- Conference on D.N.A. Profiling and the Law, April 1989. Speakers: Ian Wood (Home Office Forensic Science Laboratory, Wetherby), David Webb (Baker & McKenzie), C.M.C. Ockelton, C.P. Walker.

APPENDIX 1

CONSTITUTION OF THE CENTRE

Approved SM 87/437 of March 1988.

Object of the Centre

1. The object of the Centre shall be to develop, co-ordinate and pursue research and study into, and the dissemination of knowledge about, all aspects of criminal justice systems.

Membership of the Centre

2.1 Any members of the academic staff of the Department of Law may be a member of the Centre.

2.2 Other individuals may be appointed to membership of the Centre by the Council on the nomination of the Executive committee.

Membership of the University is not a prerequisite of appointment to membership of the Centre.

Administration of the Centre

3.1 The Centre shall be administered by a Director, a Deputy Director and an Executive Committee.

3.2 The Director and Deputy Director, who shall be appointed by the Council on the nomination of the Head of the Department of Law after consultation with members of the Centre, shall each normally hold office for a period of five years, and shall be eligible for immediate re-appointment.

3.3 The Director shall be responsible to the Executive Committee for the running of the Centre and the representation of its interests. The Director shall have regard to the views and recommendations of the Executive Committee and the Advisory Committee. The Director shall be assisted by a Deputy Director.

3.4 The Executive committee shall consist of the Director and the Deputy Director together with the Head of the Department of Law, and up to six others who shall be appointed by the Director, Deputy Director and head of the Department of Law and up to two of whom may be members of the teaching staff of the Department of Law.

3.5 The Executive Committee shall meet at least twice a year, with the Director acting

as convenor. Special meetings may be held at the request of any member of the Executive Committee.

3.6 Minutes of the meetings of the Executive Committee shall be presented by the Director to the following meeting of the Department of Law.

3.7 There shall be an Advisory Committee appointed by the Executive Committee which shall formulate advice and recommendations and which shall consist of:

(i) all members of the Executive Committee;

(ii) up to three persons who shall be members of the teaching staff of the University of Leeds other than the Department of Law whose activities or interests have relevance to criminal justice studies;

(iii) up to twenty persons who shall be practitioners in criminal justice systems (or other appropriate persons).

3.8 The Advisory Committee shall meet once a year, with the Director acting as convenor. Special meetings may be held at the request of the Executive Committee.

Amendment to the constitution

4.1 This constitution may be amended by the Council (or any committee acting with authority delegated by the Council) on the recommendation of the Department of Law and the Executive Committee of the Centre.

9 March 1988

APPENDIX 2 **MEMBERSHIP OF THE CENTRE FOR** **CRIMINAL JUSTICE STUDIES**

1. Executive Committee

Dr. C. P. Walker (Director)

Mr. P.J. Seago (Deputy Director)

Mr. I. D. Brownlee (Secretary)

Professor N. Jepson

Professor B. Hogan

Mr. C. M. C. Ockleton (retired, September 1988)

Professor W. V. H. Rogers (ex officio, Head of Department of Law)

2. Advisory Committee

His Honour Judge C. Baker

Sir L. Byford (ex-Chief Inspector of Constabulary)

Mr. I. Dobkin (Barrister)

Dr. D. Duckworth (Leeds University)

His Honour Judge Herrod

E. Jenkins (Leeds University)
Mr. P. Nobes (Chief Constable, West Yorkshire Police)
Mr. Justice Ognall (retired, December 1988)
Mr. R. Otley (Chief Crown Prosecutor)
Chief Supt. D. Pickover (Commandant, Police Officers' Training Academy)
Rt. Hon. M. Rees (M.P.)
Mr. C. Sampson (H.M. Inspector of Constabulary)
Mr. P. Whitehead (Clerk to Leeds Justices)
Councillor K. Wilson (West Yorkshire Police Authority)

3. Research Officers

Debra J. Brogarth (LL.B., LL.M)
Imogen F. B. Brown (B.A.)

4. Research Students

Lindy L. Ford (M.Sc., B.Sc.)

Christopher O'Gorman (LL.B)

APPENDIX 3
CENTRE PAPERS
SUBMISSIONS TO LAW COMMISSION
LAW COMMISSION WORKING PAPER NO. 103 -
BINDING OVER
THE CENTRE FOR CRIMINAL JUSTICE
STUDIES,
UNIVERSITY OF LEEDS

The following points arose out of a seminar held at the Centre on the 7th September 1988. The Seminar was attended by academic lawyers, Crown Prosecutors and justices clerks and was introduced by two speakers, Mr Martin Wasik and Mr Peter Seago. The seminar was chaired by Dr Clive Walker, to whom any further inquiries may be addressed.

A. Constitutional Principle

The issue raised under this heading was whether binding over was an acceptable device in view of its anomalous, quasi-criminal status.

The overwhelming consensus amongst the practitioners present was that binding over is desirable on the grounds of its speed, practicality and flexibility. It is said to allow the courts to prevent conduct which is presently offensive or a nuisance or which

threatens in the future to become criminal but is not yet serious enough to be subjected to criminal procedures. Furthermore, in neighbour disputes especially, civil procedures may also be ruled out on grounds of cost.

From their different perspective, some of the academics present expressed concern that binding over seemed improper, especially when applied to unconvicted persons. Preventive or executive justice may be understandable when reserved for emergency and serious situations (such as the internment of terrorists) but is not -warranted by low-grade, anti-social behaviour or speculations as to future, minor misconduct. It was pointed out, and accepted

by some practitioners present, that the relatively new offence of disorderly conduct in the Public Order Act 1986 s.5 covered much of the business formerly dealt with by way of binding over. Equally, it was argued that police warnings, cautions or arrests (especially under the new powers in the Police and Criminal Evidence Act 1984 s.25) could diffuse or deter undesirable behaviour which was not worth a prosecution. Thus, recent developments may have served to render binding over largely redundant. The notion of the Queen's Peace was, of course, much wider than any of fence, but one academic present (Professor Hogan) wondered where official sanctions against anti-social behaviour would end once the courts departed from carefully drawn criminal of fences. At the same time, the possibility of extending the bounds of the criminal law even beyond the Public Order Act s.5 was not seen a worth pursuing. There was little support for the Scottish offence of breach of the peace or for a new criminal nuisance offence.

Whatever the criticism, some reassurance was provided by Mr Wasik, who reminded the audience that 40% of courts in the Law Commission's survey had not issued orders. In addition, local prosecutors confirmed' that circumspection was used in all binding over cases (not least because of the danger of being liable for the defendant's costs) and especially so if no criminal charges were pending. Perhaps one way forward would be for further guide-lines to the Crown Prosecution Service to this effect.

B. Substantive and Procedural Issues

The following topics were canvassed.

1. What conduct should trigger an order, and what conduct should amount to a breach of an order?

Mr Seago suggested that "disorderly conduct" would be a preferable criterion, However, some practitioners were loathe to lose the flexibility and grandeur of "the Queen's Peace", and it could be argued that such a quasi-criminal concept is more suited to a quasi-criminal device.

2. Should consent to a binding over order be necessary?

It was noted that consent under threat of imprisonment is hardly true consent. However, the process of consent is useful in that it amounts not only to a promise as to the future but also an acknowledgement of past wrong-doing. This acknowledgement (which may be akin to a guilty plea) is important and should perhaps be made distinct from any promise or consent extracted later (which is more a matter of sentencing).

3. How long should orders last?

A suggestion of two years maximum was made.

4. What sums should be required by ways of recognizance?

It was argued that there should be a maximum linked to the fines system (perhaps Scale 3 or 4).

5. When should binding over be raised?

In view of the fact that binding over is often arranged on the day of the trial, a proposal was made that the issue should be aired before magistrates rather earlier, so as to save later time and effort. This idea was not well-received, as it would put further pressure on defendants to enter into plea-bargains before they had taken full legal advice and before they had full notice of the prosecution's case.

LAW COMMISSION WORKING PAPER NO. 110 -
COMPUTER MISUSE SUBMISSION OF THE
CENTRE FOR CRIMINAL JUSTICE STUDIES
UNIVERSITY OF LEEDS

Preface

This submission arose out of a seminar held at the Centre on the 20th December 1988. The seminar was attended by academic lawyers, computer experts, Crown Prosecutors, justices' clerks and the West Yorkshire Police. The discussion was led by two speakers, Processor Brian Hogan (Law) and Professor Mike Wells (computing Service). The seminar was chaired by Dr. Clive Walker, to whom further enquiries may be addressed.

Introduction

The view of the Law Commission (Working Paper Pt. 1) that computer misuse is increasing both in frequency and seriousness was confirmed by computer experts present. The University of Leeds has itself in one recent case been the unwitting

provider of machinery for hacking into another University's system and, in another, been the victim of an alleged hacker based in the U.S.A. Hacking and related misuses does include such amusing diversions as inserting an obscene cartoon of "Busby" on Telecom's "Prestel" network.[1] However, misuse equally carries the risk of inflicting massive financial loss through damage to machinery or programme and can even extend to life-threatening activities. The example was offered by a train traffic management system which, if interfered with, could result in crashes leading to fatalities.

The potential for computer misuse causing harm to others, the traditional concern of the criminal law, was therefore widely accepted. At the same time, a fundamental question to be answered before the Criminal law intervenes is "What is special about computers?" It is well-established that privacy per se receives no protection in law.[2] Consistent with that general position is the fact that intangible concepts, such as information, are not generally the concern of the criminal law.[3] Therefore, unless there is a fundamental reverse in legal policy and privacy does become a protected value, the general approach should be one of caution and restraint. New offences should only be created in this area if it can be shown that:

- 1) computers are in some way special; and
- 2) that other safeguards, such as the civil law or good computer housekeeping, will not suffice.

Proceeding on that basis, the subject of computer misuse was tackled under three headings by Professor Hogan, and the seminar generally found it useful to adhere to his classification. The three headings were:

- 1 crimes with computers;
- 2 crimes to computers;
- 3 filching information.

Crimes with computers

By and large, there was agreement that existing offences, such as theft and deception, were sufficient to deal with crimes committed involving the use of computers. However, there may be one small deficiency, as noted by the Law Commission (Working Paper Pt.V).

The deception of a machine rather than a person cannot ground a charge of deception under the Theft Acts 1968-78.[4] This lacuna may be minor in that other crimes will usually be applicable. For example, a person who wrongfully uses another's bank cash card to obtain money may not commit an unlawful deception, but there is inevitably theft of the cash paid out as a result of the trick practised on the cash dispenser. However, there may be instances where there is no theft. For example, the trickster may use the card to view the owner's bank balance in order to give him leverage in commercial dealings he has with the owner. An extended definition of "deception" might also be helpful when a person has attempted to use another's card but the police cannot establish what purpose he had in mind. Proof of purchase may become increasingly difficult as automated facilities increase and machines become less

concerned with the simple dispensing of cash. Such an amendment would also correlate with the Forgery and Counterfeiting Act 1981, s.10(3).

Crimes to computers

The decision in *Cox v Riley*^[5] does potentially combat much of the harm which a hacker might inflict. However, two potential difficulties were raised at the seminar.

The first was whether a hacker would have the requisite mens rea for the offence of criminal damage. The Law Commission's Option C (Working Paper, para. 6.20) is so worded to catch inadvertent damage, and the value of this wider offence was discussed. The computer experts present were of the view that the probability of inadvertent damage is quite low but that hackers, who are themselves usually well-versed in computer technology, would be aware that there was some risk, albeit low. Participants at the seminar concluded from these findings that Option C was not necessary. Unintended damage of this kind is likely to be rare, and, in so far as it does occur, it could be argued that those responsible are reckless and therefore have mens rea.^[6] The only reason to extend the criminal law along the lines of Option C would be to penalise those "up to no good". The hacker is trespassing and so should be strictly liable for damage incidentally caused. However, the same principle has not generally been applied to physical trespasses, and there seemed no obvious reason for special protection for computers.

The second difficulty arising from crimes to computers concerned the quantum of damage. It appears from *Cox v. Riley* that the damage can include the cost of restoring the machinery to its former status. However, the real harm to the owner may be the loss of his computer facilities during the period of repair.^[7] If such consequential loss could be counted as "damage", this may incidentally solve the problem of whether the activation of security measures leading to a shut down is "damage" (Law Commission - Working Paper, para. 3.40). Regard to such wider financial costs will be relevant both to mode of trial and sentencing. The seminar came to no final conclusion on this matter. It may be pointed out that, while consequential loss is real enough, it is not confined to damage to computers. The company whose factory is burnt down also suffers loss of profits. Yet, damage to physical property is more likely itself to be substantial before there is major consequential loss, whereas damage from the absence of computer facilities can more easily be out of all proportion to the cost of repairs to the computer machinery (often in the form of reprogramming).

Filching of information - hacking

The neutral term, "filching", was employed in preference to more value-laden concepts, such as "stealing".

It was noted by Professor Hogan (and the Law Commission - Working Paper para. 6.15) that the criminal law does not generally penalise unauthorised access to another's information. The question, "What is so special about computers?", is again very pertinent. A number of possible answers were offered in the seminar.

One way is that degradation of the integrity of information is rather easier in relation to computer data than for manual files. If manual files are tampered with or taken, the interference is usually apparent or, at least, rather difficult to conceal: the paper is torn or altered on its face or a page is missing. Unfortunately, computer data can easily be amended in accordance with the style of the rest of the disc or tape. The machine accepts an instruction from whosoever has gained access, authorised or not, and encodes it magnetically according to its usual processes. Obviously, the interference cannot be detected, from examining the disc or tape itself. Moreover, even a display on a VDU of the information may not make it apparent that the programme has been tampered with, so the intrusion may not be detected unless the original sources of the data are laboriously checked. This heightened danger of undetected interference essentially arises because mechanised systems can more easily be deceived than the human senses, since the mechanical representation is further divorced from reality. It follows that the owners of such systems, who have committed to them information which may be of great value, may deserve greater legal protection than the owners of manual files, the security of which is a more straightforward affair.

A second justification for treating computers as special arises out of the special vulnerability of network systems.^[8] The instantaneous transfer of information from location A to location B without any person physically entering A facilitates a form of misuse not possible with manual systems. Networking also makes such misuse more lucrative, since not just one, but any number of data files belonging to others are put in jeopardy.

In view of these two distinctions between computer and manual information, most participants at the seminar supported further legal protection. The majority were also far from convinced that the civil law (such as breach of confidence) would be of much assistance. In many cases, the hacker's purpose is simply to gain entry into the system and perhaps to add to or subtract from it, rather than to disclose it to third parties. The result was that most participants favoured Option D (Working Paper para. 6.20.). Option D was felt to be preferable to competing Options A and B because it has the virtues of simplicity and comprehensiveness. In particular, it encompasses the very act of gaining access which could itself plant suspicion in the minds of owners and result in dislocation of the system.

Two subsidiary matters were also raised during our discussions. Firstly, concern was expressed by the computer experts about the Law Commission's loose usage of the word, "access". Sometimes it meant "making a connection with the computer" (as in Options A and B). The terminology should be clarified. In any event, "access" could be misleading in some contexts. What if X breaks into Y's room where T's computer is located? Has X gained access to Y's computer? Some definition in terms of "causing a machine which can automatically process data to be activated or to perform any function in relation to the data" should be included.^[9]

The other subsidiary matter concerned the proposed penalties. The offence is to be summary only and carry only a fine (Working Paper para. 6.38.). In view of the extremely serious consequences which hacking can entail (potentially much more harmful than breaches of the Data Protection Act 1984), the proscribed penalties seem rather narrow, and a broader range should be available.

Copyright © 1997 The Centre for Criminal Justice Studies, University of Leeds.

[1] See: I.J. Lloyd - Computer hacking and the law 1985 S.L.T. 229.

[2] Malone v M.P.C. (No.2) [1979] Ch. 344.

[3] Oxford v Moss [1978] 68 Cr. App. R. 183.

[4] See: Theft Act 1968 s.15.

[5] (1986) 83 Cr. App. R. 54.

[6] See: R. v. Caldwell [1982] A.C. 341: R v Lawrence [1982] AC 510

[7] A good illustration is H.M. Advocate v Wilson 1984 SLT 117.

[8] As in R v Gold and Schifren [1988] 2 WLR 984.

[9] See also: Data Protection Act 1984, s.1.