

C LARENDON
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THE
CRIMINOLOGICAL
FOUNDATIONS OF
PENAL POLICY

*Essays in Honour of
Roger Hood*

*Edited by
Lucia Zedner and
Andrew Ashworth*

The Criminological Foundations of Penal Policy

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General Editor's Introduction

The *Clarendon Studies in Criminology* was inaugurated in 1994 under the auspices of the centres of criminology at the Universities of Cambridge and Oxford and the London School of Economics. It is the successor to the *Cambridge Studies in Criminology*, founded by Sir Leon Radzinowicz and J.W.C. Turner almost sixty years ago.

To celebrate Roger Hood's distinguished and ongoing contribution to British Criminology, the *Clarendon Studies in Criminology* is proud to add to the series *The Criminological Foundations of Penal Policy*, edited by Zedner and Ashworth. It is particularly appropriate that this collection be included in the *Clarendon Studies in Criminology* as Roger Hood was the first general editor of the series. He has also worked at all three of the institutes (Cambridge, Oxford, and LSE) involved with the series.

This book is not only a Festschrift in honour of Roger Hood, but also in its own right an important contribution to the discussion about the criminological foundations of penal policy. Zedner and Ashworth have succeeded in assembling an impressive selection of contributions on this topic by colleagues, students, and friends of Roger Hood.

On behalf of the *Clarendon Studies in Criminology*, and its editorial board, we welcome this latest addition to the series as a fitting tribute to the work of our eminent colleague.

Per-Olof H Wikström
University of Cambridge

Notes on Contributors

ANDREW ASHWORTH is Vinerian Professor of English Law, University of Oxford.

Sir ANTHONY E. BOTTOMS is Wolfson Professor of Criminology, University of Cambridge and Professorial Fellow in Criminology, University of Sheffield.

RICHARD V. ERICSON is Principal of Green College, and Professor of Law and Sociology, University of British Columbia.

DAVID A. GREEN is a Ph.D. candidate in the Institute of Criminology, University of Cambridge.

RICHARD HARDING is Inspector of Custodial Services for the State of Western Australia and Emeritus Professor at the University of Western Australia.

HEIKE JUNG is Professor of Criminal Law, University of the Saarland, Saarbrücken.

NICOLA LACEY is Professor of Criminal Law, London School of Economics, and Adjunct Professor, Social and Political Theory Program, Research School of Social Sciences, Australian National University.

SEÁN MCCONVILLE is Professor of Criminal Justice, Queen Mary, University of London.

ANDREW SANDERS is Professor of Criminal Law and Criminology, University of Manchester.

STEPHEN SHUTE is Professor of Criminal Law and Criminal Justice, University of Birmingham.

MICHAEL TONRY is Director of the Institute of Criminology and Professor of Law and Public Policy, University of Cambridge, and Sonosky Professor of Law and Public Policy, University of Minnesota.

LORD WINDLESHAM was formerly Principal of Brasenose College, Oxford, 1989–2002.

RICHARD YOUNG is Reader in Criminal Justice and Assistant Director, Centre for Criminological Research, University of Oxford.

LUCIA ZEDNER is Reader in Criminal Justice, University of Oxford.

Contents

<i>General Editor's Introduction</i>	v
<i>Notes on Contributors</i>	ix
Editors' Introduction <i>Lucia Zedner and Andrew Ashworth</i>	1
Part 1 The Theoretical Relationships between Research and Policy	
1. The Culture and Power of Criminological Research <i>Richard V. Ericson</i>	31
2. Principles, Politics, and Criminal Justice <i>Nicola Lacey</i>	79
3. Theoretical Reflections on the Evaluation of a Penal Policy Initiative <i>Anthony E. Bottoms</i>	107
Part 2 The Historical Development of Criminology as a Basis for Criminal Justice Policy	
4. Useful Knowledge? Debating the Role of Criminology in Post-war Britain <i>Lucia Zedner</i>	197
5. Hearing, Not Listening: Penal Policy and the Political Prisoners of 1906–1921 <i>Seán McConville</i>	237
6. Ministers and Modernisation: Criminal Justice Policy, 1997–2001 <i>Lord Windlesham</i>	269

viii Contents

**Part 3 Criminological Research and Policy Change:
Three Case Studies**

7. Sentencing and Sensitivity: A Challenge for
Criminological Research
Andrew Ashworth 295
8. The Forester's Dilemma: The Influence of Police
Research on Police Practice
Richard Young and Andrew Sanders 333
9. The Development of Parole and the Role of
Research in its Reform
Stephen Shute 377

Part 4 International Comparisons

10. The Renaissance of the Victim in Criminal Policy:
A Reconstruction of the German Campaign
Heike Jung 443
 11. Influencing Policy: Successes and Failures of
Criminological Research in Australia
Richard Harding 463
 12. Criminology and Public Policy in the USA and UK
Michael Tonry and David A. Green 485
- Index of Names* 527
- Subject Index* 530

Editors' Introduction

Lucia Zedner and Andrew Ashworth

This volume brings together an international group of criminologists to celebrate Roger Hood's immense contribution to the development of criminology. When plans for the volume were taking shape, we discussed them with Sir Leon Radzinowicz—the founding father of British criminology—who was first Roger Hood's mentor and then a collaborator in various joint projects. Sir Leon was enthusiastic about the plan, and was keen to write an appreciation of Roger Hood which would open the volume. When it became apparent that his advancing illness would not permit him to accomplish this, he expressed great regret that he would be unable to do what Roger Hood had done for him, and write a fitting tribute to open this *Festschrift*. However, he reminded us of the high regard in which he held Roger Hood's scholarship, of his early and public recognition of the exceptional nature of his talent for criminology.¹ In the preface to his *Adventures in Criminology*,² Sir Leon wrote of their great friendship, paid tribute to Roger Hood's 'exceptional' work in curbing his self-confessed tendency towards over-writing, and added that 'the fact that he [Roger Hood] knows the dark corners of our discipline so well made his task so much less strenuous'.

In this introduction we begin by describing the range of Roger Hood's writings on criminology; we then focus particularly on his writings on the relationship between criminological research and the development of policy, which is the theme of the volume; and we conclude with a discussion of the twelve essays in the volume.

¹ See Sir Leon's preface to Roger Hood, *Borstal Re-Assessed* (London: Heinemann, 1965).

² L. Radzinowicz, *Adventures in Criminology* (London: Routledge, 1999) p. xiv.

Roger Hood's Contributions to Criminological Literature

The purpose of this first section is not to discuss every one of Roger Hood's writings, but rather to identify some seven major areas of criminology—in addition to that which forms the theme of this volume—where his contributions have already been telling. When dealing with someone who has been director of a major criminological research centre for thirty years and who has already been honoured widely for his work by his peers (for example, the Presidency of the British Society of Criminology from 1987 to 1989, and the Sellin-Glueck Award for Distinguished International Contributions to Criminology, from the American Society of Criminology in 1986), we have to be selective.³ But, even at that, the breadth and depth of Roger Hood's research and writings are awesome. Here are some prominent examples from the fields of sentencing, parole, race, penal effectiveness, custody, penal history, and the death penalty.

Sentencing

Roger Hood's first book was *Sentencing in Magistrates' Courts*,⁴ in which he described and interpreted the data from empirical research into sentencing patterns of twelve magistrates' courts. The study was characterized by a sophisticated analysis of the meaning and existence of sentencing disparity, and concluded with challenging suggestions about the causes of the different approaches he found—that they appeared to stem from different bench traditions and, possibly, from the differing social characteristics of localities. The Magistrates' Association subsequently encouraged Roger Hood to investigate these issues further, in the specific context of motoring offences. In *Sentencing the Motoring Offender*⁵ he demonstrated not only that these local variations persisted when magistrates completed questionnaires and sentencing exercises on their own, away from their colleagues, but also that variations were greater as the features of the case became more unusual. The sophisticated framework for this study, only briefly mentioned here,⁶ is reflected in, or is a reflection

³ There has also been significant public recognition, in the award of the C.B.E. for services to criminology.

⁴ (London: Tavistock, 1962).

⁵ (London: Heinemann, 1972).

⁶ It is discussed further in Chapter 7 below.

of, the fine fifth chapter of that world-renowned book of 1970 with Richard F. Sparks, *Key Issues in Criminology*.⁷ This chapter not only assessed the state of research into decision-making in sentencing, but also developed a number of important new themes. The normative dimension of Roger Hood's interest in sentencing was pursued in rousing style in his influential lecture on 'Tolerance and the Tariff',⁸ where he began by challenging the role of parole authorities in effectively fixing the time to be spent in custody, and then argued in favour of returning the key decisions to the judges whilst urging them to be much more explicit about the normative evaluations underlying their sentencing practices.

In collaboration with Sir Leon Radzinowicz, Roger Hood continued his criticism of a group of proposed sentencing reforms for their neglect of central issues of evaluation. The recommendations of the Advisory Council on the Penal System for reform of the English 'approach' to maximum prison sentences were castigated for failing to tackle the essential question of the relative seriousness of offences, and for attempting to develop a sentencing structure without this foundation.⁹ Both the Advisory Council's proposals and those of the Flood Committee on sentences for 'dangerous' offenders were attacked strenuously for their nebulous and expansive definitions of 'danger' and for their proposals to introduce new measures in respect of this elusive category rather than refining the criteria and safeguards in existing procedures.¹⁰ The two co-authors further elaborated these themes in their masterly appraisal of the early sentencing guidelines movement in the United States,¹¹ pointing to the perils of closely constraining judicial sentencing and of the intrusion of bureaucratic commissions into key decisions about the imposition of the state's coercive powers. Subsequently Roger Hood

⁷ In the World University Library series (London: Weidenfeld and Nicolson, 1970).

⁸ 'Tolerance and the Tariff: Some Reflections on Fixing the Time Prisoners Spend in Custody', NACRO Reprint No. 11 (London: NACRO, 1974), abstracted in J. Baldwin and A.K. Bottomley (eds.), *Criminal Justice: Selected Readings* (Oxford: Martin Robertson, 1978).

⁹ L. Radzinowicz and R. Hood, 'A Dangerous Direction for Sentencing Reform' [1978] *Crim.L.R.* 713.

¹⁰ Ibid.; and also L. Radzinowicz and R. Hood, 'Dangerousness and Criminal Justice: A Few Reflections' [1981] *Crim.L.R.* 756.

¹¹ In their essay on 'The American Volte-face in Sentencing Thought and Practice' in C. Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Rupert Cross* (London: Butterworths, 1981).

himself returned to empirical sentencing research with his large-scale study on *Race and Sentencing*, discussed under 'Race' below, and then participated in the vigorous debate that surrounded the proposal of the then government to introduce mandatory sentences in the 1990s. He and his co-researcher, Stephen Shute, brought some of the evidence from their empirical research on parole and early release to bear on the government's claims about the protective effect of the proposed automatic sentence of life imprisonment and other proposals.¹² In their article they gave a cool and devastating demonstration of the fallacies underlying the government's claims, and argued against the simplistic nature of the government's package of proposed reforms. Sadly, their efforts proved to be yet another illustration of the widening gulf between criminological research findings and criminal justice policy during that decade, as legislation on the automatic life sentence was enacted without significant alteration.

Parole and Release from Custody

It is evident that a number of Roger Hood's writings on sentencing are closely, and rightly, tied into discussions of the criteria on which release from custodial sentences ought to be determined. In three overlapping but differently directed essays in the early 1970s,¹³ he argued powerfully against the tendency for parole decisions to represent a form of re-sentencing in secret, against proposals to allow even greater executive discretion over release from custody, and in favour of the reinstatement of judicial determination of the time to be served in custody. He was then invited to engage in public service which could be expected to influence policies on release from custody, and he accepted appointment to the Carlisle Committee in the late 1980s. In its report,¹⁴ the committee proposed the removal of discretionary release from sentences less than four years long, and a much more structured system for the release of those serving sen-

¹² R. Hood and S. Shute, 'Protecting the Public: Automatic Life Sentences, Parole and High Risk Offenders' [1996] *Crim.L.R.* 788.

¹³ In his 'Tolerance and the Tariff' (n. 8 above); in 'Some Fundamental Dilemmas of the English Parole System and a Suggestion for an Alternative Structure' in D.A. Thomas (ed.), *Parole: Its Implications for the Penal and Criminal Justice Systems* (Cambridge: Institute of Criminology, 1974); and in one of three commentaries on the report of the Younger Committee on Young Adult Offenders, 'Young Adults Offenders: I, The Custodial Sector' (1974) 14 *British Journal of Criminology* 388.

¹⁴ Report of the Review Committee, *The Parole System in England and Wales*, Cm. 532 (London: HMSO, 1988).

tences of four years and over. The committee also—and one detects Roger Hood's hand here—made a strong plea for the reconsideration of sentencing practices if its proposals on early release were to be implemented, and also emphasized the need for restraint in the use of imprisonment. These cautionary notes seem not to have made a great impression on the politicians, but most of the committee's recommendations on early release were enacted by the Criminal Justice Act 1991. Roger Hood then had the opportunity to study the implementation of the new system. In an important series of publications based on their thorough empirical study,¹⁵ he and his co-researcher, Stephen Shute, demonstrated how the post-1991 system of early release had the effect of lengthening the proportion of sentence spent inside by prisoners, and thus of increasing the prison population (as the Carlisle Committee had predicted would happen if sentence lengths were not reduced). They also demonstrated, among other things, how the greater emphasis on risk as the primary criterion appears to have led the Parole Board to take a more cautious approach, well beyond the actuarial predictions of risk. More about this research and its policy context can be found in Chapter 9 below.

Race

In the late 1980s Roger Hood had conversations with Navnit (now Lord) Dholakia in which he indicated his interest in carrying out empirical research into the way in which ethnic minorities were dealt with in the courts. The Commission for Racial Equality agreed to fund the research, and the Lord Chancellor's Department granted access to Crown Court records in the West Midlands, where the research was carried out. The study involved over 3,000 cases at five Crown Court centres, the largest sentencing study carried out in this country. Research on this subject was always likely to prove

¹⁵ R. Hood and S. Shute, *Parole in Transition: Evaluating the Impact and Effects of Changes in the Parole System. Phase One: Establishing the Base-Line* (Oxford: Centre for Criminological Research Occasional Paper No. 13, 1994); R. Hood and S. Shute, *Parole in Transition: Evaluating the Impact and Effects of Changes in the Parole System. Phase Two: Paroling with new Criteria* (Oxford: Centre for Criminological Research Occasional Paper No. 16, 1995); R. Hood and S. Shute, 'Parole Criteria, Parole Decisions and the Prison Population: Evaluating the Impact of the Criminal Justice Act 1991' [1996] *Crim.L.R.* 77; and R. Hood and S. Shute, *The Parole System at Work: A Study of Risk-based Decision-making*, Home Office Research Study 202 (London: Home Office, 2000).

sensitive, and when the results began to come out in late 1992, followed by the publication of *Race and Sentencing*,¹⁶ there was considerable public furor. Inevitably the carefully circumscribed findings were misinterpreted or taken out of context by some. Aggregate differences in the use of imprisonment for black offenders were found, but Hood attributed these largely to the larger number of black offenders convicted of serious offences, and to the tendency to plead not guilty and thus (if convicted) to forfeit the discount for pleading guilty. Only some 7 per cent of the difference was unaccounted for—a possible ‘race effect’—and the difference was much more in evidence in one court than in the others. The Commission for Racial Equality publicized the findings widely, and they became a central topic of public discussion. Roger Hood spoke to a wide range of different audiences to explain his findings. On the one hand some sections of the media had rushed to accuse the judiciary of racism (whereas Hood was careful to state his findings more circumspectly), while on the other hand some judges undoubtedly indulged in a whispering campaign against the findings. Some of the judicial misgivings emerged in a more sophisticated form in a short article by a Cambridge research student published in 1995, to which Roger Hood was able to write a strong, clear, and compelling response.¹⁷ *Race and Sentencing* remains the leading piece of research on racial issues, and it has recently been complemented by Roger Hood’s research (with Stephen Shute) on ethnic minorities’ perceptions of the fairness of criminal courts.^{17a}

Effectiveness of Penal Measures

At an early stage in his career Roger Hood took part in a criminological colloquium organized by the Council of Europe on the effectiveness of penal measures. The paper he produced on that

¹⁶ R. Hood in collaboration with G. Cordovil, *Race and Sentencing* (Oxford: Oxford University Press, 1992); the C.R.E. also produced a short summary of the research, as *A Question of Judgement: Race and Sentencing* (London: Commission for Racial Equality, 1992).

¹⁷ T. Halevy, ‘Racial Discrimination in Sentencing? A Study with Dubious Conclusions’ [1995] *Crim.L.R.* 267, and R. Hood, ‘Race and Sentencing: A Reply’ [1995] *Crim.L.R.* 272.

^{17a} R. Hood, S. Shute, and F. Seemungal, *Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment* (London: Lord Chancellor’s Department, Research Series No. 2/03, 2003).

occasion,¹⁸ an astute and judicious assessment of the research and some of its pitfalls, stood for many years as a most penetrating analysis of effectiveness studies. It was the foundation for many of the points developed in Chapters 6 and 7 of *Key Issues in Criminology*.¹⁹ Interestingly, Hood took the opportunity to return to the subject a quarter of a century later, again under the auspices of the Council of Europe, when he accepted appointment as general *rapporteur* for a project on *Psychosocial Interventions in the Criminal Justice System*.²⁰ This enabled him to reflect on the deep changes in policy, principle, and even criminological fashion that had taken place in the intervening years. He noted how, after the decline of rehabilitation and the rise of neo-classical rationales in the 1970s, the early 1990s were witnessing a revival of emphasis on the management of dangerous offenders and of enthusiasm for the effectiveness of treatment. From the very beginning, he pointed out the 'dangers that such claims will be influential, the lessons of the past ignored, and some of the benefits which have flowed from the adoption of just deserts reversed'.²¹ His measured assessment identifies both the advantages to be gained and the pitfalls to be avoided in what has become known as the 'What Works' movement.

Custody

Roger Hood's second book, based on his doctoral thesis, was *Borstal Re-Assessed*.²² This traced the various stages in the development of the borstal system from the early years of the century, and assembled evidence about its effectiveness. The book appraises the borstal system through the lenses of early criminological theory and then contemporary penal policy, and demonstrates how the later development of borstals and of other measures for young offenders was constrained by sensitivity to public opinion and by some judicial

¹⁸ R. Hood, 'Research on the Effectiveness of Punishments and Treatments' in Council of Europe, *Collected Studies in Criminological Research* (Strasbourg: Council of Europe, 1967) i, 73.

¹⁹ N. 7 above.

²⁰ Council of Europe, *Psychosocial Interventions in the Criminal Justice System*, *Collected Studies in Criminological Research*, xxxi (Strasbourg: Council of Europe, 1996); Hood's written contributions are to be found in his Introduction and his Conclusions.

²¹ *Ibid.*, 13.

²² R. Hood, *Borstal Re-Assessed* (Cambridge Studies in Criminology, London: Heinemann, 1965).

conservatism. This research also gave rise to the short book on *Homeless Borstal Boys*,²³ which involved a follow-up of borstal boys and an examination of factors relevant to their reconviction. Hood's sophisticated understanding of the processes at work during custodial sentences was also evident from the final chapter of *Key Issues in Criminology*,²⁴ with its searching assessment of the then current state of research on the effects of custody on the individuals subjected to it.

History of Criminal Justice

Research and writing on penal history provided the focus of Roger Hood's work for several years in the late 1970s and early 1980s. This was not the first time he had engaged in serious historical work: for example, the whole thrust of his *Borstal Re-Assessed* involved tracing the history of borstals through original sources such as reports of the Prison Commissioners, in order to identify the official objectives of the institutions before assessing the extent to which those objectives were achieved. However, his collaboration with Sir Leon Radzinowicz in the monumental task of writing the fifth volume of *A History of English Criminal Law and its Administration from 1750* took him deep into the details and the interpretation of nineteenth-century penal history. A team of researchers trawled the primary sources, and Radzinowicz and Hood then set about the task of collating, interpreting, writing, and revising. Along the way they published major journal articles arising from the research, dealing with the approach to political prisoners,²⁵ with the various initiatives towards the structuring of sentencing,²⁶ and with the various attempts to deal with habitual criminals.²⁷ Volume 5 of 'the History' was published in 1986,²⁸ to considerable

²³ R. Hood, *Homeless Borstal Boys* (London: G. Bell & Sons, 1966).

²⁴ See n. 7 above.

²⁵ L. Radzinowicz and R. Hood, 'The Status of Political Prisoners in England: the Struggle for Recognition' (1979) 65 *Virginia Law Review* 1421.

²⁶ L. Radzinowicz and R. Hood, 'Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem' (1979) 127 *University of Pennsylvania Law Review* 1288.

²⁷ L. Radzinowicz and R. Hood, 'Incapacitating the Habitual Criminal: The English Experience' (1980) 78 *Michigan Law Review* 1305.

²⁸ L. Radzinowicz and R. Hood, *A History of English Criminal Law: volume V, The Emergence of Penal Policy in Victorian and Edwardian England* (London: Stevens, 1986); the volume was reprinted in paperback, without the extensive bibliography, by Oxford University Press in 1990.

acclaim.²⁹ From the outset there was no doubt that it would stand the test of time to become the standard work, such is its degree of detail and the sureness of its interpretations. It ranges over theories of criminality, the problems of measuring crime, early efforts to deal specially with young offenders, the abiding problem of recidivists, the history of transportation and the evolution of the prison system, the range of punishments from death, through flogging to non-custodial alternatives, and the attempts to rationalize sentencing. It is an immense achievement, not least because the elegance and clarity of the writing make it a pleasure to read. A decade later Roger Hood was drawn back into the study of penal history when he obtained a research grant to carry out oral historical research into the experience of crime and social change of three generations of people in the East End of London. The report of this research demonstrates how offending and victimization were parts of everyday life in all three generations, but that various forms of social restraints were loosened and individual expectations tended to heighten as the last century wore on.³⁰

The Death Penalty

One particular sphere of criminal policy in which Roger Hood's international reputation came to him relatively late in his career is his expertise in matters of capital punishment. Although he took an interest in it in earlier years, particularly during the period when he spent a month or so each year as Visiting Distinguished Professor of Law at the University of Virginia, it was not until the late 1980s that he was commissioned by the United Nations to prepare a report on the extent to which capital punishment was still used in member states. That report was presented to the tenth session of the United Nations Committee on Crime Prevention and Control in 1988, and it formed the basis of his monograph on the death penalty, now in its third edition.³¹ The book is a comprehensive criminological study, examining such matters as the progress of the abolitionist movement, the observance of safeguards, the problems of a restricted

²⁹ Excerpts from reviews may be found on the back cover of the paperback edition of 1990.

³⁰ The most accessible publication from this research is R. Hood and K. Joyce, 'Three Generations: Oral Histories on Crime and Social Change in London's East End' (1999) 39 *British Journal of Criminology* 136.

³¹ R. Hood, *The Death Penalty: A World-Wide Perspective* (3rd edn., Oxford: Oxford University Press, 2002).

use of capital punishment, and issues relating to public opinion. Probably its most potent arguments are to be found in its analysis of the evidence on the deterrent effect of capital punishment. The book pays particular attention to certain details of the policies in the United States, where the death penalty has come to be used more frequently in recent years. However, one of the abiding difficulties is to obtain accurate information about the numbers of executions in various countries across the world: even the United Nations often cannot succeed in getting replies to its questions, and so it has taken all Roger Hood's powers to ensure that what he writes is as accurate as can be. The great success of his work on capital punishment leads him frequently on to the international stage, with visits to various countries, often at the request of the British Foreign Office, to argue the case for abolition in accordance with United Nations policy.

* * *

From this selective and relatively brief survey of Roger Hood's work, the sheer breadth of his contributions to criminology comes clear. His research is at the forefront of criminological knowledge on several fronts, and it has had a distinct influence on policy in many fields—notably sentencing, parole, race, and capital punishment. And yet the degree of influence has not always been commensurate with the quality of the research and the robustness of its findings, and this has led Roger Hood to reflect on the relationship between criminology and penal policy. It is this theme, which draws from all the fields of his criminological research, that forms the focal point of this volume in his honour.

Roger Hood on Criminology and Penal Policy

The relationship between criminological research and penal policy is a subject that has long been a matter of concern to Roger Hood. He has written about this relationship on at least four separate occasions spanning twenty-eight years.³² These four articles provide a fascinating insight into his own attitudes to the role of criminological

³² R. Hood, 'Criminology and Penal Change: A Case Study of the Nature and Impact of Some Recent Advice to Governments' in R. Hood (ed.), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (London: Heinemann, 1974) 375; R. Hood, 'Some Reflections on the Role of Criminology in Public Policy'