Destructuring and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Waste-paper Basket

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Introduction

Over the last thirty or so years there has been a concerted effort by law reformers to move our societies towards a more community-based model of criminal justice and corrections, a process described by White and Perrone as 'destructuring' (1997:177). This model was made manifest, essentially, by the four 'd' words: diversion, decarceration, decriminalisation and de-institutionalisation. The first of these themes, diversion, is the subject of this paper. Like the other themes, diversionary practices were endorsed enthusiastically by reformers of the 1970s. The impetus for change, White and Perrone suggest, came from a combination of factors including high remand numbers, high recidivism rates, high costs, and the negative impacts of conventional methods of punishment - if not the system itself (Feeley 1979; Bottoms & McClean 1976) - on rehabilitation and reintegration of offenders into wider society. There was a real sense that there was a penal crisis looming, and that only by some drastic measures would it be averted (e.g. Tomasic and Dobinson 1979; Bottoms and Preston 1980). Keeping people out of the system at the 'front end' became the catch-cry.

Despite the pitfalls and dilemmas associated with the process of evaluation itself (e.g. Sarre 1991, 1992, 1994a), policy-makers then began to determine whether diversionary effects were, in fact, being made manifest. The results were equivocal. The evaluations tended to suggest that the reforms did not necessarily achieve their aims. There are, perhaps, two reasons to suggest that this outcome should have been predicted.

The first is that the sentencing process is decidedly problematic. The Australian Law Reform Commission noted 18 years ago that even experienced judges

> *... frequently confess that the longer they perform the task of sentencing, the less confidence they have that they know what they are doing.... Serious, knowledgeable and responsible critics of the system... chastise the disparities that exist in sentencing and describe the process as a 'random lottery' depending too much on capricious and inconsistent factors and on the personality and the idiosyncratic views of the particular sentencing judge* (Australian Law Reform Commission 1980:3).

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The various aims of punishment are implemented by sentencers with very little definition and even less sustained public debate. When there is debate, it tends to be focused on leniency as opposed to deserts, with the majority of public opinion, it would seem, concerned that judges are too lenient. In that environment it is not easy for judges to adopt an approach that diverts offenders from the formal court processes, an approach which may be seen by some to be lenient and 'soft'.

The second reason is that the evidence is mounting that diversion carries with it hidden dangers. There is a constant danger with diversionary programs that people who come into contact with formal agencies of social control are more often diverted *into* a less formal - destructured - bureaucratic apparatus rather than away from the system entirely. Stanley Cohen made the following observation in 1985:

> *Leaving aside for the moment questions about causality, consequence and failure, the size and density questions can be answered quite simply:*
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> *(1) there is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (wider nets);*
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> *(2) there is an increase in the overall intensity of intervention, with old and new deviants being subject to levels of intervention (including traditional institutionalization) which they might not have previously received (denser nets);*
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> *(3) new agencies and services are supplementing rather than replacing the original set of control mechanisms (different nets).*
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> *No one who has listened to the historical tales...should be altogether surprised by any of this. But these patterns need careful scrutiny, are not always self-evident and... are never easy to explain* (Cohen 1985:43-44).

Cohen is saying, amongst other things, that one of the problems with diversion is that it can, at times, result in actual *increases* in the number of people and range of behaviours subject to official control when the idea was to *reduce* numbers. In other words, the reverse occurs due to the net-widening effect (Tomaino 1999a:172, 1999b:198). To what extent is Cohen still accurate in 1999?

What happens with diversion in fact?

In the examples in this paper that follow, a trend emerges: diversionary practice has been, at times, either unpredictable, contradictory or counter-productive. In the opinion of this author, the characteristics of the implementation failures could be classified in two ways, as follows:

i) Little really changes - *plus ça change, plus c'est la meme chose.* The exploration of this phenomenon has heightened in the last two decades. Under this thinking, the state, in the final analysis, retains its system of control. Reforms are easily subverted by practitioners who maintain a *status quo* of operation (Foucault 1977:223; McBarnet 1979; Austin & Krisberg 1981; Ericson 1981:214; Alder & Polk 1985). As Blomberg said in relation to an innovative juvenile justice diversionary initiative,

> *... [a]n essential question that emerges... concerns how an apparent liberating concept becomes intentionally operationalized into [a] policy... which results in [greater] control* (Blomberg 1977:281).

ii) The results of initiatives turn out, upon implementation, somewhat counter to the intended purpose of the architects of the exercise. This is caused by problems in implementation, problems inherent in the faith which is often placed in the 'community'

itself (White & Perrone 1997:193), and by poor theoretical conceptualisation (Polk 1987). The end result is often an outcome quite different from the intent (Chan 1990:59). As one critic has said,

> *ill considered reforms not infrequently backfire in ways that the reformer eventually finds dismayin* (Greenberg 1975:29).

In the pages following a number of diversionary reform initiatives are reviewed. Not all are unique to, but each has had implementation in, the jurisdiction with which the author is most familiar - South Australia.

Decarceration and Diversion: Indigenous issues

Police cautions as a diversionary mechanism

Family conferencing as a diversionary mechanism

Bail reform: reducing the number of remandees in custody

Decriminalisation: cannabis reform

Diversionary programs: drugs and alcohol

Diversionary programs: suspended sentences

In each case the results have been equivocal, if the aim of the exercise was to reduce numbers coming into and staying in the criminal justice system. Further exploration of each is required in order to suggest reasons why.

Decarceration and Diversion: Indigenous Issues

The Aus$40 million Royal Commission into Aboriginal Deaths in Custody which concluded in 1991 was a milestone down the continuing road of sentencing reform in this country. Commissioner Muirhead took the view that his Royal Commission should investigate not only how the 99 deaths under scrutiny occurred, but why they occurred. Thus, it was determined that the Royal Commission should include in its terms of reference a range of underlying issues, including social, cultural and legal factors which appeared to contribute to disproportionate Aboriginal arrest, detention and imprisonment rates (Office of Indigenous Affairs 1994; Cunneen & McDonald 1997; Mugford 1998).

Among the factors considered by the Royal Commission were court practices in relation to the imposition of custodial sentences. Its concern was especially with the following issues:

- Is imprisonment seen as a last resort?
- Are alternatives such as community service orders realistically available to Aboriginal people?
- Are such alternatives appropriate to Aboriginal communities, and do they set unrealistic expectations that lead, ultimately, to an increase in the incidence of offenders being placed in custody?
- Are legal aid services available and adequately funded?
- Are legal processes comprehensible to Aboriginal people?
- Do legal officers and the judiciary know enough about Aboriginal culture to be able to fix more effective penalties and impose more workable conditions on the release of offenders, which do not unwittingly encourage further offences?

In 1991 the Final Report of the Royal Commission was published by later Commissioner Johnston. One of the key findings of the Report was simple and unequivocal.

> *The first strategy to reducing the number of deaths in custody is to reduce the number of Aboriginal people coming into custody in the first place* (Royal Commission 1991:133).

In the final analysis, attention was paid in the recommendations to reducing the numbers in custody through diversion from police custody and the use of imprisonment as a last resort. The former included recommendations in relation to decriminalisation of certain offences including public drunkenness, improved and culturally relevant use of community policing, increased use of community-based options including cautioning as alternatives to arrest, and changes to bail provisions and procedures.

Recommendations in relation to the use of imprisonment as a last resort included considerations such as reforms that permitted criminal records to be expunged after a lapse of time in order to remove references to past convictions, that allowed offenders to perform community service work, that gave sentencing authorities the power to consult with discrete or remote Aboriginal communities in order to establish the general range of sentences that is appropriate, that funded Aboriginal legal services more adequately, and that made available a range of appropriate non-custodial sentencing options capable of implementation in practice. Home detention was particularly recommended as an option both for sentencing and as a means of early release. The use of community service orders, probation and parole, and the use of fines were all given limited endorsement, as long as the use of these alternatives neither disadvantaged Aboriginal offenders in relation to other opportunities nor placed them disproportionately at risk of further imprisonment for defaulting.

The Final Report made 339 recommendations, concentrating principally on the underlying reasons that bring Indigenous Australians to the attention of police. The Report sought reforms regarding, amongst other things, police training, court and prison practices, government facilities and counselling services. In relation to sentencing practices, little was said, other than to repeat the mandate that imprisonment ought to be the 'consideration of last resort' (recommendation 92). Yet, despite a commitment of governments to endorse and implement the recommendations of the Royal Commission, little has changed in relation to the interface of Aboriginal Australians and the justice system (Sarre 1999 forthcoming). Sadly, the position described by the Royal Commissioners has hardly changed in the eight years since it was identified and reported.[1] Little has changed specifically in relation to sentencing practices, and, as a corollary, the rate of deaths in prison has not fallen, although *police* custody deaths have shown pleasing reductions, as have results in South Australia.[2]

There are at least two debates continuing at the moment on ways to reduce Aboriginal rates of imprisonment. One suggests Aboriginality should be a mitigating feature in sentencing. The other suggests a more widespread use of customary law. Both of these ideas

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1 The number and proportion of Indigenous people in Australian prisons continues to increase. An Indigenous Australian adult is approximately 18 times more likely than non-Indigenous adult to be in prison Australia-wide (Brown 1997: 197) up from 14 times in 1994 (Walker 1994: 13). Suspicions that juvenile figures tell the same story (Wundersitz *et al*, 1990) have been confirmed. The rate of detention of Aboriginal children aged 10-17 is 21 times the rate for non-Aboriginal children (Atkinson & Dagger 1996). Between 1991 and 1994 there was an average of 10.5 Aboriginal deaths in custody annually, the same as the average during the period covered by the Royal Commission (Australian Institute of Criminology, 1994: 2). Between 1989 and 1996 Indigenous persons were 16.5 times more likely than non-Indigenous Australians to die in custody (Social Justice Commissioner 1996). While Indigenous peoples account for almost 2% of the Australian population, in 1997 they made up more than 13% of custodial deaths (Dalton 1998: 8).

2 From June 1996 to June 1997, there were no Aboriginal deaths in custody in SA (source: Royal Commission News: ALRM and AJAC RCIADC Independent Monitoring Newsletter, July/August 1997 # 43/44).

have been mooted for some time yet legislatures are decidedly coy about putting enabling mechanisms in place (Sarre 1997, 1998a).

Police cautions as a diversionary mechanism

The most recent reforms in South Australia to police practice in this area came into operation in January 1994. Expanded police powers of caution were designed to reduce the number of persons apprehended and drawn into the juvenile justice system. A new *Young Offenders Act* and a new *Youth Court Act* were passed through the South Australian parliament in 1993. The process introduced a new choice for police in their interaction with young offenders: where discretion determined that a mere 'caution' was required, there was now a distinction between *formal* cautions and *informal* cautions.

Formal cautions, described in section 7 of the *Young Offenders Act,* are used for matters which are more than trivial but which can be adequately dealt with by having young people and their parents attend a meeting with a cautioning officer to discuss the offending behaviour, whereupon the caution is delivered and, if necessary, sanctions imposed. These cautions can be administered in relation to not only offences against 'good order' but in more serious cases including larceny and robbery. They are distinguished from informal cautions which are used for the more trivial offences, and particularly where there has been no previous offending.

Our society has always understood that police require discretion to do their job well. But with discretion comes the potential for caprice, and the application of irrelevant and inappropriate criteria, a matter that has been given critical attention in Britain (e.g. Tweedie 1 982; Evans 1991; May 1997), North America (e.g. Shearing 1981) and Australia (e.g. Gale *et al* 1990; Cunneen 1991; White 1993, 1994; Maher *et al* 1997; Blagg & Wilkie 1997).

Police, it has been alleged, are...

> *part of a highly integrated and largely defensive group which has built up a considerable number of shared definitions of situations and standards of behaviour, and which has mechanisms whereby it can resist change...* (Cain 1971:95).

If police guidelines are interpreted with great flexibility and, as often happens, police officers themselves are sceptical about the purposes of the legislation under which the powers are given, there is potential for injustice and inconsistency (Giller & Tutt 1983; 1987). There is some reason to suggest that cautions in South Australia are not having the diversionary effect required (Sarre 1998b) and that police are using formal cautions where previously informal cautions would have been given.

Family conferencing as a diversionary mechanism

The new *Young Offenders Act* also created a system of 'family conferences' in South Australia, modelled on the New Zealand experience. The offender(s), their extended families and advocates (if appropriate), the victim(s), and the police are brought together with an independent facilitator.[3] Offenders are urged to confront their wrongdoing (for the most part the less serious offences) while being allowed to develop their own negotiated outcome. The aim of the process is to bring about reconciliation and reparation, not to exact

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3 In South Australia a justice coordinator runs the conference. Contrast the Australian Capital Territory where the police coordinate proceedings (Wundersitz & Hetzel 1996).

punishment, an aim similar to that of the various victim/offender mediation programs alive in some jurisdictions in Australia and overseas.

There were some general concerns about the South Australian conferencing model when it was first announced and implemented. It was thought that those 'diverted' from court by the program would have been likely to stay out of court anyway (Sarre 1999). That is, one may have suspicions that there are many candidates for cautions that find their way into a formal family conference - the net-widening effect - by well-intentioned but misplaced beneficence (Polk 1994). To some commentators the ideal situation is for family conferences to be convened only where a young person has re-offended and court is the *only* legislative option. The suspicion was that too few Youth Court matters would be diverted *into* conferences, and that too many conferences would be ordered for young people who were candidates for cautions.

The Wundersitz report (1996:xix) makes passing reference to this potential increase in offenders. However, it did not draw any firm conclusions. It concluded that the framers of the model were overly optimistic in suggesting a split of 60:30:10 (% of caution, conference, Youth Court) of matters coming into the system. Certainly it was overly-optimistic to suggest that it would happen in the first three years of operation. Currently the operation of the system provides a 56:4:30 split.[4] The conference option, thus, has made little difference to the numbers of matters being referred to court (the figure is three times the anticipated one), possibly because the legislation excludes serious cases from conferences.[5] Prior to 1994, 40% of matters went to court while 60% went to caution. In some respects, therefore, a diversionary effect can be noticed (40% to 30%) but it has not been as high as anticipated.

Bail reform: reducing the number of remandees in custody

In the early to mid 1970s dissatisfaction with the Australian bail system led to calls for reform. The Australian Law Reform Commission (1975) reviewed police bail, and, contemporaneously, the South Australian *Criminal Law and Penal Methods Reform Committee* (Mitchell Committee 1975) recommended comprehensive reform to bail laws and procedures in 1975. Following this upsurge in interest in bail processes (e.g. Armstrong 1977), widespread statutory change occurred across Australia in the 1970s and 1980s.[6]

In the 1990s researchers began to realise the great importance of reviewing the wider socio-political context in which bail determinations are made. The political context is clearly important, for example, many governments have been keen to show the public that they can be 'tough on crime'. In a number of jurisdictions over the last decade, there have been attempts to reduce the availability of bail in circumstances where a defendant has been charged with certain drug offences, and violent offences punishable by long periods of imprisonment. For example, in the United Kingdom the *Criminal Justice Act* was amended in 1993 to increase sanctions for offences committed whilst on bail, and to allow prosecution appeals against grants of bail when offences involving a imprisonment of more than five years were involved (Cavadino & Gibson 1993).

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4 The New Zealand split is 80:14:6.

5 In contrast to the New Zealand model that can handle very serious offending, up to and including attempted murder.

6 Bail Act 1977 (Vic); Bail Act 1978 (NSW); Bail Act 1980 (Qld); Bail Act 1982 (WA); Bail Act 1982 (NT); Bail Act 1985 (SA).

On the other hand, attempts have been made by many justice administrators, including correctional administrators, to focus on bail issues. They have identified people within the prison environment who can be seen to be at risk and have endeavoured to ensure that, as far as possible, these people are not subjected to undue periods of incarceration. For example, the over-representation of Indigenous Australians in the prison system is even greater in that section of the prison population that is remanded in custody. There are renewed endeavours now to explore these issues.[7]

Observers of the above process would probably have discerned that the victor in the tussle described has been the political process over legal concerns. That is, high rates of remand in custody evince an intention of politicians to show that they are prepared to allow the presumption of innocence to take second place behind political expedience.

Decriminalisation: cannabis reform

South Australia has partially 'decriminalised' the possession and cultivation of cannabis. While it does not mean that small-scale cannabis possession, cultivation or use no longer are criminal offences, these acts are not now prosecuted nor penalised as though they were. The 1987 amendments to the legislation (*Controlled Substances Act* (SA) 1984) specifically note that payment of the expiation fee is not an admission of criminal guilt. Perhaps the best summary from a legal point of view is that the South Australian government embarked upon a prosecution policy which *de-emphasised* the criminal status of small scale cannabis use, but stopped short of legalisation, a term which implies that there are no legal repercussions from the activity whatsoever.

Under the reforms, it is possible, however, that a magistrate will still hear the matter if a charge is defended or where a recipient of a Cannabis Expiation Notice ('CEN') fails to pay within 60 days. Indeed, the figures revealed by the Office of Crime Statistics report in 1989 (Office of Crime Statistics 1989) suggested that nearly half (45%) of CEN recipients were going to court anyway because of such a failure to pay the fines. The same story was true years later (Sarre 1994b) and persists today. When the CEN scheme was introduced, it was anticipated that it would bring about a significant decrease in defendants appearing before the courts. That has simply not happened.

Further, in reviewing unintended consequences, it was noted by the evaluators that the initial nine months of CENs had confirmed that people detected possessing or using small amounts of cannabis continued to be drawn from disadvantaged socio-economic groups, and that low-income people figured disproportionately among those prosecuted after failing to pay expiation fees. One objective in introducing an expiation system was to make the law bear less heavily on disadvantaged groups and ensure that persons committing simple cannabis offences should not be penalised by incurring a criminal record. The system has not been able to fulfil that aim. There is anecdotal evidence that police, in their desire to keep offenders from serious charges, write out multiple CENs, creating unpayable fines, and condemning defaulters to prison for defalcation. At the end of the day, even with the best intentions, the reform has essentially back-fired.

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7 A study of the remand in custody process has been recently undertaken (Bamford et al 1999) to determine why it is that remand-in-custody rates remain consistently high in some jurisdictions despite the best endeavours of reformers to reduce them.

Diversionary programs: drugs and alcohol

The decriminalisation of public drunkenness in South Australia in 1984 produced a net-widening effect. This legislative move, in fact, precipitated a significant rise in the frequency with which disadvantaged individuals, particularly Aboriginal Australians, were apprehended and held in police cells, albeit now for reasons of 'welfare' rather than public order (Office of Crime Statistics 1986; Bird 1987). Net-widening occurred because alternatives to formal court prosecution, by reducing paperwork, removed one of the major disincentives for police to intervene. Simply stated, it was far easier to direct a person to a diversion mechanism than to take a person to court. At the end of the day there were more 'self-fulfilling prophecies' than diversions.

Currently in South Australia, the Department for Correctional Services (DCS) is examining anew the place of diversionary programs in sentencing practice, especially for offenders with alcohol and other drug-related problems, and with particular attention to Aboriginal offenders. It is clear that current policies are simply not having the desired effect. The evidence is that

> *the criminal justice system, particularly as it is played out in the courts, is difficult to work with, is inconsistent, and frequently works in ways which are counter-productive for alcohol and other drug offenders* (ADCA 1996a:8).

The South Australian Drug Assessment and Aid Panel, established in 1985 under the auspices of the *Controlled Substances Act 1984*, is a pre-court drug diversionary program designed to divert people caught with possession of illicit drugs for personal use away from the courts and to the Panel, placing pre-eminence upon the medical nature of the problem. Unless the offender wishes to defend the matter in court, fails to adhere to the requirements of the Panel or is found unsuitable by the Panel, the matters are never referred to the courts and no conviction is recorded (ADCA 1996b:14).

There is a constant danger, however, that people who come into contact with formal agencies are more often diverted into a less formal bureaucratic apparatus rather than away from the system entirely (Cohen 1985:13). It is not uncommon for programs to end up with higher numbers than before the 'diversion' program was available. Those who may not normally come to the attention of the courts are referred to programs designed to provide diversionary intervention for offenders. Police and others who see the potential benefits of the program are more inclined to refer 'clients' than charge 'offenders' (ADCA 1996b:20). The reform can be said to have, in some respects, failed.

Diversionary programs: suspended sentences

In the same way one suspects that the suspended sentence, like many other diversionary and deinstitutionalisation schemes, falls into this same category, although recent empirical data is difficult to find in Australia. The suspended sentence was introduced as one mechanism designed to reduce prison numbers (Bottoms 1979). An offender may receive a jail term which is not put into operation until there is a breach of a good behaviour bond. The power to suspend was introduced in South Australia in 1970 by an amendment to the old *Offenders Probation Act* (SA) 1913-71 (Mitchell Committee 1973:140). It is well documented in the law reform literature as a means by which prison numbers may be reduced (Australian Law Reform Commission 1979; 1980; 1988 ¶ 67).

The dilemma is, however, that it has not been used to mitigate the punishment for those who would have gone to prison in the normal course of events, nor has it been given to those who were, in all likelihood, going to serve time. Rather, suspended sentences have been

used as an 'add-on' for offenders (Fox & Challinger 1985, Tait & Polk 1988). There is some suggestion that sentencers might give longer sentences to offenders than would have been given had custody been imminent (Australian Law Reform Commission 1987a; 1987b ¶ 36). Then, since infractions of good behaviour bonds do occur regularly - Sherlock (1970) put the figure 30 years ago in the UK at 83% - thereby activating dormant prison sentences, the correctional system is faced with an increasing number of people who may, potentially, be facing custodial sentences, that is, the exact reverse of the aim of the exercise (Sparks 1971, White 1973, Sarre 1984:183). As the Law Reform Commission points out, the advantages of the suspended sentence can be achieved by other means, namely the use of conditional discharge or deferred sentences (Australian Law Reform Commission 1987b ¶ 37). This may be the reason for the rejection of the practice a decade ago (Australian Law Reform Commission 1987b:7 ¶ 26). Further work needs to be done in Australia to reconcile this reform with the rhetoric, a task that appears to be the subject of current academic attention in New Zealand (Searle et al 1998).

Conclusion

The numbers of people who find themselves coming into formal contact with the criminal justice system appear *not* to be falling despite the best endeavours of reformers to reverse this trend. Diversionary schemes and other reforms appear to have had little effect on the trends upward. This essay has reviewed a selection of reforms and suggested why they may not have performed as well as anticipated by policy-makers. There may be other examples.

Of course, this is not to say that all 'destructuring' must now, of necessity, be abandoned. The purpose of this paper was not to create a pessimistic outlook likely to frustrate reform efforts, as Martinson's paper (1974) is historically regarded as having done twenty-five years ago in relation to correctional rehabilitation efforts.[8] Rather, the paper was designed to alert reformers to the risks associated with paying too little attention to net-widening effects, counter-effects, the *plus ça change* phenomenon and other implementation pitfalls.

Was Cohen (1979:360, 1985:44) accurate in his foreshadowing of the possibility of diversionary practices merely hastening an ever-widening circle of social control? Perhaps. But one should not abandon the *idea* of diversion simply because of the risks associated with its poor implementation. Indeed, the risks of *ignoring* the value of 'destructuring' may be just as great (Chan 1992). Champions of diversion must be able to convince conservative and liberal policy-makers alike of the value of their quest, lest anyone threaten to jettison reform schemes altogether.

The fact remains that reductions in the numbers of people coming into the formal (if not informal) processes of criminal justice are not occurring with the speed anticipated, sometimes demanded, by reformers. Such reductions - through diversionary practices essentially - must remain an essential plank of Australian criminal justice reforms into the new century. This will only happen, however, when a critical eye is trained on the processes of destructuring themselves, as well as on those currently charged with the responsibility of implementing change.

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8 What did Martinson actually say? At page 25 of the famous article he wrote: '... with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism'.

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