The Powers and Role of the Judiciary

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(*Remarks to the 3rd Annual Crime Prevention Seminar*
Sponsored by Chamber of Commerce
19 November 2007)

Moral codes survive only if they are constantly taught and practiced. Rules are kept by convention, habit and self-interest, and, to a large extent, because other people keep them. Self-interest works for the common good. Operating a code of behaviour is like a pyramid sales operation. As long as it continues, its working guarantees its future. Once a significant number of people start to breach the code with any frequency, self-interest becomes self-centredness and the whole system falters. People behave badly; other people then behave badly because they have lost trust. They do not have the confidence to follow what their consciences often prompt them to do. Disorder becomes its own recruiting sergeant.

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Ladies and Gentlemen, Good Afternoon.

Since I accepted the invitation over the signature of the Executive Director of the Chamber of Commerce to address "the topic 'The Powers and Role of the Judiciary' in the fight against crime and corruption at all levels", the media have published statements, made on different occasions, from the President of the Court of Appeal and the President of the Bar Association which I, respectfully, endorse and which probably make my remarks to you redundant. Actually, despite the relative recency of the invitation to me, I was able to agree to accept because I recognised that the topic would require me to say little that I have not previously publicly stated in each of the six years that, as Chief Justice, I have presided at the ceremonial opening of the legal year.

I make no apology for being repetitive because the verities to which I, in common with other judges and responsible members of the Bar, both within and without The Bahamas, have continually returned have obviously not been accepted, either at the cerebral or visceral level, by the society at large as is evident from the pronouncements that continue to pour from press pundits, pulpits and

political podia, all of which share the theme that judges, both in their methods and their results, function in a manner that is, at best, inconsistent with and, at worst, inimical to, the true interests of the society. While in The Bahamas, these misdirected comments concentrate on "crime", in Canada, the United Kingdom and the United States of America, it is "terrorism" that provides the vehicle for the like attack on judicial decisions.

I accept the reality that there tends to be a general disconnect between the judicial system and broad sections of the community at large. Many reasons for this may be advanced but I am of the view that this disconnect is rooted in the reality that the legal system emphasises **process** and **procedure** while the anxiety of the average citizen is for the achievements of **results**.

One manifestation of this is the reluctance, or inability, of many persons to accept what we as judges know as part of the fibre of our judicial being, namely, that judges are appointed not to "do justice" but to "do justice according to law". The oath that each judicial officer in The Bahamas, from the Chief Justice to a lay magistrate who may be presiding over a court of summary jurisdiction in the most remote Family Island settlement takes is.

> to "well and truly serve . . . and . . . do right to all manner of people after the laws and usages of The Bahamas without fear or favour, affection or ill will".

Judges are not knights errant with an unrestrained roving commission to right perceived wrongs in the society. Moreover, while courts only have jurisdiction to consider claims which persons choose to bring before them, whether of a criminal or non-criminal nature, courts have no control over what matters persons do choose to bring to court (except in that severely limited number of matters where persons, having been found by the court to be "vexatious litigants", are required to obtain the leave of the court to commence any new action).

Another, modern, problem faced by judges is the popularity of dramatic presentations of the legal system, usually for entertainment, especially on television, which has created the expectation that all matters that present themselves for solution before the courts can be conveniently distilled to simple propositions readily resolved in an hour. Litigants, nurtured in this expectation cannot understand why, when they become parties in real disputes before actual courts, the process of the marshalling of witnesses and presentation of evidence (which, they have been misled into believing, must always include physical evidence capable of scientific analysis using the latest technological gadgetry popularly, if etymologically erroneously, referred to as "forensics") and the deliberative process does not yield results before the sun sets on that day. Their frustration is voiced in the cry that local judges do not know what they are doing.

Before I proceed further it would probably be useful to explain who comprises the "judiciary" because it is obvious that somehow, somewhere, lessons in "civics"

have failed to educate our citizens in the rudiments of social organisation. Why, for example, would reporters continue to describe the Attorney General as "head of the judicial system"?. The common thread, even among the press – whom one would have thought, would educate themselves in these matters so as to better inform the public – is the failure to separate, and therefore, apportion responsibilities, as between police, the Office of the Attorney General, the Bar and magistrates and judges, often referring to all as being part of "the judiciary".

In the course of my remarks at the opening of the legal year in 2003, I said, and had occasion to repeat in subsequent years:

> The role and duty of the courts is to decide questions of guilt or innocence in criminal matters and to determine liabilities and obligations in other suits, whether of a family, constitutional, commercial or other nature. This is what the "Rule of Law" entails.
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> It is especially in relation to criminal matters that members of the public ventilate their frustrations with the system of justice and we in the judiciary, who do not enjoy that freedom of speech which we sit to guarantee to others, are alarmed and distressed when those who have the public ear join in the public hysteria, rather than using moments of public outrage as teaching opportunities to explain the importance of such principles as the burden and standard of proof in criminal trials, freedom from arbitrary arrest and detention, freedom from torture and the right to the security of ones home and person, which, while "inherited" by us as part of the colonial legacy, were only secured elsewhere after centuries of turmoil and struggle.
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> The popular cant, here and abroad, about the need to redress the balance as between "victims" and accused persons sets up a false dichotomy as it fails to recognise that the person wrongly accused is, too, a "victim" and it cannot enhance the public's security if, for expediency, we are careless about depriving persons of their liberty -- or even their lives -- by process of law if the individuals truly responsible for wrongdoing remain undetected and unconvicted.
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> [A year earlier I had noted that, whatever the views of persons outside the courtroom may be, in judicial proceedings, the use of the term "victim" is restricted because the bedrock principles as to the burden and standard of proof in a criminal trial are such that there is no "victim" until the tribunal of fact is satisfied that a crime has in fact been committed.]
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> No matter how heinous the transgressions of terrorists, drug traffickers, murderers and rapists are, it is not sufficient to simply accuse someone of these crimes. The State, on behalf of all of its members must prove it.

> That some alleged crimes, by their nature, are more difficult to prove than others -- sexual offences, financial crimes and frauds being the obvious examples -- cannot lesson the burden on the State to establish why a person accused should be deprived of his liberty. It is by the process of trial, not popular denunciation, that guilt is established and it is the work of the courts to conduct the process. And, when the State fails in its obligation to proceed in a timely fashion against those in respect of whom accusations are made, it is the duty of the courts to deal with such failures.

Time does not, of course, permit a full explication of the machinery of justice in The Bahamas. However, it should be elementary knowledge to anyone possessed of a secondary level education that "the judiciary" is a term that should be applied only to those who hold office as a judge, a magistrate or registrar and that the fundamental constitutional principles of "separation of powers" and the "independence of the judiciary" mean that the judiciary has and ought not to have anything whatever to do with bringing persons before the court.

The legal system is assumed to be the indispensable component that ensures that a Darwinian "survival of the fittest" order does not determine the result for persons in their family affairs, their business dealings and their relations with the political directorate, both in its coercive and regulatory capacities The nature of litigation is that it compels parties, even claimants, to participate in a process that they would prefer to have avoided and the culmination of the process leaves one, sometimes both, of the parties unsatisfied. This residual resentment often translates into the dissatisfied party feeling that he did not receive "justice", not because of the demerits of his case, but because the fountain of justice had, somehow, been polluted by the opposing side.

It is the unenviable task that judges have in all modern societies to do their jobs in this, often hostile, environment. In our region, being comparatively small countries which function more as large villages, we bear the added burden of living in cultures where popular wisdom holds as an article of faith that all services for which the State is responsible (and the legal system is not exempt) is dispensed on the basis of "who you know".

I cite a personal example. If you were to "google" my name, you would see a "blog" posted 29 October 2004:

> **Sir Burton Hall a Disgrace to Justice**
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> Sir Burton Hall is a disgrace to justice in the Bahamas. The foolish . . . judge . . . has once again embarrassed the Bahamas judicial community by reducing the sentence of a brutal murderer to manslaughter, citing a silly technicality that really has no bearing on the man's guilt . . . he may have been drinking before he murdered the girl . . .

> This is not the first time that Burton Hall has made decisions usually attributed only to bribe-taking corrupt judges. The important clue here is to find out who Moss is related to, that got him this ticket off of death row. Then trace that relationship to Sir Burton and one might even find corruption in the Judiciary.

The unidentifiable writer does not bother to point out to the readers of his blog (which, because it is posted on the internet, potentially includes every person on planet Earth with access to a computer) that I sat as one of a panel of three judges in the Court of Appeal who handed down a unanimous decision stating our reasons, as we must, for the decision which the Crown did not seek to appeal.

The court structure of The Bahamas comprises courts from those presided over by laymen, usually Family Island Administrators, to the Judicial Committee of Her Majesty's Privy Council. I need say nothing of the appellate courts, the Court of Appeal and the Privy Council, as a part of this exercise because, unlike trial courts, the role of appellate courts is to review the correctitude of the trial process not to hear witnesses. Those courts are, therefore, able to exert a greater measure of control over the flow of their work than trial courts are able to. I also only touch briefly on the work of magistrates although, in terms of sheer numbers, the Stipendiary and Circuit magistrates (that is, magistrates who are required to have legal qualifications) handle the greater volume of criminal matters.

I continue to receive complaints from lawyers and members of the public about the inconvenience and expense caused by their traveling to courts in various Family Islands at dates fixed by the court only to find that the court is not sitting. While it is easy to assert that such events are inexcusable and fault the magistrates concerned, the reality on the ground is that the need to provide services, including judicial services, throughout an archipelagic nation is a formidable task The fact of geography demands that either magistrates and their staff have to be transported to and accommodated in the various Family Islands or defendants and witnesses have to be transported to and accommodated in the Capital. Neither alternative can be achieved other than at considerable expense and, even when the bureaucratic machinery makes the funding available in time (to prevent the embarrassment of a magistrate being reminded at an establishment that the bill for accommodations provided on a previous visit had not yet been settled), a magistrate in fixing a case does not always know of the availability of air, sea or ground transportation to get him to court on the adjourned date.

The difficulties and inconvenience of moving from the Capital to another island, movement between islands or major islands and their outlying cays, and transportation and accommodation on particular islands make the problem of carrying the system of justice to the Family Islands, for the foreseeable future, the most intractable of the problems that face us.

A fact apparently not readily appreciated by the public generally or the bureaucratic machinery on which the legal system must rely, is that a court – at whatever level – is not merely the presiding judicial officer, whether judge, registrar or magistrate. The judicial officer must have adequate physical facilities in which to sit and from which to work when not presiding and must be supported by the necessary staff to arrange the flow of matters coming on for hearing, to file and record matters which are adjourned or completed, to collect and account for fines and fees, to respond to public queries and to ensure the security of the staff and members of the public.

Additionally, we have to rent living accommodations for two judges in Freeport and one of the magistrates in Freeport and the magistrate in Abaco

Concentrating on the Supreme Court – the court in our system which has unlimited jurisdiction and where the criminal matters which most concern the community are tried – comprises 11 judges one of whom sits in Freeport In the Capital, the Court which outgrew its facilities decades ago, now occupies five different buildings between East Street and Marlborough Street. Two of these are rental accommodations for which $748,000 is paid annually. In addition, the support service of court reporting is housed in privately owned premises for which additional rent must be paid. The inefficiencies in terms of management of staff and movement of files occasioned by this separation of facilities are obvious.

Assuming that a particular claim is ready to move forward for a trial or interlocutory hearing, the public tends to believe that in an ideal world, the matter first filed would be first heard. Of course, we know that the “interests of justice” order matters according to other priorities. So that, for example, matters involving the welfare of children or applications intending to prevent the dissipation of assets or their removal from the jurisdiction are permitted to “jump the queue”. When this happens, especially if the “urgent” matter attracts publicity, the litigant whose matter has not moved forward (more often than not, due to the indolence of his attorney) cries “foul!”

As Chief Justice, contrary to what many persons believe – from complaints that pass through my office – I have no authority to direct any judge or magistrate as to what finding to make in a matter before him. An incident of “independence of the judiciary” is the individual responsibility of each judicial officer to his judicial oath and, if a party is dissatisfied with a decision of a judge, the remedy is to appeal. I do, however, have administrative responsibility for all courts in The Bahamas, except the Court of Appeal and, as such assign trial judges and magistrates as necessary to accommodate the flow of work. Through the Registrar of the Supreme Court, I manage the more than 200 persons who comprise the support staff of the Office of the Judiciary. However, because in The Bahamas “independence of the judiciary” has not translated into

administrative autonomy for the Office of the Judiciary, as the support staff are all civil servants, we have no authority to hire or fire and very limited powers of discipline – an arrangements which you as businessmen may find it difficult to grasp.

The criminal division is but one of the seven divisions into which the work of the court is divided. In 2006, while 300 new criminal matters were filed, 1388 matters were filed in the common law, equity and commercial divisions, 758 were filed in the family division and 741 applications for grants of probate (92 of which were contentious) were filed. While the public is, understandably, concerned about the movement of criminal matters before the courts (and it is such matters that usually attract the attention of the media) even a casual glance at the broad range of the court's work demonstrates that, proportionally, only a small portion of judicial time is dedicated to criminal matters.

When a criminal case comes on for trial in the Supreme Court, because it involves a jury it must proceed continually. Therefore, while a trial before a magistrate can be commenced and adjourned over a period of weeks or months according to the availability of witnesses, in the Supreme Court, the prosecution cannot begin a trial which it cannot complete once the accused has been put in the charge of the jury. Furthermore, every criminal trial must have available a pool of 48 jurors from which those who will try the case are chosen and, in my experience, apart from the reluctance of most persons to perform this civic duty , it is the business community from whom the least cooperation comes in terms of their employees serving as jurors.

Returning to the limitation of our facilities, no provision is made for the separation of jurors from witnesses in the precincts of the court and where there are only two jury deliberation rooms. There are no bathrooms available for the use of witnesses, attorneys or the public in two of the three buildings which can accommodate jury trials.

Accordingly, published demands to make more judges available for criminal trials cannot be met because it is simply impractical to run more than three criminal courts simultaneously; previous attempts to run four courts were not successful and it would be wholly irrational to attempt anything beyond this number given our present limitations.

Does this mean that I am satisfied with the present state of affairs? Of course not! However, I remain unmoved by those who have the public ear who either propose or support simplistic solutions to systemic problems.

I urge that all persons would be well advised to take up the challenge represented in the otherwise forgettable 1993 film ***Rising Sun***, as a Japanese proverb: **"Fix the problem, not the blame".**

I remind you of the figures that I earlier mentioned of the work of the various divisions of the court and the figure of 758 for the family division. With few

exceptions, these are all divorce petitions (which, in terms of judicial time, each generates an average of three fixtures requiring a judge to deal with matters of maintenance of minor children and division of property). This is the work that most engages my own judicial time and when, one considers that what I see in this division is but a slice of the problems affecting family life in this country, I find the rancour and discord exhibited by so many of the parties, sometimes even in the face of the court, a disturbing expression of misconduct which is probably not isolated to the parties themselves and most likely infects the most impressionable and innocent, namely the children of these unions, who cannot escape that environment.

Persons who commit criminal offences are the products of families and the communities which form them. As you drive the streets of New Providence during the morning and afternoon "school run", observe how many children – from kindergarten up through when they themselves reach an age to wreak their own havoc on the roads – are being taught the lesson by their own driving parents that rules do not matter. As you visit the supermarkets observe how many children are taught to steal by their parents "grazing" in the produce or snack section and not paying the cashier. When you next present yourself at a port of entry, notice the number of returning residents, children in tow, teaching their children how to be deceitful in declaring their foreign purchases to the customs officer.

As businessmen, I call your attention to a matter of particular concern to me as "head of the judiciary".

Notwithstanding what I describe as "the presumption of integrity" of our support staff, whose competence, diligence and probity, guided by the supervisory and administrative levels, we take as a given, complaints come into my office, from litigants, from lawyers, from concerned and busy-body members of the public – about lost files and missing documents, about matters being assigned hearing dates – because some member of the support staff is socially (sometimes, sexually) involved with someone having an interest in the matter or of some favour being received, in some cases, money being passed. In the vast majority of cases, these complaints are so imprecise that no investigation is possible. They, nevertheless have the effect of spreading cynicism of and distrust in the legal system, thus sapping the public confidence in its ability to deliver "equal justice under law".

I apprehend that, with our gatekeepers at the support level, despite training and orientation programs that we have in place, the system is infected by a culture common throughout the civil service of which the support staff of the Judiciary is a part. It is a culture which sees nothing inherently objectionable about accepting gifts from members of the public with whom they deal. One might be tempted to assert that this ought not to be considered a problem because we live in a free market economy where, as consumers of a wide range of services from shop

assistants to restaurant servers, we are permitted (in some cases expected) to show our appreciation for good service in some tangible manner beyond a “thank you”. Why is the clerk at the business licensing bureau who is extraordinarily courteous and helpful any different from the shop assistant in the leather store who gives similar service? Of course, the short answer is that, in the former case, the business licensing clerk is paid a salary for her work even if no applicants come in for the week while the shop assistant probably works on commission and, in any event is required to encourage customers for her employer’s business.

The hazard is that, for the person on the public payroll, a favour or a gift as innocuous as lunch money creates a relationship which places the donor at an advantage over any other person similarly placed who is entitled to apply for that particular state-provided service. The most disadvantaged then are the citizen tax-payers who cannot afford to grant such favours and, when a practice of accepting such favours become established, the “market forces” of supply and demand produce the result that the greater the means of the applicant for state services to confer favours, the greater access to such services he procures to the disadvantage of others in the society.

That this culture seems endemic across the civil service is disturbing. When the agency involved is one responsible for regulatory matters, say, health and safety, it becomes menacing. When the civil servants who follow this pattern are on the staff of the Judiciary it becomes corrosive.

To the extent that this activity – real or imagined – is a problem, it is one of social attitudes, not law since, for more than 30 years, the Prevention of Bribery Act of The Bahamas has provided:

> **3.** (1) Any person who, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's-
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> > (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
> >
> > (b) expediting, delaying, hindering or preventing or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or
> >
> > (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

(2) Any public servant who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his-

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

14. In any proceedings for an offence under this Act, it shall not be a defence to show that any such advantage as is mentioned in this Act is customary in any profession, trade, vocation or calling.

Section 2 of the Act defined "advantage" as:

(a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description . . .

(d) any other service, or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;

"entertainment" means the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time as, such provision.

These broad provisions, therefore, clearly proscribe a range of activities which, if “street talk” has any substance in fact, is standard operating procedure for many civil servants and, when it is said of the support staff of the courts, surprise of

surprises, the complaints that come from litigants or lawyers is of what the side opposite is doing!

In The Bahamas there has long existed the practice of businesses giving gifts at Christmas of liquor, tobacco and candy, and other consumables to the staff of government offices and it had become notorious that some law firms had been quite generous in some of the not insubstantial gifts to the staff of the Judiciary. My predecessor attempted to address the concerns raised by this practice by issuing a prohibitory order which, it is reported, was promptly sought to be subverted by some members of staff who would visit the chambers of the "beneficent" attorneys instead of the attorneys having their largesse delivered to the courts office.

I am of the view that neither administrative rules nor criminal laws will work in the absence of a change of the culture. For similar reasons I do not consider that raising the salaries of support staff is an answer because the staff member intent on so benefiting himself will never regard his lawfully earned salary as sufficient.

I see this change in the culture as the real challenge, especially since it will require the staff of the Judiciary to adhere to standards that their counterparts in the remainder of the public service need not meet. For example, it is commonplace for government agencies to give recognition to their support staff at social functions such as awards banquets and departments usually solicit support from the business community for these events in the provision of gifts, the sale of advertisements in commemorative booklets, and so forth. (Occasionally, questions circulate in public when the department is Immigration or Customs as to the propriety of these arms of law enforcement developing such relationships and all in this room would recall the recent controversy involving the Police Force.) How then can the Judiciary do the like for its support staff when it must view every business entity (even its vendors of necessaries such as stationery and cleaning supplies) as a potential litigant before the courts and every firm of attorneys as lawyers for potential litigants?

TRACE International Inc, a firm based in London and Washington DC, which describes itself as representing the "global standard for anti-corruption compliance" in its publication ***The High Cost of Small Bribes*** makes the following observations:

> In many companies a distinction has long been drawn between major bribes and mere "facilitation payments". The distinction has been confusing. Bribes and "facilitation payments" are both payments or gifts to, or favours for, government officials in exchange for preferential treatment. If companies pay these small bribes willingly, they are nevertheless bribes. If companies pay these bribes because they believe they have no choice, they are extortionate.

> Expediting payments . . . are usually demanded by entrepreneurial government officials who threaten delay and red tape if they are not paid small amounts at regular intervals. Historically, it may have been easier to pay then to argue.
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> It is difficult to maintain a good reputation within a local business community when your company is believed to buy its way past the administrative obstacles that local citizens and companies must endure. When a bureaucratic delay is legitimate – rather than created by the bribe-taker – purchasing preferential treatment for your company bumps others further down the waiting list.
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> Paying small bribes is poor legal practice, but more to the point, we were told, it is bad business practice. Widespread small bribes set a permissive tone, which invites more and greater demands.
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> Every company we interviewed expressed dissatisfaction with these small bribes. They told us that they amount to a hidden tax on business, they tend to proliferate, they buy an uncertain, unenforceable advantage and – the most common complaint – they are simply irritating. Well-run businesses seek clear, dependable terms and enforceable contracts. Small bribes introduce uncertainty, risk and delay.
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> The study showed that entrepreneurial bribe-takers learn to focus their demands on companies that have paid bribes before. For those companies, the level of harassment for small bribes actually increased with the rate at which they were paid. Entrepreneurial bribe-takers must erect more or greater obstacles in order to increase their income. Small bribe-takers thrive on inefficiency and bureaucratic obstacles.

Ideally, the Judiciary will be blessed with a cadre of staff committed to public service over private gain, without regard to feelings of personal disadvantage as against their colleagues elsewhere in the civil service. Among the tasks I have set for myself as "Head of the Judiciary" is to inspire, effect and manage the cultural reorientation to achieve this ideal.

I began my address to you by quoting Mr Frank Field, Labour MP for Birkenhead, writing in the Christmas 2003 edition of the ***New Statesman***, remarks which I employed at the opening ceremonies in 2004 and, again, at the beginning of the current year,

In that later address I added that in March of 2005, having been invited to participate in the lectureship series on the occasion of the 165th Anniversary Celebrations of the Royal Bahamas Police Force, I had returned to this theme that:

> [T]he police can do precious little to "prevent" crime in the absence of a broad community consensus of behaviour which it simply will not tolerate.

and had posed the question:

> Why, for example, is the prevailing social attitude that the police should spend their time chasing burglars and armed robbers rather than "otherwise law abiding" traffic offenders. Apart from the fact that persons who abuse their spouses and children are also "otherwise law abiding", the truth of the matter is that an illegally parked car may itself lead to an accident and accidents, especially those in which speeding is a factor, kill and maim more people than do burglars and armed robbers.

and concluded, as I now repeat:

> In sum, while courts might impose punishment upon conviction achieved after due process, no court or any other state agency will curtail objectionable behaviour in which a large measure of the population insist in engaging.

I thank you.

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