SENTENCING REFORM
A CANADIAN APPROACH

Report Of The Canadian Sentencing Commission

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February 1987

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The Canadian Sentencing Commission

La Commission canadienne sur la détermination de la peine

February, 1987

To Her Excellency
The Governor General in Council

May it please Your Excellency:

We, the Commissioners appointed under Part I of the *Inquiries Act* by Order in Council of May 10, 1984, P.C. 1984-1585, as amended on February 8, 1985; P.C. 1985-441, in accordance with the Terms of Reference assigned therein, have inquired into and beg leave to submit this report on sentencing in Canada.

The recommendations contained in this report contemplate a comprehensive reform of sentencing laws and practices in Canada. These recommendations represent a high degree of consensus and for the most part are unanimous.

We respectfully submit our recommendations.

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Anthony N. Doob

Frederick C. Hayes

Edward J. Langdon

Bruno J. Pateras
(Minority report on the nature of sentencing guidelines)

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Acknowledgements

In undertaking our mandate, we have received valuable assistance and support from provincial governments and a number of departments and agencies of the Government of Canada, most particularly, the Department of Justice, the Ministry of the Solicitor General, the Canadian Centre for Justice Statistics and the Law Reform Commission of Canada. The ongoing administrative help and advice provided to the Commission by officials of the Department of Justice assisted the efficient operation of the Commission and were greatly appreciated. In addition, we have been assisted by suggestions received from numerous individual Canadians (laypersons and professionals alike), leading scholars in the area of sentencing from other countries, professional associations and community and voluntary associations, who made submissions to the Commission or otherwise gave us the benefit of their views and advice.

On behalf of all the members of the Commission, I would like to express our gratitude to the Honourable William Robert Sinclair of Edmonton, Alberta, formerly a Justice of the Court of Appeal and Chief Justice of the Court of Queen's Bench of Alberta, who, for the first seven months, served as Chairman of the Commission. Although regrettably he was unable to continue as a member of the Commission, we were fortunate in benefitting from his expertise and experience in setting up the Commission and launching it on the right course. We thank him for his valuable contribution.

Commissions, such as ours, must rely heavily on their research staff in the realization of their mandate. Given the number of Commissioners, eight of whom were part-time, and the breadth of our mandate, it was crucial that the Commission recruit a competent and efficient research team. We were very successful in enlisting the services of research officers who served us extremely well.

Although they came from different backgrounds each one of our research officers, Renate Mohr, Karen Markham and Julian Roberts, made unique and effective contributions to the work of the Commission. The quality and volume of their work and their timely performance was beyond normal expectations. They responded cheerfully and unselfishly to our frequently urgent requests for information within next to impossible deadlines and invariably delivered a superior product. The high quality of their work made our task much easier. We were also assisted toward the end of our mandate by Gabriella Cavallero who, as research assistant, tirelessly and efficiently performed many of those tasks which make it possible to complete a report such as this one.

Special thanks go to Dr. Jean-Paul Brodeur, our esteemed Research Director. At the outset upon examining our mandate it readily became clear that the Commission would require a director of research who was not only knowledgeable but who had a vision of the range and depth of issues to be considered as well as the ability to assist the Commissioners in structuring the next two years so as to allow in-depth consideration of issues within a rigorous time-frame. Jean-Paul Brodeur, with the aid of his staff, saw to it that research was planned in advance and completed on time and organized information and background material in such a way that we were able to derive the maximum benefit from our meetings and keep our decision-making on an orderly schedule. The combination of his high degree of expertise, reliability and dedication was exceptional; it not only inspired confidence but made our work so much easier. We are indebted to l'Ecole de Criminologie of the Université de Montréal for generously acceding to the secondment of Dr. Brodeur to the Commission.

The work of the administrative personnel deserves special mention, since it is their dedication and efficiency that allowed the completion of massive amounts of work in short periods of time. Since this Commission had relatively few full-time staff persons, co-operation in all aspects of our work became essential. Madeleine de Carufel was our first administrator and laid a solid foundation for the smooth operation of the Commission. Patricia Rutt, without whom meetings with Commissioners from across the country could never have run so smoothly, served not only as our administrative officer, but took on tasks ranging from endless photocopying to proofreading the final report. Perhaps more than anyone else, Nancy Boswell and Lynn Ouellet, the permanent secretaries to the Commission, were called upon to undertake tasks above and beyond the call of duty and always succeeded in fulfilling these requests, no matter how late the hour. Their support for and assistance to the research staff and members of the Commission was invaluable. In thanking them for their generous contribution and unfailing efforts, I echo the sentiments expressed throughout the course of our mandate by all the Commissioners and members of the research staff.

In closing, let me say that the task of this Commission was both challenging and difficult. The Commissioners accept full responsibility for their recommendations. While the issues dealt with were not easy to resolve, the quality of the decision-making was in large measure attributable to Jean-Paul Brodeur and his very able staff. The realization of all this work was greatly facilitated by the good will and valuable assistance of the administrative personnel. All the members of the Commission join me in expressing to the entire staff our sincere appreciation and thanks for a job well done. I am indebted to all of them and will continue to cherish their friendship.

J.R. Omer Archambault, P.C.J.
Chairman

Summary

1. The Context

This summary is meant to provide the reader with an overview and an understanding of the report of the Canadian Sentencing Commission. It should not be read as if it were the report itself. The recommendations are described in broad terms without mentioning details. Evidence and explanations of the Commission's findings and recommendations are only occasionally and then, very briefly, discussed. The entire report must be consulted to achieve a full understanding of the proposals.

The Canadian Sentencing Commission was given the responsibility of examining sentencing in Canada and of making recommendations on how the process should be improved. After conducting a thorough review, the Commission concluded that there are serious problems with sentencing in Canada and that these problems cannot be eliminated by tinkering with the current system or exhorting decision-makers to improve what they are doing. The system is in need of fundamental changes in its orientation and operation.

Unfortunately these are not novel assessments. The problems have existed for a very long time and in recent years have become the source of extensive discussion and debate. Yet the changes that have occurred have been piecemeal in nature while the overall context in which sentencing takes place has remained virtually unchanged for over a century. Over the course of time, various commentators, federal commissions and committees have identified many of the same problems identified by the Canadian Sentencing Commission. Problems — such as the over-reliance on custodial sanctions and the existence of unwarranted disparity in sentencing — do not require almost two and a half years of inquiry by a nine member Commission to be discovered. Identifying the problems may be relatively easy. Determining the solution is not.

The Government of Canada established the Canadian Sentencing Commission in recognition that there exist serious problems in the structure of sentencing and that these problems could only be resolved by a comprehensive set of recommendations which reflected the complexities of the criminal justice system as a whole. The members of the Commission accepted this assessment and were mindful of what had been said about sentencing over the past century.

2. An Overview of Structural Problems

The Commission found that the problems of sentencing in Canada had more to do with the structure in which sentencing decisions are made than with the people who actually make the decisions. It identified a number of serious problems including the following:

- The almost complete absence of policy from Parliament on the principles that should govern the determination of sentences.
- Maximum penalties that are unrealistically high and which do not always reflect the relative seriousness of offences.
- Mandatory minimum sentences that create injustices by unnecessarily restricting judicial discretion without accomplishing other functions ascribed to them.
- Parole and early release programs that add uncertainty and an element of indeterminacy to sentences and yet which, at the same time, fail to accomplish the goals set out for them.
- Courts of Appeal that are not structured in such a way as to make adequately comprehensive sentencing policy to provide effective guidance to trial judges. For example, Courts of Appeal, in formulating sentencing policy, can only respond on a case-by-case basis and only to those few cases brought before them. Indeed, the Courts are understandably reluctant to take on what is essentially a legislative role in setting down explicit policy on sentencing.
- A lack of systematic information about current sentencing practice. For policy-makers and sentencing judges alike easily accessible information on sentencing does not exist.

2.1 Lack of Public Confidence in Sentencing

In this context, it is not surprising that the public does not understand sentencing in Canada and yet is also critical of it. It is a system whose structure is in need of change. The public may articulate part of its concern about sentencing in terms of its belief that offenders, in particular violent offenders, are not dealt with harshly enough. However, as the Commission's public opinion surveys show, the public recognizes that the problems are more fundamental than simply a difference of opinion on the appropriate level of penalties.

Victims, too, have expressed some concerns about sentences and the sentencing process. They feel that the criminal justice system generally, is not adequately responsive to their concerns. In the specific area of sentencing, they often feel, for example, that sentences are not predictable and do not reflect the gravity of the offences. When they hear of an offender receiving a custodial sentence, they do not know what portion of that sentence will actually be served in custody. The system is not designed to encourage restitution to victims in all situations where it is appropriate. Admittedly the sentencing

process cannot, itself, address the problems of victims in the criminal justice system as a whole. However, in addressing the lack of clarity and predictability in the process and in constructing a framework to encourage the exchange of information between all those involved in and affected by the sentencing process, the recommendations of this Commission will address some of the very real concerns expressed by victims of crime.

2.2 Disparity in Sentencing

The problems with the structures in which sentencing takes place go deeper than public perceptions. There is abundant evidence of unwarranted disparity in sentences including the following:

- The majority of judges who responded to a Commission survey noted that there was variation in sentencing from judge to judge. This was perceived to be largely due to different personal attitudes and/or approaches taken by judges in sentencing offenders.
- Over 80% of almost seven hundred Crown and defence counsel from six provinces who responded to a Commission questionnaire thought that there was unwarranted variation in sentences in their own jurisdiction, and over 90% thought there was unwarranted variation across Canada.
- There is evidence that judges approach similar cases in different ways. These different approaches to cases — based on different views of what principles should be paramount — lead to different sentences being handed down for similar offences committed by similar offenders in similar circumstances.
- There is, for some offences, a fair amount of variation in the sentences handed down across jurisdictions (within and across provinces). This variation follows no discernible pattern.
- Sentencing exercises with judges who were all given the same written facts to determine a sentence suggest that judges differ widely in the sentences they would hand down. In addition, the sentences they said they would recommend tended to correspond to their view of the principles that were important in the case.

2.3 Over-Reliance on Imprisonment

Canada does not imprison as high a portion of its population as does the United States. However we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most

onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction.

2.4 The Courts of Appeal

Over the years, Parliament has provided little guidance to judges with respect to the determination of sentences. The sentencing judge must look to the Courts of Appeal for guidance on sentencing. Courts of Appeal are not, however, adequately structured to make policy on sentencing. They are not organized nationally; hence, there is no obvious way of creating a national policy. They do not have the means and resources required to gather all of the necessary information to create policy on appropriate levels of sanctions. They are structured to respond to individual cases that are brought before them rather than to create a comprehensive integrated policy for all criminal offences. Most importantly, Courts of Appeal do not represent the people of Canada as Parliament does; judges are understandably reluctant to transform their courts into legislative bodies making public policy with respect to sentencing decisions. They appear to prefer to do what they do best; to guide the interpretation of the will of Parliament in the determination of the appropriate sanction in an individual case.

3. The Need for a Comprehensive and Integrated Set of Proposals

The sentencing structure that is being proposed by this Commission involves a fundamental overhaul of sentencing in Canada. It involves recommendations having to do not only with how the judge determines a sentence, but also with important components of the criminal justice system that give meaning to the sentence imposed. Thus, the Commission has made recommendations regarding parole and remission recognizing that early release procedures are an integral part of the sentencing process and hence have a profound impact on the meaning of a sentence of imprisonment.

Since the terms of reference and the problems of sentencing are broad, the recommendations made by this Commission are necessarily broad as well. In addition, they are interrelated. Their purpose is to provide a comprehensive structure to make sentencing more equitable, predictable and understandable. This necessarily means that to understand the nature of the Commission's recommendations, one must consider them in the context of the total package. Considering almost any subset of the recommendations in isolation from the rest will distort the overall meaning of those recommendations.

4. The Need for a Canadian Solution

Solutions being proposed in other jurisdictions, though perhaps useful to examine, cannot be imported unchanged into Canada. The structure of sentencing in Canada has many positive features. Ultimately, in developing our approach to sentencing reform in Canada, we endeavoured to preserve the strengths of our sentencing system while directly attacking its weaknesses. Thus the Commission recommends that the ultimate authority for determining the appropriate sentence to impose in an individual case should remain with the trial judge. Courts of Appeal should continue to have the power and responsibility of reviewing and modifying sentences in individual cases. Parliament, as it does in other areas of national interest, should play a leading role in the formulation of criminal justice policy for the country.

5. Guiding Principles

After examining closely our system of sentencing offenders and identifying its strengths and weaknesses, the Commission was guided, in making its recommendations, by the principles found in the first column below. The second column contains a summary of the current situation.

Guiding Principles	*Current Situation*
Role of Parliament	
• The sentencing of criminal offenders should be governed, in the first instance, by principles laid down by Parliament.	Parliament has thus far never stated what principles should guide sentencing.
Purpose	
• The fundamental purpose of sentencing is to preserve the authority of and to promote respect for the law through the imposition of just sanctions.	There are at least five main purposes with no explicit system of priorities. In a given case, these purposes may conflict.
Priority	
• The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.	As noted above, there is no paramount principle. Judges choose among these purposes and combine them as they see fit. There are no rules determining the priority of these purposes.

Trial Judges	
• Within the limits set by Parliament, the sanction imposed on an offender in Canada should ultimately be determined by an impartial and independent person with the best knowledge of the case: the trial judge.	This is the current situation. The Commission maintained this as an important principle in its recommendation.
Statutory Maximum Penalties	
• The upper limit of maximum penalties should provide sufficient scope to allow the imposition of appropriate sentences. However, the range available should not be so wide as to provide no guidance.	At the moment, many maximum penalties are so high that they are rarely if ever used. Therefore, at present, the maxima provide little guidance and in many instances give a false impression of what sentence might be expected.
Restraint	
• In line with the recommendations of numerous Canadian commissions that have reported in the past, sentences of imprisonment should be used more sparingly, especially for those convicted of minor property offences. Sentences of imprisonment should normally be reserved for the most serious offences, particularly those involving violence. People should not be imprisoned because of an inability to pay fines.	Canada presently imprisons more people than do most western democracies. A substantial proportion are imprisoned for minor property offences or for non-payment of fines.
Guidelines	
• Within the statutory limits, judges should be given explicit guidance on the nature and length of the sanction to impose. This guidance should not preclude the judge from selecting the most appropriate sanction from the full range of sanctions prescribed by Parliament.	Parliament, directly or by implication, provides no guidance to the sentencing judge in determining the appropriate sentence to impose. Courts of Appeal give some guidance, but because the Supreme Court of Canada does not hear sentence appeals, there is no opportunity for a uniform approach across Canada.
Comprehensibility	
• The sentence imposed by the court should bear a close and predictable relationship to the administration and execution of that sentence. We should move much closer then, to	The sentence pronounced in court, in many instances, varies substantially with what actually happens to an offender because of the manner in which a sentence is administered and executed.

"real time" sentencing. "Real time" sentencing reduces the discrepancy between the sentence as pronounced by the judge and as administered by correctional authorities.	Those sentenced to a term of imprisonment may be granted day release after serving one-sixth of the sentence and full release on parole after serving one-third thereof.
Equity	
• The system to be proposed should, as much as possible, promote equity and enhance clarity and predictability in sentencing.	There is unwarranted disparity in sentences such that the sentence is determined by factors beyond the seriousness of the case, the blameworthiness of the offender, and the circumstances surrounding the commission of the offence. Sentences are, in most instances, not predictable unless one knows not only the facts of the case but also factors such as the identity of the trial judge and agreements that might have transpired between defence and Crown counsel. Given the uncertainty and unnecessary complexity of the system, it is not surprising that most people do not understand sentencing.

6. Definition of Sentencing

The Commission defines sentencing as the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. That definition implies that sentencing is a different concept from punishment, though obviously most sentences do involve some degree of punishment and coercion. A sentence, however, is something that must be carried out, and therefore, there must be a reasonable level of accountability in the administration of sentences. Sentences should be what they are said to be.

6.1 Purposes and Principles of Sentencing

At present, we have in Canada no clear guidance for the consistent application of principles governing the imposition of legal sanctions on offenders. There are a number of often-stated purposes — denunciation, deterrence (both general and specific), incapacitation and rehabilitation — but there is no way of determining which is most important in a particular case. Judges differ on the importance they attribute to the various purposes of sentencing in a given case. In addition, of course, these purposes are not ones which can be found in any law passed by Parliament. They are the product of judicial decisions rather than the result of democratically determined public policy.

Three of these purposes (deterrence, rehabilitation and incapacitation) are clearly pragmatic. Sentences could potentially be justified with reference to these goals to the extent that they are able to realize them. There has been a great deal of research on each of these three purposes. Although the results are too equivocal to yield certainty, the research does, nevertheless, indicate the following:

- Evidence does not support the notion that variations in sanctions (within a range that could reasonably be contemplated) affect the deterrent value of sentences. In other words, deterrence cannot be used, with empirical justification, to guide the imposition of sentences.
- There are no comprehensive data that support the idea that courts can in general, or with specific identifiable groups, impose sanctions that have a reasonable likelihood of rehabilitating offenders.
- Although it is a truism that offenders will not be able to commit the same offences while imprisoned as they would if they were at large in the community, the extensive literature on incapacitation suggests that as a crime-control strategy the costs of imprisonment far outweigh the benefits achieved in reducing crime. The difficulty with incapacitation as a crime-control strategy is simple: too many people would have to be imprisoned unnecessarily in order for crime levels to decrease appreciably.

This Commission accepts the view that sentencing cannot by itself solve major social problems such as the occurrence of crime or the plight of victims of crime. However as long as society will, pursuant to the criminal law, authorize the imposition of sanctions on offenders, the sentencing process must, first and foremost, ensure that the principles of justice and equity prevail in the exercise of the power to impose and enforce such sanctions.

7. Impact of the Proposed Changes in Structure

The Commission's recommendations deal with the structure in which sentencing decisions are made. Ultimately, of course, changes in this structure will affect what actually happens to people who have been found guilty of criminal offences. In broad terms, the Commission's recommendations would have the following impact:

- **Sentences would be more proportionate:** sentences have to be proportionate to the gravity of the offence and the responsibility of the offender. Violent offences which result in serious harm to persons would attract the longest custodial sentences. Offences against property and other less serious offences would attract lighter sanctions and to the greatest extent possible sanctions which do not involve incarceration.

- **Sentences would be more equitable:** the severity of the sanction would be determined by a more explicit set of principles, so that offenders being sentenced for similar offences committed in similar circumstances would receive similar sentences.
- **Sentences would be more understandable:** the length of a sentence of imprisonment imposed in court would be considerably closer than at present to the length of time actually spent in custody by an offender.
- **Sentences would be more predictable:** the offender, the victim and the informed public should have a better idea of what the sentence would likely be.
- **Sentences of incarceration would be used with restraint:** as a result of the development of principles to govern the determination of sentences, it is expected that frequently voiced concerns about the over-use of incarceration will be effectively addressed.

8. The Proposed Reform

8.1 An Overview of the Commission's Main Recommendations

The recommendations made by this Commission are designed to provide the sentencing judge with additional structure and guidance for the determination of sentences. They are not intended to inhibit the judge's ability to impose fair and equitable sentences which are responsive to the unique circumstances of individual cases before the court. The net effect on actual sentences would be less dramatic than might otherwise be anticipated from an examination of the individual elements of the overall policy. This is illustrated by examining the Commission's central recommendations:

- **A new rationale for sentencing;**
- **Elimination of all mandatory minimum penalties (other than for murder and high treason);**
- **Replacement of the current penalty structure for all offences other than murder and high treason with a structure of maximum penalties of 12 years, 9 years, 6 years, 3 years, 1 year or 6 months. In exceptional cases, for the most serious offences which carry a maximum sentence of either 12 or 9 years, provision is made to exceed these maxima;**
- **Elimination of full parole release (other than for sentences of life imprisonment);**
- **Provision for a reduction of time served for those inmates who display good behaviour while in prison. The portion that can be remitted would be reduced from one-third to one-quarter of the sentence imposed;**

- **An increase in the use of community sanctions. The Commission recommends greater use of sanctions which do not imply incarceration (e.g. community service orders, compensation to the victim or the community and also fines, which do not involve any segregation of the offender from the community);**
- **Elimination of "automatic" imprisonment for fine default to reduce the likelihood that a person who cannot pay a fine will go to jail;**
- **Creation of a presumption for each offence respecting whether a person should normally be incarcerated or not. The judge could depart from the presumption by providing reasons for the departure;**
- **Creation of a "presumptive range" for each offence normally requiring incarceration (again the judge could depart by providing reasons); and**
- **Creation of a permanent sentencing commission to complete the development of guideline ranges for all offences, to collect and distribute information about current sentencing practice, and to review and, in appropriate cases, to modify (with the assent of the House of Commons) the presumptive sentences in light of current practice and appellate decisions.**

8.2 The Purpose and Principles of Sentencing: The Commission's Recommendation

A very important weakness of the present sentencing structure is that there is no clearly stated purpose of sentencing and there are no principles of sentencing that have been endorsed by Parliament. Instead we have a combination of sometimes unattainable and often conflicting purposes and principles.

The Commission concluded that the overall purpose of sentencing had to have two main qualities: (1) it had to be realistic, and (2) it had to emphasize the principle of justice. Thus it recommended that the fundamental purpose of sentencing should be to preserve the authority of and promote respect for the law through the imposition of just sanctions. It follows that the paramount principle determining the sentence should be that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle can be combined with a principle that has been repeated throughout legal writing in recent decades: the principle of restraint in the imposition of sanctions. The often-mentioned purpose of contributing to a just, peaceful and safe society is clearly more appropriate as a guiding purpose for the criminal law as a whole than it is as a guide to sentencing.

Since the emphasis is on the accountability of the offender rather than on punishment *per se*, a sentence should be the least onerous sanction appropriate

in the circumstances. Imprisonment should not be used for rehabilitation and should be imposed only in those cases where:

a) it is necessary to protect the public from violent crime,

b) another sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of the offender, or

c) any other sanction would not adequately protect the public or the integrity of the administration of justice.

Imprisonment could be used in cases of wilful non-compliance with the terms of a sentence where no other sanction can achieve compliance.

8.3 Mandatory Minimum Sentences

Canada has a long and inconsistent history of legislated mandatory minimum sentences which have, for decades, been criticized as being ineffective and unfair by many commentators and groups interested in criminal justice. It is sometimes argued that mandatory minima indicate Parliament's view of the seriousness of an offence. However, such a view ignores one important point: some of the most serious offences — e.g. aggravated sexual assault or manslaughter — do not carry minimum terms of imprisonment. Another argument is that mandatory minima are a way of guiding the trial judge on the type of penalty that is appropriate. However, mandatory minima do not guide, they force; consequently discretion is taken out of the hands of the judge and transferred to those in the system responsible for the initiation and conduct of criminal prosecutions. For these and other reasons, then, the Commission has recommended that all mandatory minimum penalties (except for murder and high treason) be abolished.

8.4 Maximum Penalties

At present, the only guidance from Parliament on the determination of sentences for most offences is the maximum term of incarceration prescribed for each offence. These maxima have two main problems associated with them: the maxima prescribed for various offences do not correspond to the relative seriousness of those offences; and maxima do not relate to what does or should happen to someone who is convicted of an offence.

The Commission carried out a thorough review of maxima. In doing so, it looked both at current practice and the manner in which current practice would be "translated" into the Commissions's overall proposals for policy. This involved creating equivalences between the effect of current parole and remission practice and the Commission's proposal that inmates serve a minimum of 75% of their sentence before being released. The Commission recommends that the ceiling for any offence (other than murder and high treason) be twelve years. A twelve year sentence under the Commission's

proposals is not only more definite than a twelve year sentence under the current system but it also would normally be a more severe sentence. Indeed almost all current sentences would, when "translated" into their equivalent sentence under the Commission's proposals, come within the twelve year limit.

After setting the ceiling at twelve years, the Commission had the responsibility of recommending maximum penalties for the over 300 offences in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV). The final recommendations were influenced by the findings of public opinion research, rankings by other Commissions, maximum penalties presently assigned in this country and other countries, and patterns of sentences actually handed down. In general, the Commission, in line with public concerns about penalties, assigned the most severe maximum penalties to violent offences which result in serious harm to persons. The Commission recommended that the maximum penalty of 12 years be assigned to such offences as manslaughter, aggravated sexual assault and kidnapping. A nine year maximum was assigned to robbery, extortion, and sexual assault with a weapon. The lowest maximum penalty (six months in prison) was assigned to such offences as theft under $1000, indecent acts, and gaming and betting.

8.5 Enhanced Sentences

The Commission attempted to set maxima to reflect realistic limits on what should be expected. In doing so, however, it acknowledged that there are rare circumstances where extraordinarily long sentences are appropriate. Currently we have in Canada legislation allowing for an indeterminate sentence for "dangerous offenders". The Commission recommends that this legislation be repealed and replaced with a proposal to increase the maximum (definite) sentence under special circumstances. The major criteria governing its imposition would be (a) the offence must carry a maximum penalty of 12 or 9 years, (b) the offence must be a serious personal injury offence, and (c) it must be a brutal instance of such an offence that compels the conclusion that the offender is a threat or it must be part of a series of similar repetitive incidents. Various procedural safeguards are proposed to limit the use of this "exceptional sentence" provision. If the relevant criteria are proved by the Crown, the maximum penalty available for the offence may be increased by up to fifty percent.

8.6 Total Sentences

Many offenders before the court are sentenced for convictions arising from multiple charges. Criteria for concurrent and consecutive sentences are especially confusing since the Court must also take into account the principle that the "total sentence" must be reasonable. The Commission took the view that it is the resulting total sentence which is important rather than the means used to arrive at it. Under the Commission's proposals, individual sentences would be assigned for each offence of conviction and then the sentencing judge

would apply the totality principle to impose a total sentence. It would no longer be necessary to make sentences consecutive and/or concurrent in order to impose the appropriate total sentence. In most cases, the judge would have, as an outer limit for the total sentence, the maximum provided for the most serious offence plus one-third of that maximum.

8.7 Parole

The Commission concluded that if the sentence pronounced in court is to be made more predictable, fair, and understandable, the rules and practices surrounding the administration of the sentence cannot continue to work at cross-purposes with sentencing principles. Thus, the Commission examined carefully the process by which a sentence of imprisonment is administered and the various programs which have the effect of varying the amount of time a person actually serves in prison.

After a person is sentenced to a term of imprisonment under the present system he or she comes under the authority of correctional services and, for purposes of release, the parole board. Although there are a number of reasons why a person might have received a sentence of imprisonment by the judge (e.g. incapacitation, deterrence, rehabilitation, denunciation), release decisions are made largely on the basis of two criteria: the perceived need for incapacitating the offender for protection reasons and an assessment of the offender's progress towards rehabilitation.

Given that the severity of the sanction imposed on an offender under the Commission's proposals is to be proportionate to the gravity of the offence and the degree of responsibility of the offender, it would be inconsistent to effectively alter the sentence for different reasons. As well, there are other considerations that make the existence of discretionary early release (parole) problematic.

8.7.1 Uncertainty

In the first place, parole release adds a great deal of uncertainty to the sentencing system. A person sentenced to a term of six years in a penitentiary could be released on day parole after one year, or on full parole after two years, or might be refused parole and would be eligible for release (because of earned remission) on mandatory supervision after four years. Assuming good behaviour in the institution, then, one inmate sentenced to six years could spend up to four times the amount of time in custody that another inmate also sentenced to six years could spend. If the original six year sentences were both set in proportion to the offence, violation of the principle of proportionality and inequity result if one offender spends up to four times as long in prison as another offender, when the same sentences were initially imposed.

Although the case law is somewhat unclear as to what role the possiblity of early release should play in determining the length of a prison sentence, the majority of trial judges report that they sometimes take into account the possibility of parole being granted when they determine a sentence. Given the fact that judges do not know how the parole board might, in years to come, decide on a parole application, this kind of second guessing can only add uncertainty and inequity to an already uncertain and sometimes inequitable system.

8.7.2 Equalization

Second, there is evidence that for certain offences, the effect of full parole release is to equalize sentences; those sentenced to long terms of imprisonment tend to serve a smaller portion of their sentence in custody than do those originally given shorter sentences. Although under the current law such effects might be permissible, they make no sense in a system based on the principle that the sanction should be proportionate to the gravity of the offence and the responsibility of the offender.

8.7.3 Lack of Purpose

Probably the most powerful argument against parole is that it serves none of its stated purposes in the current system nor would it serve any rational purpose in the context of the Commission's proposals. It is essentially a structure based on a rehabilitation model. If sentencing were based primarily on rehabilitation and if offenders were rehabilitated in prison, and if we could determine with a high degree of certainty that a person had been rehabilitated, parole would make sense. Neither the present system nor the Commission's proposals have these characteristics. The Commission has, therefore, recommended that full parole be abolished.

8.7.4 Integrated Recommendations

Although offenders would generally serve a longer proportion of their sentence in custody, the recommendation to eliminate parole does not necessarily imply that there would be an overall increase in the length of time that offenders will serve in custody. As has already been noted, it is important to consider the Commission's integrated set of recommendations in order to understand the full impact of changes. The elimination of parole (and the reduction of the proportion of the sentence that can be remitted) *must* be accompanied by a reduction of the length of custodial sentences that are imposed in order to achieve the same overall average result. If the length of custodial sentences remains the same, the resulting growth of the prison population may prove to be unmanageable for the correctional authorities.

8.8 Earned Remission

The earning of some time off the original sentence for good behaviour in the institution does not present the same difficulties inherent in a system of full

parole release. Various purposes can be served by allowing a portion of a sentence to be remitted. Among the purposes served are that it allows a form of relatively non-coercive administrative control, it provides an incentive for inmates to behave appropriately, and it may provide an incentive for inmates to engage in productive training. There is no need, however, for the amount that is to be remitted to be large. Since the Commission's proposals are based, in part, on the idea that we should move closer to "real time" sentencing, the Commission recommends that this portion be relatively small. Specifically, it recommends that an inmate be able to earn (for behaving acceptably) one day for each three days of good behaviour. At present the inmate can earn one day for every two days served.

8.8.1 Withholding Release

In rare circumstances where the inmate has been convicted of one of a list of serious violent offences which caused death or serious harm and where the Sentence Administration Board (the body created to, among other things, monitor conditions of release on remission) is satisfied that the inmate is likely to commit, prior to the warrant expiry date, an offence causing death or serious bodily harm, the Board would have the power, as the National Parole Board has at present, to withhold release on remission.

8.8.2 The Issue of Supervision

At present, federal inmates released on remission are released on "mandatory supervision". The term is misleading since although the conditions of release are mandatory, the inmate cannot realistically be considered to be supervised. Resources are not and cannot be made available to supervise adequately all offenders released on remission. The Commission recommends, therefore, that all offenders be released without conditions unless the Sentence Administration Board (on the recommendation of the trial judge or on its own initiative) feels that conditions are required. Assistance, on a voluntary basis, should be provided to all inmates.

8.9 Open Custody

Given that the Commission's recommendations with regard to sentences of imprisonment are designed to create a closer correspondence between the sentence that is handed down by the judge and what actually happens to the offender, it follows that judges should be given additional power and responsibility to determine, within certain parameters, the nature of the facility where the offender should serve his sentence. At the moment, there are a number of correctional facilities that could be considered to be forms of "open custody". By letting the judge determine the type of custody as part of the sentence, the expectations of the offender and members of the public will be more likely to match the reality of what happens.

8.10 Guidelines

The Commission has recommended that the full range of sanctions — from community sanctions to the maximum term of imprisonment associated with a given offence — be available for consideration by the judge in determining the appropriate sentence for each offence. Another element that is necessary to provide adequate guidance to the judge is a rationale for sentencing. These are the only parts of the overall package of guidance to the judge which are mandatory: the judge must sentence the offender within the statutory limits, and he must do so in line with the principles approved by Parliament.

As a method of providing guidance to judges in determining the appropriate sanction this is not sufficient. A judge should receive advice on three other points: (a) the kind of sanction that is normally appropriate for cases such as the one in question, (b) an indication of the expected quantum (for sanctions such as imprisonment or fines), and (c) a procedure for departing from the normal sanction or range in appropriate cases.

This Commission recommends that guidelines be created for each criminal offence. Although such guidelines would be presumptive, the judge could give a sentence outside the guidelines if it was appropriate to do so and if explicit reasons for the departure were given. It is expected that sentencing judges would find the guidelines useful and reasonable and that they would generally follow them. However it would be inappropriate for judges to always sentence within the guidelines because to do so would, in many instances, result in granting ordinary treatment to extraordinary cases.

The guidelines for the more serious and/or the most frequently committed offences would be in two parts. First, the guideline would inform the judge whether the presumptive sentence would involve a community sanction or would include a term of imprisonment. All offences have been assigned one of four presumptions: in (custody), out (community sanction), qualified in (custody unless it is a minor instance of the offence and the offender has no relevant criminal record) and qualified out (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).

Second, for those offences involving a presumption of custody, a presumptive range is provided. For practical reasons only, the Commission has not provided numerical presumptive ranges for all offences. Instead, it chose to present prototypes of numerical ranges for a sample of offences.

The guidelines also provide a non-exhaustive list of aggravating and mitigating circumstances which may be used to determine the sentence within the presumptive range (for sentences involving custody) and which also serve as grounds for departing from the guidelines.

Guidelines that have a real impact on sentencing are important not only because they are a means of achieving sentencing goals such as fairness and equity, but also because they are the only way of ensuring that some of the Commission's other proposals — the abolition of parole and the reduction of remission — can come into effect without increasing dramatically and quickly prison populations. Under the Commission's proposals, inmates would serve a considerably higher portion of their sentences in custody. Even to maintain the same level of incarceration, it is imperative that sentences change.

Many people have expressed concerns to the Commission that certain types of guidelines would restrict unduly the discretion of the judge in imposing sentences. The Commission's proposals would structure rather than eliminate discretion. They would suggest a type and/or range of sentence to the judge; they would not ultimately be compelling on the judge. Furthermore, the guidelines would not be fixed by legislation in such a way that it would be almost impossible to change them. The Commission has recommended that they be continually evaluated and updated by a permanent sentencing commission. Indeed, this commission could revise the guidelines taking into account general changes that have occurred in Canadian society or in the criminal justice system rather than on an offence-by-offence basis.

8.10.1 Courts of Appeal

The Courts of Appeal also have an important role to play with respect to the guidelines. Crown and defence would maintain their current right to appeal sentences. Courts of Appeal would also be given the power to modify, for their province, the presumptive range for sentences of imprisonment if there were substantial and compelling reasons to do so.

8.10.2 A Permanent Sentencing Commission

A permanent sentencing commission is proposed that would have the responsibility to create, evaluate, and update these guidelines. This commission, like the Canadian Sentencing Commission, would be broadly based. It would, in the development of guidelines, consult with a judicial advisory council, the membership of which would consist of a majority of trial judges. These guidelines would be tabled in Parliament and would come into force (as guidelines) unless a resolution rejecting them was adopted by the House of Commons within a specified period of time.

8.10.3 Presumptive Guidelines

The Commission chose a middle ground on guidelines. It rejected guidelines that are strictly advisory. They have been shown to be ineffective in other jurisdictions. This is not surprising, in part because if they were seen to be useful, judges would, themselves, have developed such guidelines. No legislative change is necessary for judges to create a system of advice and yet no such system exists in Canada. The Commission also rejected all forms of

mandatory sentencing systems where a sentence would be rigidly predetermined as soon as a judge had ascertained the existence of certain characteristics of the case. Such a rigid system was seen as not allowing for adequate individualization of sentences. Similarly, the Commission rejected all forms of formally legislated guidelines. It was felt that overall sentencing policy such as the purposes and principles of sentencing must be dealt with by Parliament as formal legislation. It was also felt that Parliament should have some say in the further determination of that policy by giving the House of Commons the power to reject, by resolution, presumptive sentencing guidelines proposed by a permanent sentencing commission. Legislative presumptive guidelines, however, were rejected by the Commission for the following reasons: (a) they would be too cumbersome and difficult to change, (b) it was felt that the involvement of Parliament at this level although necessary should be minimal and more in the nature of general overview than detailed consideration and (c) in a presumptive system of guidelines, ultimate authority to determine a particular sentence should rest with the trial judge, subject only to appellate review.

8.11 Community Sanctions

As previously mentioned, the Commission recommends that all sanctions other than custody (e.g., those involving community programs or resources, or those that involve compensation to the community such as fines or compensation to the victim) be referred to as community sanctions. They should not be thought of as "alternatives" to imprisonment, but rather as appropriate sanctions in their own right. The Commission recommends greater use of community sanctions, but that this greater use be accomplished in a principled way. Through the use of guidelines, mechanisms can be put in place to minimize the likelihood that community sanctions would be used inconsistently and as add-ons to an otherwise adequate sentence.

The Commission makes general recommendations on the need to increase the use of all community sanctions. The Commission also makes detailed recommendations on the use of two community sanctions: fines and restitution. It looked at fines because they are imposed frequently. Also there is evidence of disparity in the impact of fine default on identifiable groups (e.g., native offenders and women). Furthermore, those who fail to pay fines contribute significantly to prison populations. The Commission examined restitution because it is an appropriately constructive sanction which helps to meet some of the needs of victims.

The Commission recommends that fines be imposed only in circumstances where an inquiry reveals it is appropriate to do so. There is no point in imposing a fine on someone who cannot pay. Thus the Commission recommended that before a fine is imposed, an inquiry as to the offender's ability to pay be carried out.

The Commission recommends that we abandon the almost automatic use of imprisonment for fine default. An offender could only be incarcerated for

wilful default and only after other methods of collection have been exhausted or were determined to be inappropriate by the court. Finally, if a person were to be incarcerated for wilful default, the Commission is recommending a fixed conversion table which translates dollar amounts of fines into custodial terms.

The Commission also recommends that restitution be used more frequently in order to encourage the offender to take responsibility for his acts and, of course, as a way in which victims can be compensated.

8.12 Plea Bargaining

The Commission, by its terms of reference, had to examine the relationship between guidelines and matters related to plea negotiations. With the sentence that a convicted offender received being more explicitly linked to the offence of conviction, the practice of plea bargaining becomes more crucial. Plea bargaining can undermine the equity of a sentencing system by distorting the relationship between the criminal activities which led to the conviction of the offender and the sanction that is imposed.

The Commission rejected the idea of recommending that plea bargaining should be abolished. Such a recommendation was seen as unrealistic and furthermore was seen as effectively only transferring discretion to people in less visible parts of the criminal justice system. Thus the Commission focused on mechanisms to enhance visibility and accountability in the plea bargaining process and recommends that procedures be developed by the relevant authorities to make the plea bargaining process more open (for example, by generally requiring full disclosure of a plea agreement in open court). Furthermore, the Commission recommends that guidelines be developed which direct the Crown to keep victims informed of the process and to take their views into account. It further recommends that prior to the acceptance of a plea bargain, Crown counsel should generally be required to receive and consider a statement of the facts of the offence and its impact on the victim. In the end, however, the judge would, of course, retain ultimate authority to impose the sentence independent of any agreement regarding sentence between Crown and defence counsel.

9. Conclusion

The Commission has recommended a uniquely Canadian solution to the problems that exist in sentencing in Canada. It differs in material ways from solutions suggested elsewhere. It is an integrated package that would make sentencing more equitable, understandable and predictable. If implemented, it would have a profound impact on sentencing in Canada. However, its implementation would not result in a radical change of the nature of the sentencing process itself. The Commission's proposals seek to chart a middle ground between unfettered discretion on the one hand and rigidity on the other. This can be achieved through a combination of legislation (i.e. purpose and

principles of sentencing) and more flexible means (i.e. presumptive guidelines that are not fixed in legislation although subject to the tacit approval of the House of Commons). Those parts of the proposal which would be enacted as legislation would be binding on the system; those parts that are not (e.g., guidelines) would be presumptive. It is, therefore, a set of integrated proposals which, by representing a middle ground, is susceptible to criticism from both sides. Nevertheless, the Commission views its proposals as realistic and feasible. Sentencing should change in Canada. It is too important to be left to develop in an *ad hoc* manner. The adoption of the proposals in this report would significantly improve the sentencing process in Canada.

Part I

The Issues

Chapter 1

Terms of Reference

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Chapter 1

Terms of Reference

Never before has a commission of inquiry dealt exclusively with issues related to the determination of sentences. This is not indicative of satisfaction with all aspects of the sentencing process. In fact, since the construction of the first penitentiary in Canada, there has been strong and persistent criticism of the use of incarceration.[1] Two recurrent themes in government reports dealing with the criminal justice system are that too many people are sent to prison and for longer periods than necessary.

The commencement of the Criminal Law Review process in 1981 followed extensive preliminary work by the Law Reform Commission of Canada. It was based upon the federal government's earlier recognition (in 1979) of the need for a comprehensive review of the criminal law and the development of integrated proposals for change which were consistent with a criminal justice policy. The latter emerged in 1982 with the release of *The Criminal Law in Canadian Society* (Canada, 1982; hereafter referred to as CLICS). This statement of the purpose and principles of criminal law served as a framework for the more specific work of the federal government's Criminal Law Review, a major project of which related to the issue of sentencing.

The Sentencing Project, which was launched by the Department of Justice and the Ministry of the Solicitor General in 1982, culminated in legislative proposals for reform which were embodied in the proposed Criminal Law Reform Act, 1984 (Bill C-19)[2]. The sentencing provisions in Bill C-19 were drafted in response to the issues and concerns set out in CLICS and in various reports of the Law Reform Commission of Canada, most notably the report on *Dispositions and Sentences in the Criminal Process* (1977). Bill C-19 recognized that the goals of equity, accountability, clarity and predictability can only be achieved if the structure and basis for our sentencing laws and practices are articulated and made more visible and understandable to professionals and laypersons alike. It also acknowledged the importance of public understanding of a sentencing system which provides sanctions as severe as imprisonment and other forms of deprivation of liberty.

The sentencing proposals in Bill C-19, which constituted only one part of the Sentencing Project, consolidated and expanded existing sentencing

provisions to form a distinct and self-contained part of the *Criminal Code*. The sentencing package focused on four areas: a statement of the purpose and principles of sentencing; enumeration of rules relating to procedure and evidence at the sentencing hearing; the development of a new and expanded range of sentencing options; and modification of the provisions relating to dangerous offenders.

The other part of the Sentencing Project was concerned with the creation of a commission of inquiry. This initiative recognized that a number of important residual issues relating to sentencing and requiring more in-depth study and consideration could not be addressed through immediate legislative change. The Canadian Sentencing Commission was created by His Excellency the Governor General in Council, by Order in Council P.C. 1984-1585 of May 10, 1984.

The broad mandate of the Commission (reproduced below) reflects the position that a careful review of a number of the more complicated aspects of sentencing should complement the substantive and procedural proposals outlined in Bill C-19. Specific areas within the Commission's mandate include the issue of a revised maximum penalty structure, proposals to minimize unwarranted variation in sentencing decisions, and mechanisms to provide more complete and accessible sentencing data to the courts and other components of the criminal justice system.

The fact that the Commission was an independent commission of inquiry permitted the review of these issues in a politically non-partisan environment. Further, the membership of the Commission, which included five members of the judiciary, three criminal justice professionals[3] and a member of the academic community, ensured that the issues within the Commission's mandate were examined by individuals who had extensive knowledge of and experience in the criminal justice system and sentencing in particular.

At the time the Canadian Sentencing Commission was created, it was anticipated that the provisions of Bill C-19 would become law. However, the Bill died on the order paper with the dissolution of Parliament on July 9, 1984. Many of the provisions of Bill C-19, exclusive of the sentencing package, were later incorporated into the *Criminal Law Amendment Act, 1985*[4] (the former Bill C-18) which was proclaimed into force on December 4, 1985. The significance of the death of Bill C-19 to the Commission's interpretation of its mandate will be addressed in the comments concerning the Commission's terms of reference.

1. Terms of Reference

The preamble of the Order in Council establishing the Commission defined the context in which its terms of reference were to be interpreted. The preamble reads as follows:

> **WHEREAS the sentencing of offenders is an integral part of the criminal justice system;**

WHEREAS fairness, certainty, effectiveness and efficiency are desirable goals of sentencing law and practices;

WHEREAS unwarranted disparity in sentences is inconsistent with the principle of equality before the law;

WHEREAS sentencing guidelines to assist in the attainment of those goals have been developed for use in other jurisdictions and merit study and consideration for use in Canada;

AND WHEREAS other aspects of the sentencing process require in-depth examination.

The specific terms of the Commission's mandate are quoted below:

(a) to examine the question of maximum penalties in the Criminal Code and related statutes and advise on any changes the Commissioners consider desirable with respect to specific offences in light of the relative seriousness of these offences in relation to other offences carrying the same penalty, and in relation to other criminal offences;

(b) to examine the efficacy of various possible approaches to sentencing guidelines, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context, and for their ongoing review for purposes of updating;

(c) to investigate and develop separate sentencing guidelines for:
i) different categories of offences and offenders; and
ii) the use of non-carceral sanctions;

(d) to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:
i) prosecutorial discretion, plea and charge negotiation;
ii) mandatory minimum sentences provided for in legislation; and
iii) the parole and remission provisions of the Parole Act and the Penitentiary Act, respectively, or regulations made thereunder, as may be amended from time to time; and

(e) to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of information systems necessary for the most efficacious use and updating of the guidelines.

The Committee further advise that the Commissioners be guided, in the development of any model guidelines, by the policy and approach that such guidelines should:

(f) reflect the fundamental principles and purposes of sentencing as set forth in any legislation that may be adopted by Parliament, and in the Statement of Purpose and Principles set out in *The Criminal Law in Canadian Society*;

(g) be based on relevant criminal offence and offender characteristics;

(h) indicate the appropriate sentences applicable to cases within each category of offence and each category of offender, including the circumstances under which imprisonment of an offender is proper;

(i) if a sentencing guideline indicates a term of imprisonment, recommend a time, or range in time for such a term; and an appropriate differential between the maximum and the minimum in a range;

(j) include a non-exhaustive list of relevant aggravating and mitigating circumstances and indicate how they will affect the normal range of sentence for given offences; and

(k) take into consideration sentencing and release practices, and existing penal and correctional capacities.

The terms of the Commission's mandate can thus be divided into four main areas: maximum and minimum penalties; the examination of guidelines within the Canadian context; pre-sentencing issues (e.g., plea bargaining) and post-sentencing issues (e.g., conditional release from prison); and information systems.

Maximum and Minimum Penalties

Issues relating to maximum penalties include a reorganization of the penalty structure to reflect the relative seriousness of offences and the establishment of new maximum penalties corresponding therewith. The question of minimum penalties concerns the relationship which should exist between these provisions and any guidelines proposed by the Commission.

Guidelines

The question of guidelines arises from a concern about unwarranted disparity in sentencing and the search for the appropriate balance between maintaining nationally-consistent sentencing standards and providing sufficient flexibility to address the circumstances of particular cases. The overuse of incarceration has become an issue of growing importance with respect to sentencing guidelines. The development of sentencing guidelines is a sizeable undertaking since guidelines can be developed for the use of all types of sanctions.

Pre- and Post-Sentencing Issues

The Commission was concerned with pre- and post-sentencing issues to the extent to which they affected its sentencing policy and proposals. For example, a sentencing system which strives for greater clarity in the law may be undermined by plea negotiations involving fact bargaining which compromise the quality of information presented to the sentencing court. Also, post-sentencing release provisions have an obvious impact upon the amount of time an inmate actually serves in prison.

Information Systems

The question of information systems concerns both the accessibility and accuracy of current sentencing data in Canada as well as the use of data by the courts to reduce unwarranted disparities and provide feedback on current sentencing trends.

Comments

A number of comments may be made concerning these four areas of the Commission's mandate. Proposals respecting the first three issues, although interrelated, constitute discrete packages which embody particular policy goals. In contrast, the issue of information systems is not an end in itself but a means of developing (and updating) a realistic penalty structure and a system of guidelines. These systems are also necessary to assess the impact of penalty structures and guidelines upon sentencing practice.

A second comment is that because the Commission attempted to formulate a comprehensive sentencing package, it ordered its decision-making in a logical sequence. For example, the skeletal structure of a new sentencing system was determined by the reorganization of maximum penalties. Within this structure, sentencing guidelines provided further assistance for the determination of sentences in individual cases.

Recommendations respecting pre- and post-sentencing decisions were made to ensure that the exercise of discretion by various actors in the criminal justice process was consistent with the sentencing policy embodied in the Commission's proposals.

A third comment is that the Commission's mandate did not provide a definition of guidelines. Hence, the Commission was free to develop guidelines which varied in their level of detail and degree of constraint. For example, it was possible, in view of the more intrusive nature of custodial sentences, to develop detailed guidance about the use of these sanctions but to issue general guidelines about other types of dispositions.

Finally, the demise of Bill C-19 had important consequences for the work of the Commission. In its terms of reference the Commission was directed to formulate policy which would:

> reflect the fundamental principles and purposes of sentencing set forth in any legislation that may be adopted by Parliament ...

As already noted, when the Commission was created it was expected that Bill C-19 would be dealt with by Parliament. The demise of the Bill required the Commission to re-assess the sentencing policy embodied therein and to develop fundamental principles of sentencing as the philosophical base for its deliberations and proposals.

2. Issues Excluded from the Inquiry

It was necessary for the Commission to restrict the scope of its inquiry at an early stage given the magnitude of the task and the two-year period initially allocated to complete its work. Issues relating to capital punishment and dispositions under the *Young Offenders Act* were not included in its mandate and were not considered. Furthermore, time constraints prompted the

Commission to limit its study to offences contained in the *Criminal Code*, the *Narcotic Control Act* and Parts III and IV of the *Food and Drugs Act* although it fully recognized that its sentencing principles could be applied to the sentencing provisions of many other federal statutes.

During the course of its deliberations the Commission received, from individuals and groups, representations respecting such important questions as the role of the victim at the sentencing hearing and the nature and quality of information presented to the court. Procedural proposals of this nature were carefully examined by the Sentencing Project and many of the recommendations which emerged during consultations with various community and professional associations conducted by that Project were incorporated into the sentencing provisions of Bill C-19. In the absence of express reference to the sentencing hearing in its mandate and with the expectation that the Minister of Justice will be revisiting this issue, the Commission excluded procedural issues *per se* from the scope of its inquiry. However, this did not preclude the Commission from generally considering the interests of victims when making proposals respecting sentencing policy and particular aspects of the sentencing process.

3. Previous Commissions in Canada and Elsewhere

The Commission's terms of reference may be highlighted in two important respects: it was the first Commission in Canada mandated to deal specifically with the determination of sentences and related issues; and second, the scope of its inquiry was extremely broad, encompassing not only the sentencing stage itself but those pre- and post-sentencing decisions, such as plea bargaining and conditional release, which affect the length and nature of sentences. The Commission's mandate also embraced an examination of custodial and non-custodial sanctions.

3.1 Previous Commissions in Canada

Most previous commissions had either a narrow or broad focus of inquiry. Examples of commissions or committees with a relatively narrow mandate are the Archambault Commission and the subsequent Fauteux and Goldenberg Committees. In contrast to the diverse areas within the Canadian Sentencing Commission's mandate, these bodies were not directed to deal with sentencing as a whole but were required to focus on one particular area (e.g., parole or remission).

The general mandate of the Royal Commission to Investigate the Penal System of Canada (1938; chaired by The Honourable Mr. Justice Joseph Archambault) was to inquire into various aspects of corrections policy. It was specifically directed to consider such issues as the classification and treatment of offenders in penitentiaries; the classification, organization and management

of penitentiaries; selected aspects of the conditional release of offenders; as well as co-operation between governmental and social agencies in the prevention of crime and in providing assistance to prisoners released from prison.

The terms of reference of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (1956; chaired by The Honourable Mr. Justice Gerald Fauteux) were:

> to investigate and report upon the principles and procedures followed in the Remission Service of the Department of Justice in connection with the exercise of clemency and to recommend what changes, if any, should be made in those principles and procedures. (p. 1)

The mandate of the Standing Senate Committee on Legal and Constitutional Affairs (1974; chaired by The Honourable H. Carl Goldenberg) was initially to "examine and report upon all aspects of the parole system in Canada" and was expanded a year later to include "all manner of releases from correctional institutions prior to termination of sentence". (p. 1)

These commissions and committees made important contributions to law reform in their respective areas of inquiry but they were not directed to make recommendations concerning numerous components of the criminal justice system.

The Canadian Committee on Corrections (1969) (chaired by The Honourable Mr. Justice Roger Ouimet) is the most notable example of a committee of inquiry with an all-encompassing mandate. Its sweeping terms of reference included the field of corrections in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner's sentence. The work of the Ouimet Committee had a profound influence on the subsequent development of the criminal justice system. The Canadian Sentencing Commission, to a greater degree than required of the Ouimet Committee, was directed to articulate detailed proposals respecting issues within its mandate. For example, the Commission was expressly empowered to make recommendations for the modification of the current penalty structure through a re-assessment of the relative seriousness of offences. The Commission was also directed to recommend specific terms – or ranges of terms – for custodial sentences as well as to formulate a non-exhaustive list of aggravating and mitigating factors relevant to the determination of sentences. The Commission was thus required to venture beyond general policy development and into the determination of operational features of a sentencing system.

3.2 Commissions in Other Countries

The terms of reference of the Advisory Council on the Penal System (1978) in Great Britain and those of several American Sentencing Guidelines Commissions also focused on issues which were only components of the

Canadian Sentencing Commission's broad mandate. For example, the British Advisory Council was directed:

> to consider the general structure and level of maximum sentences of imprisonment available to the courts; to assess how far they represent a valid guide to sentencing practice; and whether further provision needs to be made regarding the suspension of periods of imprisonment and the combination of existing forms of non-custodial penalty and disability with sentences of imprisonment; and to make recommendations. (Advisory Council on the Penal System, 1978; 3).

The main focus of the Advisory Council's work was thus to review the compatibility of current principles governing maximum penalties for major offences with current values and to produce a more rational and relevant penalty structure. This review did not entail consideration of the effect of plea bargaining and post-sentencing release on time served nor the circumstances in which non-carceral or community sanctions should be imposed. (Hereinafter the term "community sanctions" will be employed to refer to all non-carceral sanctions. For a discussion of the reasoning behind this usage, see Chapters 5 and 12).

The Minnesota Sentencing Guidelines Commission,[5] which is one of the best-known American Sentencing Guidelines Commissions, was directed to establish sentencing guidelines which offered guidance both with respect to disposition (when to impose a custodial term in excess of one year) and duration. In the course of performing this task, the Commission was required to consider combinations of offence and offender characteristics. It was also obliged to take prior sentencing and release practices into account and to consider available correctional resources. The Commission was empowered, though not directed, to establish guidelines for community sanctions.

To summarize, the main task of the British Advisory Council was to reformulate the existing penalty structure. In contrast, the Minnesota Sentencing Guidelines Commission was primarily concerned with providing guidance for the application of sentencing laws which were already in place. The terms of reference of the Canadian Sentencing Commission required it to accomplish both tasks; that is, to formulate a new penalty structure and to give specific direction respecting the determination of sentences.

A number of consequences flowed from the fact that the Commission's mandate embraces both of these tasks. The most important implication was the need for a high degree of consistency between the proposed changes to the penalty structure and the sentencing guidelines. For example, the work of a sentencing commission directed both to review maximum penalties and develop guidelines should not produce discrepancies between the seriousness of an offence, as defined in the *Code*, and as ranked in the guidelines.[6]

4. Sources of Information and Commission Activities

The purpose of this part is to highlight the sources of information used by the Commission in its decision-making and the general nature of its activities.

A detailed account of the Commission's research and work procedures is contained in Appendix A.

In addition to its research program the Commission conducted its inquiries by five principal means, each of which will be discussed briefly.

4.1 Submissions

The Commission's mandate expressly authorized the reception of submissions and briefs from members of the public and participants and professionals working in the criminal justice system. The Commission received submissions ranging from letters of one page in length to comprehensive briefs. Submissions were received from members of the public, from national, provincial and local groups, professional associations, as well as from individual judges and Provincial Court Judges' Associations.

Some of the submissions responded to a list of questions formulated by the Commission and distributed in 1984 as part of its information package. Other briefs focussed discussion on a number of specific issues or on particular offences. Although addressing a large number of topics, the main issues discussed were: maximum penalties, the ranking of offences, minimum penalties, purposes and principles of sentencing, disparity in sentencing, sentencing guidelines, the use of community sanctions and early release issues.

The importance of the submissions was enhanced by the fact that due to resource constraints the Commission did not hold public hearings.

4.2 Meetings

The Commission met with all professional and community associations who had prepared written submissions and who had requested a meeting. The diverse perspectives of various organizations were very helpful. Over the course of its mandate, the Commission met with such groups as the Law Reform Commission of Canada, the Criminal Lawyers' Association of Ontario, the Elizabeth Fry Society of Canada, the John Howard Societies of Canada, Alberta and Ontario, the National Joint Committee of the Canadian Chiefs of Police and the Federal Correctional Services, the Church Council on Justice and Corrections and the National Association of Provincial Court Judges.

4.3 Public Information About the Commission

Prior to the development of its recommendations, the Commission responded to invitations of various groups who had expressed an interest in learning more about the Commission's mandate. The Commission was able to provide information about its mandate and activities to these various associations and to benefit from consultations with them.

4.4 Consultations

During the formulation of its sentencing proposals, the Commission conducted two types of consultations: it met with leading Canadian, American, English, and Australian sentencing experts to obtain information and advice about the most current sentencing issues in their respective jurisdictions; it also sought legal advice from Canadian experts about selected aspects of its sentencing package.

4.5 Surveys

In an effort to form as accurate a picture as possible about public understanding of and opinion about sentencing issues, the Commission conducted three different national public opinion surveys. In addition, the Commission also undertook surveys of various groups of criminal justice professionals in recognition of the importance of utilizing their views and expertise. This was to ensure that any changes which the Commission recommended were responsive to the concerns and needs of the general public and of those professionals who must continue to work within the system. These surveys canvassed such issues as parole, sentence severity, disparity in sentencing decisions, the purpose and principles of sentencing, plea bargaining, sentencing for multiple offences and community sanctions.

4.6 Research Program

The Commission's research program involved five main activities, each of which are briefly described below:

i) *Legal Research*

Legal research was undertaken on behalf of the Commission on a variety of topics relating to the Commission's mandate. For example, in the course of developing policy on guidelines, work was commissioned on the role of Appeal Courts in establishing guidelines on sentence ranges as well as on the operation of mitigating and aggravating factors in appellate sentencing decisions (*Young, 1985*).[7] Plea bargaining (*Verdun-Jones and Hatch, 1985*) and fines (*Verdun-Jones and Mitchell-Banks, 1986*) were two additional areas of legal research.

ii) *Position Papers*

Another activity within the Commission's research program related to position papers. These papers were written by leading experts in fields which had already been the subject of substantial research. Two such papers commissioned were on the effectiveness of deterrence as a goal of sentencing (*Cousineau, 1986*) and on the role of victims in the sentencing process (*Waller, 1986*).

iii) *Review of the Literature*

To avoid duplication of research which had already been done, the Commission conducted literature reviews in a number of areas pertinent to its terms of reference. For example, in order to ascertain the existence of real or perceived sentencing disparity in Canada, the Commission undertook a review of the literature on this topic (*Roberts, 1985*).

iv) *Empirical Research*

The Commission conducted two types of empirical research. One consisted of statistical analyses of sentencing practice (undertaken with the assistance of a number of government departments (see Hann and Kopelman, 1986). The other comprised opinion surveys of key participants in the sentencing process such as judges, Crown and defence counsel and other criminal justice professionals.

v) *Media Policy on Reporting Sentencing Decisions*

Based on earlier research which established a relationship between public views of sentencing and media treatment of sentencing decisions (Doob and Roberts, 1983), part of the Commission's research focused upon the news media. Analyses of media policy upon this topic were commissioned (*Rosenfeld, 1986; Tremblay, 1986*). These analyses complemented Commission research examining a nation-wide sample of newspaper stories relating to sentencing (Research #4).

4.7 Commission Activities

The main forum for the Commission's deliberations consisted of regular meetings of all Commissioners held at periodic intervals of three to six weeks. These meetings lasted from two to three days. The Commission's report embodies the recommendations and policy decisions which evolved during those discussions.

Of the nine Commissioners, eight were part-time. In addition to their other professional responsibilities, they were required to attend Commission meetings as well as review materials sent to them between meetings. Most of the working papers studied by Commissioners were prepared by the full-time research staff, consisting of the Director of Research, three research analysts, part-time researchers and administrative staff. They worked under the direction of the Chairman who was the only full-time Commissioner as well as the Commission's Executive Director[8].

In addition, the Commission contracted with a number of leading researchers and academics to conduct studies on a variety of sentencing issues.

5. Integrated Nature of the Terms of Reference

In summary, the Commission's terms of reference were quite broad; this was reflected in the comprehensive nature of its inquiries. However, the most salient feature of the Commission's mandate was not its breadth but the implication that the sentencing process should be viewed as an integrated whole where changes introduced at one point reverberate throughout the entire system. Hence, in fulfilling the terms of its mandate, the Canadian Sentencing Commission was confronted with a challenging task: the requirement to develop a comprehensive sentencing package for Canada. Recommendations in the diverse areas within the Commission's terms of reference do not merely constitute proposed changes to separate aspects of the criminal justice process. They also represent components of an integrated package which reflects a unified sentencing policy and attempts to realize, amongst others, the goals of equity, clarity and predictability.

The mandate of the Commission envisaged the re-classification of offences and the development of a new penalty structure. It further encompassed the development of methods to structure sentencing decisions to reduce unwarranted variation, and to make sentences more predictable and understandable. Both of these features were to operate within the context of a sentencing policy and of recommendations for the development of controls upon decisions which affected either the nature and quality of charges presented to the court or the time actually served in custody by inmates. The Commission interpreted its mandate as inviting changes which were extensive and far-reaching, and did so with the understanding that the value of its recommendations could only be appraised in the context of their interrelation and on the basis that they must be considered as components of an integrated package. This is not to say that the individual elements of that package are completely resistant to modification; however, it must be stressed that because the package represents a synthesis of various components, changes to one area automatically imply the requirement to modify other areas.

Various reform bodies, such as the Law Reform Commission of Canada and the Ouimet Committee, have from time to time formulated important proposals for change in selected aspects of sentencing. In formulating its recommendations, the Commission built upon these suggested reforms and integrated them into a comprehensive scheme. In doing so, it gave express recognition to the fact that the sentencing process cannot be expected to address all the deficiencies of the criminal justice system.

Given the breadth of its mandate and the relatively brief time in which to complete its research and studies, it was necessary for the Commission to address its terms of reference in varying degrees of detail. Hence, the Commission's proposals concerning the revised penalty structure were fairly exhaustive whereas the recommendations respecting sentence ranges presented models for only a select number of offences. These models, to be referred to as prototypes, provided a basis upon which future reform could be built. The

detailed aspects of guidelines for all criminal offences are properly the subject of future construction, when additional sentencing data become available and thorough impact analyses have been conducted. Furthermore, the substantive elements of most offences in the *Criminal Code* are now being reviewed by the Law Reform Commission of Canada as part of the complete revision of the *Code* which it is currently conducting. It would have been a waste of effort to develop sentence ranges for offences which might be repealed or re-formulated in the future.

Finally, since custody is currently the most severe form of punishment which can be imposed, the Commission endeavoured to be as explicit as possible in its recommendations on the use of incarceration.

Endnotes

1. *Pires (1986)* (p.8) cites the Committee of the House of Assembly (1831) for the following:

   Gaols managed as most of ours are, as Lord Brougham well remarks, seminaries at the public expense for the purpose of instructing His Majesty's subjects in vice and immorality, and for the propagation and increase of crime.

   And later (p.9) he quotes comparable comments made by the Brown Commission in 1849:

   The vast number of human beings annually committed to prison in every civilized country, and the reflection that there they may receive fresh lessons in vice or be led into the path of virtue...must ever render the management of penal Institutions a study of deep importance for the Statesman as well as the Philanthropist.

   See Chapter 2 of the report for a list of such quotations.

2. Bill C-19 received first reading on February 7, 1984.

3. Her Honour Gladys Young was appointed to the provincial court of New Brunswick on April 14, 1986. Prior to her appointment, Commissioner Young was a Crown prosecutor.

4. 33-34 Elizabeth II, S.C. 1985, c. 19.

5. Both the Pennsylvania Commission on Sentencing and the Washington Sentencing Guidelines Commission had similar mandates. The former was directed to develop presumptive sentencing guidelines which would address three issues:

   (a) Specify a range of sentences applicable to crimes of a given degree of gravity;

   (b) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or of a crime involving the use of a deadly weapon; and

   (c) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances. (Commonwealth of Pennsylvania Commission on Sentencing, 1982; 53)

   The Washington Sentencing Guidelines Commission was required to develop a system of presumptive sentencing guidelines for adult felons. The specific terms of its mandate were to:

   (a) Recommend to the legislature a series of standard sentence ranges for all felony offences and a system for increasing the severity of the sentence to reflect any prior criminal history, and;

   (b) Recommend to the legislature prosecuting standards to structure charging of offences and plea agreements. (Sentencing Guidelines Commission, 1983; 2)

6. It is important to note that the Minnesota Sentencing Guidelines Commission was directed to develop sentencing guidelines rather than to also re-order offences in the *Minnesota Criminal Code*. As a result, the Minnesota Commission was less concerned with discrepancies between the seriousness ranking of an offence as it appeared in the *Criminal Code* and as it was listed in the Guidelines, than it would have been had it been required to both re-order offences and to develop guidelines.

7. An italicised reference indicates research undertaken specifically for this Commission. All other works are presented in standard social science format. Internal research projects conducted by the Commission research staff are indicated thus: Research #6.

8. Mr. Justice William Robert Sinclair resigned as Chairman of the Commission on December 3, 1984 and was succeeded by the former Vice-Chairman, Judge J.R. Omer Archambault. Associate Chief Judge Edward Langdon joined the Commission on February 8, 1985 to fill the vacancy left by the appointment of Mr. Justice Claude Bisson as Vice-Chairman.

Chapter 2

Historical Overview

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Chapter 2

Historical Overview

The purpose of this chapter is to examine the past, hoping that it might yield clues to the most desirable route for the future. This is not a comprehensive study of the history of sentencing in Canada in the nature of scholarly research. The analysis focuses on the issues which have a practical significance for policy-making and only the most meaningful trends and events in penal history are reviewed.

History is to be examined from two perspectives in this chapter. First, as a train of events,[1] with emphasis put on the interaction between changes in the criminal law and the penalty structure and the transformations in the nature of punishment and of the custodial facilities. Second, as a chain of commentaries on these events,[2] which reflects how the officials responsible for the administration of the criminal justice process viewed the system. Characteristics specific to Canadian penal history allow distinctions to be drawn between the events and the comments upon them. As was stressed in an early report of the proceedings of the Canadian Bar Association, the history of the Canadian criminal law is an account of incremental changes:

> Since 1892, the Code has been amended year after year, here and there, something added to one section, something taken from another, with many entirely new sections and even new statutes of a criminal nature added. One is reminded of an ancient edifice to which additions have been made, planned by many architects and carried out with little regard to the appearance of the completed structure. The so-called revision of 1906 was a consolidation rather than a revision. We therefore recommend that representations be made to the Minister of Justice urging upon him the necessity of a complete revision...

This extract was approvingly quoted by the *Royal Commission to Investigate the Penal System of Canada* (Canada, 1938; 167). Close to half a century later, the complete revision of the *Criminal Code* has yet to be done. Over time, the piecemeal amendments were piled one upon the other, blurring the ultimate goal of comprehensive review and leaving the impression that no substantial changes have actually occurred. It is as if the initial picture had become a mosaic, without ever changing its colours. A review of the numerous reports which have been written on various aspects of the penal system provides overwhelming support for the impression that the history of punishment in

Canada — and particularly the history of incarceration — is simply a series of perfunctory changes.

The first part of this chapter covers the early history of the criminal law in Canada in detail. This emphasis on the earlier stages of the development of the criminal law is justified by the fact that the current penalty structure was actually implemented in the latter half of the nineteenth century. Since then, the essential features of the penalty structure have remained unchanged. The second part of the chapter illustrates this point using various official reports on the penal system. Over the last century these reports have repeatedly diagnosed the same operational defects and advocated similar remedies, which have never been implemented.

1. The Development of the Penalty Structure

Seventeen hundred and ninety one (1791), the year in which the *Constitutional Act* was proclaimed and in which a British imperial decree created Upper and Lower Canada has been selected as the starting point for this analysis. Events which occurred before 1791 are beyond the scope of this chapter. Though the *Quebec Act* of 1774 allowed for the use of French civil law in French Canada it reaffirmed that criminal affairs were to be settled according to English criminal law in all British North American colonies.

For the purposes of this chapter, Canadian penal history is divided into five periods. The most significant events of each period are briefly discussed. The conclusions that are drawn in the summary highlight important features of the process which led to the development of the present penalty structure.

1.1 From 1791 to 1846: The Wane of Capital Punishment and the Establishment of Kingston Penitentiary

Capital punishment was at the centre of the penalty structure in England at the end of the eighteenth century; more than 200 offences called for the death penalty. Given that Canada had adopted English Criminal law[3], capital punishment was also the primary sentence imposed in this country. The use of incarceration was then quite limited. In 1827 the total cell capacity of local jails in Upper Canada was under 300 beds.[4]

If incarceration was not frequently used, the same can be said about the death penalty. The severity of the punishment seemed so disproportionate to the seriousness of some of the offences which called for it, that the law was applied very irregularly. Juries often refused to convict and when they did, criminal justice officials resorted to an increasing array of legal techniques to mitigate the harshness of the law or to suspend its application altogether. The criminal law became a legal fiction, punishment being as uncertain as it was severe.

By the end of the eighteenth century, European penal reformers such as Beccaria had already stated the cardinal principle of deterrence: it is not the severity but rather the certainty of punishment which deters potential offenders. A penalty structure which relied on punishment so severe that it could not be applied systematically was in clear conflict with this principle. Furthermore, England was experiencing at that time a growing crime problem. It became imperative to transform the penalty structure and the British Parliament enacted several laws to reduce the number of capital offences.[5]

The transformation of the penalty structure initiated in England was continued in Canada. For instance, an Act was passed in Upper Canada, in 1833, to limit the use of capital punishment to very serious offences such as murder, treason, rape, robbery, burglary and arson.[6] Incarceration replaced capital punishment as the corner-stone of the penalty structure. This transition gave birth to the sentencing process as we now know it. Aside from physical punishment such as whipping, the pillory or the stocks, a penalty structure which centered on capital punishment left no room, after the conviction of an offender, for the exercise of judicial discretion. The sentence is wholly predetermined and cannot be quantified: death is either inflicted or not. In contrast, a sanction such as incarceration can range from one day to life imprisonment and the imposition of a custodial sentence must be further specified by the determination of its length. Indeed, there is a whole array of new issues, such as maximum and minimum penalties, the individualization of sentences, the notion of an indeterminate custodial sentence, which are not relevant to capital punishment but which must be addressed in a penalty structure based on incarceration.

The thorniest of these issues, perhaps, relates to the influence of public opinion on penal reform. If a penalty is disproportionate to the seriousness of the offence, it will not be applied. However, reformers often make the mistake of underestimating the amount of public support which exists for even the most unreasonably severe penalties. The public's faith in the deterrent effects of harsh punishment appears unshakable. D.A. Thomas, a British authority on sentencing, gives a detailed account in *The Penal Equation* (1978) of how the proponents of a penalty structure based on imprisonment had to set the terms of incarceration disproportionately high in order to make them acceptable substitutes, in the mind of the public, for capital punishment. This flawed reform took place in England within a period of ten years, from 1824 to 1834.

The movement away from capital punishment towards incarceration was deliberate. It is doubtful, however, that legislators and penal administrators were conscious of the problems which needed to be solved in order to articulate a new penalty structure that was both principled and consistent. This lack of awareness is nowhere more obvious than in the wandering process which led to the codification of maximum custodial penalties in Canada.

1.1.1 Banishment and Transportation

Incarceration eventually replaced capital punishment as the basic criminal sanction, but it was not the initial substitute for the death penalty. Transporta-

tion was first widely-used in England as either a condition for commuting a death sentence or as a penalty imposed in its own right by the sentencing judge. Convicted offenders were transported to, rather than from, British colonies. As a criminal sanction in those colonies, transportation required some transformation.

The Canadian equivalent of transportation was banishment and a provision in the 1800 Statutes of Upper Canada stated that[7]:

> Whereas so much of the said criminal law of England as relates to the transportation of certain offenders to places beyond the seas, is either inapplicable to this Province or cannot be carried into execution without great and manifest inconvenience, (the Court), instead of the sentence of transportation, shall order and adjudge that such person be banished from this Province, for and during the same number of years, or term for which he or she would be liable by law to be transported.

Banishment and transportation (the word continued to be used in legal statutes) were not widely-used sanctions in Upper and Lower Canada. According to the records of the Upper Canada Assize Courts, no more than five persons were either banished or transported between 1792 and 1802.[8] The importance of banishment and transportation in Canadian penal history does not lie in the frequency of their use but in the fact that these sanctions provided the initial determination of the length of *custodial* sentences. In this regard, their significance cannot be overstated, for they had the effect of increasing drastically the level of maximum penalties of imprisonment.

According to D.A. Thomas, an English Act of 1717 provided the legal basis for transportation and served as a model for many later transportation statutes.[9] This statute established the preference for the seven times table and set the duration of transportation at seven and 14 years. These numbers have to be understood in the context of eighteenth century sailing ships, when the trip to the place of transportation could take as much as a year in itself.

Sentences of banishment imposed in Canada were of the same length as sentences of transportation in England. This does not seem unreasonable, since banishment and transportation are merely different forms of exile. What is surprising is that the scale of penalties for transportation was also applied without modification to sentences of imprisonment. In 1835 the establishment of Kingston Penitentiary entrenched the practice of incarceration in the sentencing process. In 1842 *An Act for Better Proportioning the Punishment to the Offence* stated that an offender could receive a penitentiary term equal to "any term for which he might have been transported beyond Seas."[10] This was even more severe than a similar measure passed in England ten years later: the English *Penal Servitude Act* of 1853 translated a sentence of seven years of transportation into a shorter sentence of four years of incarceration.[11] The equivalence drawn in Canada finally prevailed and the second English *Penal Servitude Act* stated that terms of imprisonment should be identical with the initial term for transportation.[12]

It should be noted that transportation did not always deprive offenders of their freedom. Once they had reached their faraway destination many became free settlers.[13] It seems trite to point out that imprisonment, which by definition involves a complete deprivation of freedom for its duration, provides a stark contrast to transportation, which did not imply a comparable deprivation of freedom. However, it is important to bear this in mind in analysing the significant increase of punishment involved in translating sentence lengths from transportation to imprisonment. In spite of the many differences in severity between the two, the number of years set for transportation eventually was transferred directly, and cast in prison stone.

1.1.2 The Establishment of Kingston Penitentiary

Upon a recommendation made in 1831 by a Select Committee of the House of Assembly of Upper Canada, Kingston Penitentiary was opened in 1835. It was the first penitentiary in Canada and its establishment has exerted a strong influence on many aspects of Canadian penology.

The penitentiary was intended to remedy the problem prevailing in the local prisons of the Province of Upper Canada. According to the 1831 report of the Select Committee, "...Imprisonment in the common gaols of the province is inexpedient and pernicious in the extreme...".[14] The Committee suggested the following solution[15]:

> A Penitentiary, as its name imports, should be a place to lead a man to repent of his sins and amend his life, and if it has that effect, so much the better, as the cause of religion gains by it, but it is quite enough for the purposes of the public if the punishment is so terrible that the dread of a repetition of it deter him from crime, or his description of it, others. It should therefore be a place which by every means not cruel and not affecting the health of the offender shall be rendered so irksome and so terrible that during his after life he may dread nothing so much as a repetition of the punishment, and, if possible, that he should prefer death to such a contingency. This can all be done by hard labour and privations and not only without expense to the province, but possibly bringing it as revenue.

Hard labour and privations notwithstanding, it is not altogether clear how Kingston Penitentiary was to instigate such dread that a former inmate "should prefer death" to "a repetition of the punishment", *without* resorting to "means not cruel". By recommending to cure prison's illnesses by establishing a penitentiary in which the conditions would amount to a living death, the Select Committee appears to have chosen to fight a disease by spreading it. Later parts of this chapter fully document that the establishment of Kingston Penitentiary was followed by a string of inquiries into prison conditions. Criticism of incarceration became more intense with each investigating body.

From 1833, the year in which the use of capital punishment started to diminish, to 1841, the penalty structure fluctuated so much that it is difficult to get a clear picture of it. Several Acts were passed in both Upper and Lower Canada which provided, for different categories of offences, terms of

incarceration ranging from two years in jail to life imprisonment.[16] The death penalty was still the punishment for the most serious offences. There does not seem to be any consistent rationale in the determination of penalties.

However, in 1841, in the wake of the unification of the Provinces of Upper and Lower Canada, Kingston Penitentiary became the penitentiary for the United Provinces. This event had important consequences for the administration of correctional institutions and resulted in significant modifications to the penalty structure. For the first time in Canadian penal history, a statute — enacted in 1841 — provided that provincial jails would be used for those serving prison terms up to a maximum of two years.[17] Kingston Penitentiary was to be reserved for offenders serving a *minimum* of seven years in custody. Corresponding changes were introduced into the penalty structure. In imposing a sentence, the judge's choices were narrowed to a few basic alternatives: a maximum term of two years in a provincial prison or a minimum sentence of seven years in the penitentiary for all recidivists and for offences for which no specific penalty was provided by the law.[18] Several major Acts relating to Malicious Injuries to Property, Offences Against the Person and Larceny and other offences were passed in 1841 and they followed the pattern just described.[19]

These provisions were amended in 1842 and the judge was no longer compelled to impose a maximum term of two years in a provincial facility or a minimum of seven years in the penitentiary.[20] The minimum term in the penitentiary was now reduced to three years. This amendment to the criminal law did not obliterate the fact that it was originally the nature of available custodial facilities which dictated the penalty structure, and not the other way around.

1.2 From 1847 to 1867: Centralization and Decentralization

This period, which ends with Confederation and the proclamation of the *British North America Act* (now referred to as the *Constitution Act*, 1867)[21], witnessed two important developments which were both embodied in this Act. The first of these was the granting of the power to legislate in the field of criminal law to the federal government. The second was the attempt to give the provinces jurisdiction over the administration of corrections. Neither of these developments was wholly successful.

1.2.1 The Power to Make Criminal Law

It was decided that the power to enact criminal law rests exclusively with the federal government. Two quotations from a speech made in 1865 to Parliament by Sir John A. Macdonald (then Attorney-General) provide the general context in which this decision was taken:[22]

> The criminal law too — the determination of what is a crime and what is not and how crime shall be punished — is left to the General Government. This is

> a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces — that what is a crime in one part of British America, should be a crime in every part — that there should be the same protection of life and property in one as in another.

Sir John A. Macdonald stressed the need for having one criminal law throughout the land by contrasting his proposal with the weakness of the system adopted in the United States:[23]

> It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own, — that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

However, if we define "crime" as behaviour which is harmful enough to be *punishable by law*, it follows that the federal authority over the enactment of criminal statutes is not really exclusive. Indeed Section 92(15) of the *B.N.A. Act* granted the provinces the power to impose "*punishment by fine penalty or imprisonment for enforcing any law of the province...*". Such was the source of the relatively artificial distinction between federal criminal law and provincial penal statutes (not to mention municipal by-laws carrying a penalty). Such also was the inception of the practice of using incarceration for reasons other than the commission of a crime. This practice is now appearing as a major problem.[24]

1.2.2 The Authority to Administer Correctional Institutions

It is obvious that when Canadians established Kingston Penitentiary, they were not nearly as critical of the experience of their neighbours to the south as they had been in dividing jurisdictional authority between the central and provincial governments. In the United States, there existed at that time two competing models for correctional institutions: the Auburn Congregate system implemented in New York penitentiaries and the Philadelphia Separate system, which was in force in the Cherry Hill penitentiary in Pennsylvania. Both systems required the inmates to be silent. Under the Congregate system, inmates worked together during daytime and were isolated in their cells during the night; the Separate system implied continuous solitary confinement.

Kingston Penitentiary was initially modelled on the Auburn penitentiary system. However, in 1848, 13 years after it opened, Kingston Penitentiary was the object of a Royal Inquiry. The Brown Commission was appointed to investigate a situation which was the same as that which prevailed in provincial jails before the establishment of the Penitentiary. Like the local prisons it was

supposed to replace, Kingston Penitentiary had become a breeding ground for hardened criminals.[25]

The Brown Commission of 1848 initiated a penal trend which could be called the hybridization of corrections. The Brown Commission recommended that a blend of two competing models, the congregate and separate sytems of incarceration take place within Kingston Penitentiary. The Commission neglected to examine whether it was feasible to supplement the existing system with components borrowed from a rival structure (50 cells were to be added to Kingston Penitentiary for purposes of solitary confinement, as conceived in the Separate system). The tendency to patch up flaws by piling upon them a miscellany of conflicting remedies was to grow within the penal system, in the face of increasing difficulties.

The 1867 Constitution entrenched (in the highest law of the country) the hybrid character of Canadian corrections. In accordance with the general spirit of the Confederation, the *Quebec Resolutions* of 1864 had devolved to the provinces the administrative authority for "the establishment, maintenance and management of *penitentiaries*, and of public and reformatory prisons" (our emphasis).[26] Although this resolution had been approved by the 1866 London Conference, the authority over the administration of correctional institutions for no apparent reason was ultimately divided between the federal government and the provinces.[27] The two year threshold for dividing provincial and federal custody is not specified in the Constitution and several proposals have been made to change it. In 1887, an Interprovincial Conference recommended that a six month threshold be substituted for the two year threshold.[28] The Archambault and Fauteux Commissions also recommended modifications[29]; so did the Ouimet Committee and the Law Reform Commission of Canada[30].

In the end, both the criminal legislative power and the administrative authority over correctional institutions remained divided between the central and the local governments, in spite of the will to allocate the former to the federal government and the latter to the provinces.

1.3 From 1868 to 1891: Consolidation

Sir John A. Macdonald believed that the advantage of vesting the authority to make criminal law in the central government was not only that the entire country would be ruled by the same criminal law but also that this law could be based on the criminal law of England. Lord Carnavon, the British Colonial Secretary, praised this arrangement in the House of Lords and expressed his hope that "before very long the criminal law of the four Provinces may be assimilated — and assimilated... on the basis of English procedure."[31] This assimilation actually did happen with the *Consolidation Acts* of 1869, which was based on English criminal law. Before discussing the acts it is necessary to review briefly the English Consolidation of 1861.

1.3.1 The English Consolidation of 1861

At the beginning of the nineteenth century, the English criminal law was a disorganized collection of statutes. The English Criminal Law Commissioners were appointed by Lord Brougham in 1833 to introduce order and consistency into the legal confusion. Indeed, as it was acknowledged by the Commissioners in their Second Report, "it is the very essence of a law that its penalties should be definite and known; how else are they to operate on the fears of offenders, or to afford a practical guide of conduct?"[32] The work of the English Criminal Commissioners has been described by Sir Rupert Cross as the "largest and most abortive codification enterprise" undertaken in England.[33] Two bodies of Commissioners were successively appointed. They laboured for more than 20 years and produced at least 11 reports, none of which resulted in legislation.[34]

The Commissioners' reports did not have any immediate effects, but they were used for drafting the English Consolidation of 1861. An English Home Office Report of 1979 stressed the ambiguity of the influence of the Criminal Law Commissioners on the 1861 legislation:[35]

> While the consolidation owed much to the work of the Criminal Commissioners, the Acts do not in any way reflect the views of the Commissioners, either on the penalty structure or on the scope of judicial discretion in sentencing.

The authors of this report took a very critical view of the Consolidation of 1861, stating that "despite the many and vigorous criticisms by the Criminal Law Commissioners of the *disorderly nature of the penalty structure of the early 19th century, no significant rationalization was achieved.* Improvements were limited to minor amendments..." (p. 23, emphasis added). Charles Greaves, the draftsman of the English consolidation, recognized the same shortcomings and acknowledged these in the preface to his book on the new Consolidation Acts, where he wrote:[36]

> I have long wished that all punishments for offences should be considered and placed on a satisfactory footing with reference to each other, and I had at one time hoped that might have been done in these Acts. It was however impracticable...The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establish any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences.

In view of these critical assessments, it seems clear that the British legal reformers only succeeded in consolidating past deficiencies in the penalty structure.

1.3.2 The Canadian Consolidation of 1869

The Canadian penalty structure before Confederation needed to be reordered at least as much as the English criminal statutes of the early nineteenth century. It was inconsistent, harsh and allowed for the exercise of much judicial discretion. In a study undertaken for the Canadian Sentencing

Commission, Professor Friedland provides many illustrations of this. For example: having carnal knowledge of a girl under 10 years of age was punishable by death; however, if the girl were over 10, then the punishment was entirely at the discretion of the court.[37]

It is unfortunate that the Canadian legal reformers who undertook the consolidation of the criminal law were not as critical of the English consolidation as was Greaves. What was deemed a failed attempt at rationalization in England was believed to be nothing less than science in the Dominion of Canada. When he presented the Canadian Consolidation Acts in the House in 1869, Prime Minister Macdonald had these words to say about the English criminal law:[38]

> At present, the English system of criminal law, as a matter of science, was...as complete as it could be. The principle of the (Canadian) Bills...was identical with that of the English law, a little altered in order to suit a new country and new institutions.

In fact, the Canadian Consolidation Acts of 1869 were to a very significant extent exact copies of the English Consolidation Acts of 1861[39] and, consequently, they embodied all their defects. This assimilation of English criminal law was quite deliberate and was seen by the Prime Minister as an immeasureable advance, as he stated before the House:[40]

> ...the language was as nearly as possible the language of the criminal laws of England...because it was of the greatest importance — ... — that the body of the Criminal Law should be such that the Judges in the Superior Courts should have an opportunity of adjudicating upon it, as on English law. It would be an incalculable advantage that every decision of the Imperial Courts at Westminster should be law in the Dominion. On every principle of convenience and conformity of decision with that of England, he thought it well to retain the English phraseology.

The importance of the Consolidation Acts of 1869 can scarcely be exaggerated. They provided the main articulations of the penalty structure, including: arbitrariness of design; heavy penalities; wide judicial discretion; few minimum sentences and prison terms based on the number seven. The Stephen *Code* of 1892 did not alter these basic features, which were the result of a failed criminal reform in the English homeland.

The 1869 consolidation did not follow every provision of the English criminal law. In fact, the minimum penitentiary term was reduced from three to two years, thus bridging the one year gap between prison and penitentiary, which had been introduced in 1842, in conformity with English law. The maximum prison term at that time was two years, while the minimum penitentiary term was three years, and, therefore, sentences could not range between 24 and 36 months of jail, because there was no institution where such a term could be legally served.

1.3.3 The Introduction of Remission

One of the explanations given for the sudden transfer of penitentiaries to federal jurisdiction, contrary to the original intent of the framers of the Constitution, was that it would promote uniformity of discipline. Lord Carnavon, the British Colonial Secretary, had been the chairman of a Select Commission of the House of Lords on the state of discipline in Gaols and Houses of Correction. This committee had recommended that prison discipline be even more severe than it already was and that the Philadelphia system of complete isolation be rigorously enforced. Lord Carnavon may have insisted that the federal government have authority over penitentiaries in order to ensure that Canadian institutions enjoyed the same conditions that prevailed in English jails.

Despite the trend towards repression and special deterrence which was to affect all British colonies,[41] remission of sentences for good behaviour was introduced in Canada by the *Penitentiary Act of 1868* (section 62). Though the Act stated that remission was not to exceed five days for every month — approximately one sixth of a custodial sentence — the use of rewards instead of punishment to ensure prison discipline was a marked departure from orthodox correctional practices in Canada. The 1848 Brown Commission had explicitly advocated in its second report that prison discipline be reinforced by punishing rule-breakers rather than by rewarding the inmates who obeyed regulations.[42]

> This (granting rewards for obedience) would open a wide door to favouritism ... If he (an inmate) breaks the Prison rules, he should also have the quantum of punishment to which he becomes subject.

Like almost everything else so far, the concept of remission was borrowed from a foreign system. This time, it was the Irish Crofton system of remission, named after an earlier head of the Irish Prison system, which was to make its contribution to the growing hybridization of Canadian corrections. The draftsman of the *Penitentiary Act* of 1868 explicitly acknowledges his debt to the Irish Prison system in a letter to the Director of Irish Convict Prisons:[43]

> In my capacity as Chairman of the Board of Inspectors of Asylums and Prisons of Canada, I have been requested to prepare a rough draft of the proposed measure (remission), and in doing so I am anxious to introduce into the Dominion the principles found to work so well in the Irish Convict Prisons, so far as they may be applicable to the circumstances of this country.

The Canadian penal system was now stratified with at least four layers of diverging penal philosophies: the Auburn Congregate system, the Philadelphia Separate system, English disciplinarian movement and Irish principles of reward.

1.4 1892: The Canadian *Criminal Code*

Some historians of the Canadian criminal law date the birth of the criminal law back to 1892, when the *Criminal Code* was enacted. But it could

be argued that the *Code* merely gave form rather than substance to the pre-existing criminal law. It's a well-established fact that James Fitzjames Stephen's *Draft Code* of 1879 provided a pattern for the *Code* of 1892. Stephen's draft was transformed, with slight modifications, into the British *Commissioners' Draft Code* of 1879, which in turn provided the base for the English *Draft Code* of 1881. Although this last code was never enacted in England, its influence on the drafting of the Canadian *Criminal Code* was extensive.

It must, however, be stressed that all three above-mentioned British codifications derive from a common source: the English Consolidation of 1861. Since the Canadian *Consolidation Acts* of 1869 were themselves a carbon copy of the 1861 English criminal legislation, it follows that the penalty structure derived from Stephen's *Draft Code* was already embodied in the Canadian criminal law. The penalty scale of six months, two, five, seven, ten and fourteen years of incarceration, of life imprisonment and of capital punishment, which allegedly passed from Stephen's draft into the Canadian *Criminal Code*, had already, in fact, been in use since the *Consolidation Acts* of 1869.

In addition to the introduction of a more systematic penalty structure — which was the basic aim of codification — the only true innovation of the 1892 *Code* was the replacement of the normative difference between felonies and misdemeanours by a procedural distinction between indictable and non-indictable offences. Some offences offered the prosecutor a choice between proceeding by way of indictment or by way of summary conviction; these are referred to as "hybrid" offences. There were also relics from former times in the 1892 *Code*. For instance, a provision that was first enacted in 1841 which stated that a seven year penalty applied to all offences for which no particular penalty had been provided, was incorporated into the *Code*.

Though the *Criminal Code* of 1892 was more of a last step in the process which began in 1869 than a fresh start, certain features of this legislation require further discussion.

1.4.1 The Rationale Underlying the Code

In assigning onerous penalties to a large number of offences, the *Code* of 1892 embodied a rationale of retribution and deterrence. James Fitzjames Stephen, who provided the initial draft for the *Code*, had been consistent in advocating vengeance as the cornerstone of criminal justice. As early as 1874, he had written that "vengeance affects and ought to affect the amount of punishment".[44] He was to revisit the issue in his monumental *History of the Criminal Law of England* (1883), where he wrote:[45]

> The criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite.

Stephen then developed the argument that the criminal law actually regulates the passion of revenge, thus providing legitimacy for its exercise.

This emphasis on revenge and retribution was not foreign to Canadian penal tradition; it was in fact particularly consistent with the principles which were applied in Kingston Penitentiary. Principles of reformation through penance were, in theory, also applied in Kingston Penitentiary. However, the principles of retribution and deterrence were originally given priority, as can be inferred from later criticism of the penitentiary.

1.4.2 The Logic of the *Code*

In the course of the parliamentary debates which surrounded the passing of the *Code*, Sir John Thompson, the Canadian Minister of Justice, declared in the House of Commons:[46]

> We have to provide maximum punishment for the gravest kind of ... offence, leaving it to the discretion of the court to mitigate the punishment according to circumstances.

The above-quoted argument has been stated so often that little attention is paid to either its meaning or its implications. It must be noticed that Sir John Thompson gives an interpretation of the nature of the law which is open to question. According to its rightful meaning, the law provides the norm or the standard which is to be applied in most instances. By contrast, special circumstances, such as mitigating or aggravating factors, are associated with deviations from the norm or standard. The argument put forth by Sir John Thompson, however, turns this logic around. It claims that the legal standard should be set in order to accommodate the exceptions — the gravest kinds of offences — and that mitigating circumstances should generally be applied in the normal cases. When it is embodied in legislation, this line of thought generates a wide discrepancy between the very high maximum penalties, which are almost never imposed, and *current* practice which appears to deviate systematically from the legal standard, as it is actually formulated.

This view of sentencing is neither obvious nor compelling. One can easily think of alternatives, such as setting the legal standard closer to the average case and providing ways of going beyond that standard in cases of exceptional gravity.

1.4.3 Individual Offences

The penalty structure consolidated by the *Code* of 1892 was amended slightly in the course of parliamentary debate. Hansard supplies the following account of an exchange between a member of Parliament and the Minister of Justice, which took place on May 25, 1892. The object of the discussion was the penalty for having had sexual relations with a mentally-retarded person:[47]

> Mr. Flint: I do not think the punishment in this case is severe enough.
>
> Sir John Thompson: Make it four years, then.

Appearances notwithstanding, what this exchange and its conclusion illustrates is *not* the arbitrariness of parliamentary decisions regarding criminal

penalties, but rather, it is a strong reminder of the important point made by Charles Greaves, the draftsman of the very influential English Consolidation Acts of 1861. Charles Greaves rightly argued that the punishment for a particular offence cannot be determined by examining the offence independently of the whole structure of penalties for other offences. There is no natural connection between an offence and a particular number of years in jail. Hence, when a sentence is taken out of a penalty structure, there is nothing to impede doubling or halving it. Determining a particular punishment should always be an exercise involving comparison of the seriousness of the offence to other offences.

1.4.4 The Right to Appeal

The right to appeal a conviction[48] was introduced by the *Code* of 1892. However, the right to appeal *sentences* was limited at first to cases where the sentence was one "which could not by law be passed."[49] Only in 1921 were Courts of Appeal given the power to review the fitness as opposed to just the legality of the sentence imposed.[50] Penal history suggests that Parliament has been reluctant to grant the Courts of Appeal sweeping powers with regard to the sentencing process.

1.5 From 1893 to Present Day: Sentencing Practice and Sentencing Theory

This report does not attempt to present as detailed an account of the events that followed the enactment of the *Criminal Code*, as the chronicle of the events preceding the year 1892. The purpose of this historical development was to discuss the events which led to the establishment of the present penalty structure. Although the history of the Canadian criminal law did not end in 1892, no legislative enactments in this area since that time were designed to alter its basic structure, with perhaps two notable exceptions. First, the creation of full parole in 1958 and the ensuing measures taken in the field of early release from custody such as release on mandatory supervision. Second, the abolition of capital punishment in 1976.

The reader should be reminded here that while the Commission has decided to address all issues connected with incarceration, it did not deal with the death penalty itself as it was not considered to be included in its mandate. In this context, it can be said that the replacement of capital punishment by a mandatory sentence of life imprisonment (without eligibility for parole until 25 years of the sentence has been served) illustrates the tendency to compensate for the abolition of the death penalty by increasing the severity of the substitute sanction, apparently without a full assessment of the consequences of this increase.

It should not be inferred from these preliminary remarks that no more can be said about the evolution of criminal law from 1892 to 1986. In fact a number of significant points will now be discussed.

1.5.1 The Growing Complexity of the Criminal Law

To a large extent, two basic factors account for the great increase in the complexity of the criminal law. The first of these is the fluctuation over time of the maximum penalties. Dandurand (1982) has painstakingly recorded the amendments made to the maximum penalties in the *Criminal Code* from 1892 to 1955. Not only are these amendments extremely numerous, but they do not appear to have been made with a view to preserving what little consistency the penalty structure initially had in 1892. The changes reflect society's changing moods concerning the seriousness of an offence over time and they were greatly influenced by external historical factors. For instance, in the 1892 *Code* the offence of sedition was punishable by a maximum of two years in jail. In 1919, two years after the Russian revolution and the spread of Communism in Europe, Parliament raised the maximum to 20 years of incarceration. It was reduced to two years again in 1930 but raised to seven years in 1951, during the Cold War. The maximum for sedition was increased once more to 14 years in the 1953-54 revision of the Code where it has remained ever since.[51] Changes in penalties for existing offences were not the only amendments made to the *Criminal Code*. New offences have been added to the *Code*, such as the offences relating to the protection of privacy (Part IV.1 of the *Code*). New related acts such as the *Narcotic Control Act* and the *Food and Drugs Act* have expanded Canadian criminal law, while offences which are now considered obsolete (such as duelling (s.72), witchcraft (s.323), or seduction of female passengers on vessels (s.154)) have not been deleted. Thus, the proliferation of amendments to the *Criminal Code* without the deletion of outdated or redundant offences undermines the credibility of the criminal law and contributes significantly to its complexity.

The second factor which accounts for the increasing complexity of the criminal law was the introduction of new dispositions and new sanctions. Although the Report will discuss this issue in greater detail in the chapter on community sanctions, it should be mentioned at this stage that the practice of probation originated in 1921, that the suspended sentence was in use in 1927 and that the absolute discharge, the conditional discharge and the intermittent sentence were introduced in 1972. These are approximate dates and only refer to the introduction of a practice which was the object of further legal developments in later years. While the notion of probation had appeared in 1889, this measure only evolved after 1921 and took its present form in 1961.

However wide-ranging, like the introduction of probation, or relatively narrow, like the fluctuation of the maximum penalty for sedition, these changes were not intended to refurbish the penalty structure. The overall effect of these developments has been to transform the *Code* into a maze of provisions in which legal experts are found wandering and the Canadian citizen is completely lost. The complexity of the criminal law has also created a gap between the letter of the law and its current application. When a system becomes too complicated and burdensome, it generates a parallel informal process, where cases are resolved more expeditiously and with less accountabil-

ity. Plea bargaining is a good example of an informal process that has evolved to circumvent some complex and time-consuming procedures.

1.5.2 The Ideal and the Practice of Rehabilitation

The end of the nineteenth century witnessed a major shift in penology. The stern ideology of retribution and deterrence, which had been predominant among officials of the criminal justice system was gradually displaced by the idea that prison ought to be used to rehabilitate offenders. Rehabilitation was to become the major trend in penology until the 1970's. It was advocated in England by the Gladstone Committee as early as 1895. In the U.S., the state of New York incorporated the goal of rehabilitation into its penal legislation in 1876. When California enacted the most comprehensive legislation on the rehabilitation of offenders in 1917, 41 states had already followed the example set by New York.

The attitudes of criminal justice officials towards rehabilitation were more ambivalent in Canada than elsewhere. Actually, the only important Canadian report that included a clear position in favour of rehabilitation was the 1969 *Report of the Canadian Committee on Corrections* (the Ouimet Report, p. 18):

> The Committee sees the overall end of the criminal process as the protection of society and believes that this is best achieved by an attempt to rehabilitate offenders...

Ironically, at that time close to a century of experimentation with rehabilitation programs in other countries had produced disappointing results.

In order to understand the fate of rehabilitation in Canada, it is necessary to understand the implication of the concept of rehabilitation at its inception. Rehabilitation sprang out of nineteenth-century positivist philosophy which, according to the medical analogy, viewed delinquency as a disease requiring treatment. The cure was to be administered *inside prison.* This last point is of paramount importance; those who advocate rehabilitation in the 1980's claim that the best, if not the only way to achieve this aim is through *non-custodial programs.*

The original proponents of rehabilitation viewed a penitentiary as a sort of maximum security hospital. Normally, when a patient is admitted to a hospital, he should not be released until he is cured. However, it is very difficult to predict when the patient is going to be restored to health. Hence the length of a stay in a clinic or a hospital is indeterminate and depends on the progress of the particular individual. Similarly, prison rehabilitation required indeterminate sentences. The offender was to be released only after being cured of his criminal pathology and there was no way for the sentencing judge to know exactly when this would happen. Hence, judges were compelled to impose indeterminate sentences. In fact, all 43 American states which embraced rehabilitation also adopted indeterminate sentencing practices. In Canada, the ideal of rehabilitation was embraced, but what was believed to be the necessary means to achieve it — indeterminate sentencing — was largely rejected.

At the end of the 1930's, there was a strong reaction against the ideology of retribution and deterrence. Hence, the 1938 *Report of the Royal Commission to Investigate the Penal System of Canada* (the Archambault Report) stated unambiguously (p. 9):

> [I]t is admitted by all the foremost students of penology that the revengeful or retributive character of punishment should be completely *eliminated*, and that the deterrent effect of punishment alone ... is practically valueless...

Likewise, the 1956 *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Fauteux Report) asserted, (p. 11):

> While, therefore, we speak of "punishing" the offender, it is clear that in a modern correctional system there is no place for punishment which is based on nothing more than retribution.

Because of its humanitarian overtones, the notion of rehabilitation appealed to penologists who were critical of the repressive use of incarceration and it conveniently served to fill the vacuum left by the repudiation of retribution.

However, the ambiguity of feelings towards rehabilitation can be perceived even in the Archambault Report, which uses the word "reformation" more readily than the expression " rehabilitation".[52] Actually, it was realized in Canada as early as 1915 that it was unjustifiable to incarcerate someone solely for purposes of rehabilitation. In a speech delivered to the House of Commons in that year, the Minister of Justice, C.J. Dougherty declared:[53]

> When it is suggested that a penitentiary should cease to be a place where people are punished, that the conditions in it shall be made such as it shall cease to be a punitive institution, then I think the time will have arrived when the state would have no right to maintain such an institution. We have no right, in my judgment, to imprison a man exclusively for the sake of reforming him; our right rests on the necessity of punishing him to protect society, and when the necessity for punishment will have disappeared, the right to imprison will have disappeared also.

Since there were such strong objections to the use of incarceration for the sole purpose of rehabilitating an offender, it should come as no surprise that the most specific embodiment of the rehabilitative use of custody — the indeterminate sentence — was not accepted in Canada.

Limited indeterminate sentences have been imposed since 1913 in Ontario and since 1948 in British Columbia.[54] In those two provinces, a sentencing judge could add a two years less a day indeterminate sentence to a two year less a day definite sentence, thus opening up the possibility that an offender might spend four years (less two days) in a provincial jail. The Ouimet Report recommended the abolition of all two year indeterminate sentences in Ontario and British Columbia. Its recommendation was finally implemented and made law in 1977.[55]

Indeterminate sentences are still used in Canada in a very limited way. In 1947, Parliament passed the *Criminal Code Amendment Act*, which permitted the incarceration of habitual criminals for an indeterminate period of time.[56] At that time, an habitual criminal was defined as one who "has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading a persistently criminal life".[57] When it criticized the habitual criminal legislation, the Ouimet Report noted that it was "enacted in Canada at a time when its defects were already being recognized in England".[58] Following a recommendation of the Ouimet Report, the habitual offender legislation was abolished in 1977 and replaced by "dangerous offender" legislation, which is still in force.

In view of later criticism of indeterminate sentences, and of their failure to fulfill their rehabilitative goals, it is fortunate that Canadian sentencing did not fully embrace this practice. However, there was one unfortunate consequence. The criminal justice system adopted rehabilitation as the underlying sentencing rationale and spurned its practical implications for a sentencing policy. By so doing, the system thereby entrenched the age-old discrepancy between theory and practice.

1.6 Summary

The results of the preceding analyses will be summarized by describing the main features which have emerged from the historical development of the penalty structure in Canada.

1.6.1 Contingency

When the criminal law is examined over a relatively short time-frame such as a decade, it would appear that penal practice is both the product of deliberate criminal justice policy and is governed by the criminal law. This misperception is fostered by the fact that practice does seem, over a short period of time, to be determined by legal necessity and by reason. However, this perspective changes if the operation of the criminal law is examined over periods of time of sufficient length to expose the nature of legal change. Over these lengthy periods of time, it is practice which appears to override the criminal law. For example, the current penalty structure in Canada was greatly influenced by the establishment of Kingston Penitentiary and by the use of banishment and transportation. Reference to the two year mark to delineate sentences served in provincial prisons, as opposed to federal penitentiaries, was influenced by so many considerations that it cannot be said to reflect one particular rationale.

The upshot of these remarks is that the assertion that a particular feature of the criminal law is the outcome of historical tradition cannot be said to be an argument for its preservation, its amendment or its abolition. The historical

development which produced a specific element of the criminal law must itself be the object of independent assessment.

1.6.2 Transplantation

There is one particular tendency which can and should be avoided. It is the incorporation into Canadian legislation of that which is known to be inadequate in the country of origin (i.e. where there does not seem to be any reason to transplant legal measures, except that they happen to be available). For instance, though the draftsman of the English Consolidation of 1861 knew that it violated important principles of justice, (and he said so), it was branded state-of-the-art criminal legislation here and was copied with only minor adaptations in the Canadian Consolidation of 1869. Again, as the Ouimet Report noted, Canada passed habitual criminal legislation when this measure was under severe criticism in England. In turn, the Ouimet Committee chose to advocate rehabilitation when the results of rehabilitation programs were being questioned by an increasing number of people.

1.6.3 Stratification

Stratification refers to the gradual accumulation of sentencing principles and goals without any thorough assessment of whether they are consistent with each other. They are laid one upon another with no attempt at integration. In this manner, a layer of retribution becomes the foundation for a level of rehabilitation and these are finally transformed into loose rationalizations which are amenable to the justification of widely diverging sentencing practices. In a similar way, the Congregate system of incarceration originally implemented at Kingston Penitentiary was supplemented with elements from rival systems based upon completely different principles. The predictable outcome of stratification is the disparate character of sentencing and penal practice.

1.6.4 Recurrence

It is a striking fact that a Canadian Minister of Justice declared before the House of Commons in 1915 that imprisonment for the sole purpose of rehabilitation was unjustifiable and yet this issue only came to the fore in the late seventies. This principle was in fact enshrined in the *Statement of Purpose and Principles of Sentencing* in the Criminal Law Reform Act, 1984 (Bill C-19). However reasonable or well-supported by empirical evidence, so few things are taken for granted in penology that the same discussions are held as periodic rituals generating nothing beyond their own repetition.

1.6.5 Purposefulness

The history of the penal law cannot be reduced to a sequence of unintended events. Deliberate choices were effectively made, such as the

general rejection of the indeterminate sentence. The undercurrent in the history of Canadian criminal law is a striving for unity and explicitness. In contrast with the American model, Canadian law-makers have upheld the necessity of having the same criminal law for all citizens. Contrary to the British experience, they have also stressed the need for a codification of the criminal law. This concern for legal unity and explicitness has been expressed with varying intensity over time. This Commission believes that it was nevertheless always present and that it will always be justified.

2. The Reports on the Use of Incarceration

The introduction to this chapter asserted that a review of official reports on the criminal law and its operation in Canada provided clear evidence that Canadian penal history was more of a tribute to the resiliency of the criminal justice system than a chronicle of change. The best way to support this statement is to illustrate, through a series of quotations, the extent to which official reports repeat themselves. Going through this list of quotations may be tedious, but it is also rewarding. The systematic redundancy of these reports becomes quite clear. The following quotations are excerpts from reports written between 1831 and 1977. They all make the same basic point — that prisons are training grounds for criminals. The failure of the system of classification, which is supposed to segregate occasional offenders from hardened criminals, is generally blamed for this situation. It is important to note that any number of themes could have been chosen to illustrate the redundancy of the reports.

The "school of crime" theme has been selected among many others to provide a list of significant extracts from official reports for one specific reason. It represents one of the most fundamental criticisms that can be made of the use of imprisonment. Prisons are intended to deter offenders and to reduce the incidence of crime. At the very least, they are not supposed to foster crime. If there is one defect in the practice of incarceration which ought to have been remedied, it is this one.

2.1 Excerpts from Official Reports

1831: Committee of the House of Assembly, *Report in the Journal of the House of Assembly.*

> Imprisonment in the common gaols of the province is inexpedient and pernicious in the extreme, as there is not a sufficient classification or separation of the prisoners, so that a lad who is confined for a simple assault (or crime in which, as there is but little moral turpitude, argues no depravity in the offender) or even on suspicion of crimes of that description and degree, may be kept for twelve months in company with murderers, thieves, robbers and burglars and the most depraved characters in the province, and a man must know but little of human nature indeed who can for a moment suppose that such evil communications will not corrupt good manners...Gaols managed as most of ours are, as Lord Brougham well remarks, are seminaries at the

public expense for the purpose of instructing His Majesty's subjects in vice and immorality, and for the propagation and increase of crime (Appendix, 211-212).

1849: Brown Commission, *Second Report of the Commissioners of the Penitentiary Inquiry* (Kingston).

The vast number of human beings annually committed to prison in every civilized country, and the reflection that there they may receive fresh lessons in vice or be led into the path of virtue that, after a brief space, they are to be thrown back on their old habits, more deeply versed than before in the mysteries of crime, or returned to society with new feelings, industrious habits, and good resolutions for the future — must ever render the management of penal Institutions a study of deep importance for the Statesman as well as the Philanthropist.

In Canada... We have but one penal Institution of which the aim is reformation, and the little success which has as yet attended its operations, it has been our painful duty to disclose (p. 71).

1859: *Report of the Board of Inspectors for the Year 1858.*

Let us state at once (and here we merely echo the opinion of the great majority of the officers of our prisons), that our common gaols are schools of vice, to which novices in crime repair to receive, in an atmosphere of idleness and debauchery, lessons in villainy from hardened adepts, older than themselves in crime, who become at once their models and their guides.

1914: Macdonnell Commission, *Report of the Royal Commission on Penitentiaries.*

Thus it will be seen the daily round of the penitentiary offers little to stimulate or encourage the well-disposed convict. On the contrary, its silence and solitude must breed moroseness and resentfulness. One convict said to us: "If a man is battered down until he feels that he is nothing much more above the beast, how can you expect him to go out feeling better? It requires a very strong will to keep you from feeling that you are finished." (p. 8)

1921: Biggar Committee, *Report on Penitentiary Regulations.*

Almost all the inmates of the penitentiaries must before they die be returned to freedom, and each prisoner on his release will be called upon to live the ordinary life of a free man. Society therefore must inevitably suffer, if during his term a convict's spirit has been broken, if his habit of industry, if it existed, had been suppressed, and to the extent that his morals have been corrupted by prison associations. It is also true of course, that the convict himself suffers...(p. 11).

It is no part of the purpose of imprisonment that the spirit of prisoners should be broken or that they should when they have completed their terms, as almost all of them sooner or later will be worse citizens by reason of their punishment. On the contrary, they should be better and less likely than when they entered the penitentiary...

1938: Archambault Commission, *Report of the Royal Commission to Investigate the Penal System of Canada.*

The undeniable responsibility of the state to those held in its custody is to see that they are not returned to freedom worse than when they were taken in charge. This responsibility has been officially recognized in Canada for nearly a century but, although recognized, it has not been discharged. The evidence

before this Commission convinces us that there are very few, if any, prisoners who enter our penitentiaries who do not leave them worse members of society than when they entered them. This is a severe, but in our opinion, just indictment of the present and past administrations (p. 100).

Although there have been nearly one hundred years of legislation and agitation on the subject of classification, we regret to state that throughout Canada, both in the penitentiaries and the reformatories, there is very little intelligent or effective classification of the prisoners (p. 104).

Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty. The injustice in such a law is patent. The poverty-stricken man is punished more severely for the commission of the same offence than the man with means. Your Commissioners are of the opinion that many recidivist criminals often receive their first education in crime upon being committed to prison for non-payment of fines (pp. 167-168).

1947: Gibson Inquiry, *Report Regarding the Penitentiary System of Canada.* (Commissioner Gibson was appointed to inquire whether the recommendations of the Archambault Report had been implemented.)

It will be seen, therefore, that substantial progress has been made in carrying out the physical changes recommended by the Royal Commission but that much remains to be done to give that greater emphasis on the reformative training and treatment of the convicts that formed the main theme of the Commission's Report (p. 8).

1956: Fauteux Committee, *Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada.*

If, through lack of understanding on the part of the court, or the lack of proper probation facilities, the first offender is sent to prison, the result may be to promote even greater anti-social conduct (p. 26).

1969: Ouimet Committee, *Report of the Canadian Committee on Corrections.*

One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. As a result, instead of reformed citizens society has been receiving from its prisons the human product of a form of anti-social organization which supports criminal behaviour (p. 314).

1969: Commission Prévost, *La société face au crime.*

At the very heart of our convictions about punishment is our absolute confidence that drastic penalties remain the most efficient way to bring the guilty to respect the law.

However, the vast majority of inmates in Québec prisons are recidivists. Thus, our prisons generate their own clientele. Thus, also is our correctional system a judge of itself...(translated from the French, p. 48).

1972: Swackhamer Commission, *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary During April 1971.*

The classification process is work that calls for a highly refined although largely subjective judgment about an inmate's personality and needs. Under the pressures of time and staff which existed in Kingston Penitentiary, it is inconceivable that a proper classification program could have been applied, either upon reception or later (p. 40).

1973: Le Dain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs.*

Perhaps the chief objection to imprisonment is that it tends to achieve the opposite of the result which it purports to seek. Instead of curing offenders of criminal inclinations it tends to reinforce them. This results from confining offenders together in a closed society in which a criminal subculture develops (pp. 58-59).

These adverse effects of imprisonment are particularly reflected in the treatment of drug offenders. Our investigations suggest that there is considerable circulation of drugs within penal institutions, that offenders are reinforced in their attachment to the drug culture, and that in many cases they are introduced to certain kinds of drug use by prison contacts. Thus imprisonment does not cut off all contact with drugs or the drug subculture, nor does it cut off contact with individual drug users. Actually, it increases exposure to the influence of chronic, harmful drug users (p. 59).

1974: Law Reform Commission of Canada, The Principles of Sentencing and Dispositions. Strict Liability.

When a judge sentences an offender to jail to "protect the community" what does he mean? Does he mean that the jail term will reduce the likelihood of this particular offender committing another crime, or does he mean that while the offender is locked up the community will be free of his depredations, or does he mean that the sentence of imprisonment will deter others from committing similar crimes? Of these three possible meanings, only the second can be fully accepted...

The first of the three possible interpretations, above, is definitely unfounded by the evidence; if anything, it is said, jail is likely to strengthen recidivism rather than reduce it (pp. 4-5).

1977: MacGuigan Sub-Committee, *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada.*

The persistent recidivist statistic can be related to the fact that so many in prison have been irreversibly damaged by the system by the time they reach the final storehouse of the Criminal Justice System — the penitentiary...It was compounded in schools, foster homes, group homes, orphanages, the juvenile justice system, the courts, the police stations, provincial jails, and finally in the "university" of the system, the penitentiary (p. 10).

Most of those in prison are not dangerous. However, cruel lockups, isolation, the injustices and harassment deliberately inflicted on prisoners unable to fight back, make non-violent inmates violent, and those already dangerous more dangerous (p. 16).

Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes — correcting the offender and providing permanent protection to society. The recidivist rate of up to 80 percent is the evidence of both (p. 35).

1977: Solicitor General of Canada, *A Summary and Analysis of Some Major Inquiries on Corrections — 1938 to 1977.*

> Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals, (p. iv).

1983: Government of Canada, *The Report of the Inquiry into Habitual Criminals in Canada*, The Honourable Judge Stuart M. Leggatt.

> There is also no question that in a number of cases the length of an offender's detention is directly related to his obstreperous and aggressive attitude towards authority and supervision (p. 9).

Reading through this list of quotes is a monotonous exercise. It was thought that making the reader experience the repetitious character of the reports on the criminal justice system would be the most efficient way to demonstrate that the same points kept recurring in these reports, without any significant change having occurred in the criminal justice system itself.

It was previously emphasized that the topic discussed in the quotations — prisons as schools for crime — was one of several issues discussed in the various reports. Some other concerns mentioned in these reports were: the over-use of custodial sanctions; the excessive length of sentences of imprisonment; the high costs of incarceration; the stigmatizing effect of a jail term and the need to resort to the least drastic alternative in sentencing.

2.2 A Provisional Conclusion: Restraint

One theme which recurs even more frequently than that discussed in the previous section of this chapter is the principle of restraint. The need for restraint can be viewed as an echo of the belief that incarceration is a breeding ground for crime. If imprisonment is realized to be, at best, a partial failure, it is only logical to recommend that it be used with extreme moderation.

The original concept of restraint was quite narrow. However, its meaning has been progressively extended by the various commissions and select committees that have discussed the need for moderation in the use of punishment.

The development of the principle of restraint can be divided into three periods. The first period started in 1849, with the publication of the Brown report and ended in the early 1950's before the publication of the Fauteux report. During this lengthy period, the principle of restraint was restricted to apply to the living conditions which prevailed in Canadian prisons, particularly in Kingston Penitentiary. The harshness of prison discipline, effected through physical punishment such as flogging, was denounced repeatedly by numerous reports. The turning point was the publication of the Archambault Report in 1938. This report recommended "that the revengeful or retributive character of punishment should be completely eliminated" (p. 9). The Archambault Report was the last important report which did not question the use of imprisonment

per se. The concept of restraint for this first period called for moderation in the administration of punishment rather than addressing the broader question of the imposition of sentences themselves.

The second period concerning the evolution of the principle of restraint was very brief. It began in 1956 with the publication of the Fauteux report and ended in 1969 with the release of the Ouimet Committee report. One of the principal findings of the Fauteux report was the degree to which sentences in Canada were more severe than elsewhere in the world:

> We are particularly struck by the fact that the length of sentences imposed in Canada, when compared with those imposed in England for comparable offences, are generally much greater (p. 18).

The Fauteux Committee gave a much broader meaning to the principle of restraint than had been understood in the first period, where the concept of restraint was restricted to the conditions of incarceration. In this second period, restraint was to be applied in the context of the sentencing process itself and was to guide judges in the determination of sentences. It was also to assist correctional authorities in the exercise of their discretion respecting the early release of inmates:

> Throughout this Report great importance is attached to the concept of reformation and rehabilitation... In a modern correctional system "the first principle is to keep as many offenders as possible out of prison" (Herbert Morrison, Home Secretary, United Kingdom, 1944). When all of the alternatives to imprisonment have been exhausted, there will remain certain classes of offenders who must be sent to prison (p. 46).

The final period in the development of the principle of restraint ranges from the publication of the Ouimet Committee report in 1969 to the present. The Ouimet report was dated by some aspects of its proposals, such as its emphasis on rehabilitation. However, the more innovative recommendations in the report triggered a new beginning in Canadian penology. For example, whereas previous reports referred to sentences as "punishment", the Committee designated them as "dispositions" or as "measures". The Committee also stressed the need for "alternative dispositions" (p. 193) which provided sanctions for criminal conduct without removing the offender from the community (p.309). However, the most original contribution of the Ouimet Committee report was to extend the context of the principle of restraint from the sentencing process to the legislative process itself by advocating moderation in the use of the criminal law generally.

> No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means (p. 12).

These proposals were further developed by the comprehensive work of the Law Reform Commission of Canada. Within the scope of this brief chronology, it is impossible to fully acknowledge the critical role played by the Law Reform Commission of Canada in clearly articulating the principle of restraint and in giving it such prominence in current penal philosophy.

It is difficult to go beyond the theoretical foundation laid by the Law Reform Commission of Canada respecting the principle of restraint. What is now needed is not further theoretical development of this concept but a policy which transforms the principle of restraint into a reality.

Endnotes

1. The main source for the description of these events is a study undertaken for the Commission by Professor Martin L. Friedland of the Faculty of Law and of the Centre of Criminology of the University of Toronto. Unless we specify otherwise, we shall closely rely upon Professor Friedland's study, which we will at times simply paraphrase. However, the facts will be presented according to a particular perspective and the chapter will stress the significance of certain events.
2. Professor Alvaro Penna Pires of the Department of Criminology of the University of Ottawa was requested by the Commission to write a *compendium* of statements on different aspects of incarceration, which are to be found in official reports issued in Canada by the federal and provincial governments and in the general literature. Dr. Pires's study will be the primary source for the content analysis of reports and literature on the penal system and, particularly, on incarceration.
3. Stat. U.C. 1800, c.1.
4. See Talbot (1983; 152-53), *Justice in Early Ontario, 1791-1840.*
5. See, for example, English statute 7 & 8 George IV, 1827, c. 27 and c. 28.
6. Stat. U.C. 1833, c. 3.
7. Stat. U.C. 1800, c.1, s.5.
8. See Talbot (1983; 150).
9. The statute is 4 George I, 1717, c. 11. For an analysis of the issue of transportation in England, see Thomas (1978; 3-4), *The Penal Equation.*
10. Stat. Can. 1842, c.5, s.4.
11. See Thomas (1978; 30).
12. See Thomas (1978; 32).
13. See Rusche, G. and Kirchheimer, O. (1939). *Punishment and Social Structure.*
14. Committee of the House of Assembly (1831). *Report in the Journal of the House of Assembly*, Appendix, pp. 211-212. Also quoted in Jackson (1983; 26-27).
15. Quoted in Beattie (1977; 82).
16. See for example, Stat. U.C. 1883, c. 3; Stat. U.C. 1837, c.4, s.3 and s.4; Stat. U.C. 1837, c.6, s.1; Stat. U.C. 1838, C.11, s.1.
17. Stat. Can. 1841, c. 24.
18. Stat. Can. 1841, c. 24, s. 24 and s. 30.
19. Stat. Can. 1841, c. 25, containing 70 sections; Stat. Can. 1841, c. 26, containing 42 sections and Stat. Can. 1841, c. 27 containing 44 sections.
20. Stat. Can. 1842, c. 5, s.2.
21. 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.
22. See Lapin, M.A. and Patrick J.S. (eds., 1951; 40-41). *Index to Parliamentary Debates on Confederation of the British North American Provinces.*
23. Lapin and Patrick (eds., 1951; 41).
24. This problem has been documented in several publications of the Law Reform Commission of Canada. For example, Law Reform Commission of Canada (1974c), *Studies on Sentencing*; Law Reform Commission of Canada (1976), *Our Criminal Law*; Law Reform Commission of Canada (1976b), *Studies on Imprisonment*, and the Law Reform Commission of Canada (1977), *Guidelines; Dispositions and Sentences in the Criminal Process.*
25. See *The Second Report of the Commissioners of the Penitentiary Inquiry*, pp. 71-73. This was the report of the 1848 Brown Commission.
26. The earlier Charlottetown Conference had taken the same position: see Appendix 4, "A Brief Legislative History of Penitentiaries Prior to Confederation" in the government document dated

April 29, 1976, *Bi-lateral Discussions on the Division of Correctional Responsibilities Between the Federal Government and the Government of British Columbia.*

27. See the above-quoted document.

28. See Needham (1980; 339).

29. See *Royal Commission to Investigate the Penal System of Canada* — the Archambault Commission (1938; 339 *et seq.*). See also *Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* — the Fauteux Committee (1956; 50).

30. See *Canadian Committee on Corrections* — the Ouimet Committee (1969; 279 *et seq.*) and the Law Reform Commission of Canada (1977).

31. See Herbert (1902), *Speeches on Canadian Affairs by the Fourth Earl of Carnarvon.*

32. See *Second Report from the Commissioners on Criminal Law*, (1836; 24). This report deals with capital punishment, but it is indicative of their views. See also the *Seventh Report of the Commissioners on Criminal Law* (1843; 92). Thomas (1978; 20 *et seq.*) also discusses this issue.

33. See Cross (1978; 5), "The Report of the Criminal Law Commissioners (1883-1849) and the Abortive Bills of 1853" in Glazebrook (1978)).

34. See Thomas (1978) and Cross (1978) for the history of the English Criminal Law Commissioners.

35. See Home Office Report (1979; 23). Sentences of Imprisonment.

36. Greaves, C. (1861; xlv). *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict.* with notes and observations. London: Stevens. Also cited in the Home Office Report (1979; 24).

37. Stat. Can. 1859, c. 91 ss. 20 and 21.

38. Hansard, House of Commons, April 23, 1869, at 54-55.

39. Compare in this regard 24 & 25 Vict., 1861, cc. 94-100 with Stat. Can. 1869, cc. 18-36.

40. Hansard, House of Commons, April 27, 1869, at p. 89.

41. *See Digest and Summary of Information Respecting Prisons in the Colonies, supplied by the Governors of Her Majesty's Colonial Possessions, in answer to Mr. Secretary Cardwell's Circular Dispatches of Jan. 16 and 17, 1865. C. 3961, 1867.*

42. Journal of the Legislative Assembly (1849), Appendix B.B.B.B.B. Cited in Beattie (1977; 156 *et seq.*).

43. See generally, Calder (1979; 50-51). *The Federal Penitentiary System in Canada.*

44. See Stephen (1874, reprinted 1967; 52). *Liberty, Equality, Fraternity.*

45. See Stephen (1883; 98-99). *A History of the Criminal Law of England.*

46. Hansard, House of Commons, May 19, 1892, col. 2840.

47. Hansard, House of Commons, May 25, 1892, col. 2972. See generally, Parker (1981) *in* Flaherty (1981).

48. See 742 *et seq.* of the 1892 *Code*. See generally, Del Buono (1978).

49. See s. 744(4) of the 1892 *Code*.

50. Stat. Can. 1921, c. 25, s. 22; see also Stat. Can. 1923, c. 41. s.9.

51. Those amendments are fully documented in Friedland (1980; 18).

52. See the Archambault Report, p. 9.

53. Hansard, House of Commons, March 30, 1915, at p. 1782.

54. See the *Prison and Reformatories Amendment Act*, S.C. 1913, c. 39, s. 1. The provision was extended to British Columbia in 1948: see the Ouimet Committee Report, at p. 283.

55. *Criminal Law Amendment Act*, 1977, Stat. Can. 1976-77, c. 53, s. 46(3).

56. *Criminal Code Amendment Act*, Stat. Can. 1947, c. 55, s. 18. See generally Morris (1951). *The Habitual Criminal.*

57. *Criminal Code*, Stat. Can. 1953-54, c. 51, s. 660(2).

58. See the Ouimet Committee Report (1969; 243).

Chapter 3

Current Situation and Problems

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Chapter 3

Current Situation and Problems

1. Introduction

1.1 Overview of the Current Situation

As a way of resolving disputes, the criminal justice system is best thought of as an institution of last resort. Although people often have disputes with each other or with their government; most of these, fortunately, do not end up in the criminal courts. As an institution of last resort, the criminal justice system holds the power to impose the most severe forms of control on people within this society. A wide variety of powers are given to the criminal justice system. The criminal law itself defines the kinds of conduct for which people can be held criminally liable. Rules governing the criminal trial provide the framework within which guilt or innocence may be determined. The sentence imposed by the judge is the one point in the process, however, at which the power to impose sanctions, as provided by the law, is most visibly exercised.

Although the criminal justice system has the power to impose a wide range of sanctions, it is sometimes seen as having purposes well beyond this. It is sometimes seen as a system whose goal is to control a person's behaviour, or to define the activities that are prohibited in society, or to make better people out of some of us. There have been arguments over the years as to whether the criminal justice system does or could contribute to meeting these goals or, indeed, whether the criminal justice system should aspire to these goals. However, there can be little argument about one thing: the criminal justice system is a system whose purpose is, at least in part, the identification of those who have acted in ways that are unacceptable to society and on whom, as a result, certain sanctions can be imposed. Among these is the right to punish people and, under many circumstances, to impose severe terms of imprisonment. If nothing else, then, the criminal justice system is a system that often punishes people.

The perspective of the criminal justice system as a system which emphasizes punishment now appears to be held by many people who are charged with criminal offences (see Casper, 1972, Ericson and Baranek, 1982).

Quite understandably, most accused people who appear before the courts are interested in the punishment that they might receive even though, as some authors have suggested (e.g., Feeley, 1979), going through the process itself may serve as the penalty. In Canada, we use our most severe punishment — imprisonment — more than most other western countries (Correctional Service of Canada, 1986).

What is remarkable about our criminal law is how little direction is given in our legislation on the determination of sentences. For historical reasons outlined in Chapter 2, we have, in Canada, a system of prescribed maximum penalties that effectively has distanced Parliament from the actual sentences that are to be imposed for all criminal offences other than murder and high treason.

1.2 The Absence of Policy: A Comparison

Criminal sanctions provide the potential for the most serious intrusions of the state into the lives of individuals. The absence then, of a clear policy regarding the imposition of these sanctions seems quite remarkable. In other areas of a person's life, Parliament has taken a much more active role. In taxation, for example, not only are the purposes of a particular tax policy fully debated and discussed, but the actual level of burden (or potential burden) on a given citizen is expressed as clearly as possible in the legislation. If the level of specificity of criminal sanctions were to be translated into the area of income tax, it would be as if Parliament were to pass a tax bill indicating that certain kinds of income were to be taxed at a rate "of up to 34%" to accomplish goals that were never specified. Courts, then, on an individual basis, would be expected to weigh such factors as the impact on individual incentive, job creation and the taxpayer's ability to pay, to come up with a set of individual cases from which general principles might be derived. Courts would make decisions independent of one another and there would be no mechanism for resolving differences across provinces. Indeed, individual provinces might differ on which factors would be relevant in determining the amount of federal income taxes to be paid.

If there existed this amount of ambiguity in the laws governing personal income tax, undoubtedly the government would act quickly to change the situation. Most citizens would not tolerate such ambiguity and would not view it as appropriate that policy and practice on such an important matter be left exclusively to the courts in the absence of any legislative direction. Clearly, all issues could not be resolved completely unambiguously by Parliament and indeed, certain issues would have to be resolved or interpreted by the courts.

In the area of criminal law, however, we have long tolerated this kind of ambiguity. One reason is that the most severe sanctions of the criminal law — unlike income tax — affect only a small minority of the population. Another reason that there has not been great political pressure on Parliament to take a more active role in providing guidance for the determination of sentences is

that there has not been a vocal or clear consensus on the direction that we should be moving in. Finally, as one submission to this Commission noted, "there is no great groundswell of concern generally in Canadian society as a whole crying out for reform in our sentencing processes. The group which has the most to gain from sentencing reform, those convicted of criminal offences, have in fact the least effective lobby."

Although appellate courts have developed principles of sentencing, these principles are not applied uniformly in practice, nor are they accepted by all sentencing judges. The reasons underlying the imposition of a particular sentence are sometimes unclear and often not articulated. The person sentenced, those responsible for the administration of the sentence, and the public remain uninformed as to the principles underlying the sanctions and the reasons for these sanctions.

1.3 Sentencing: Problems

It would be wrong to suggest that there is a perceived crisis in sentencing. Although commission after commission over the past 50 years has expressed the view that there are fundamental issues to be resolved in the area of sentencing, no Parliament in the history of Canada has undertaken a comprehensive review of the fundamental issues in sentencing. Indeed, until the Law Reform Commission of Canada reported on sentencing in 1976, Parliament had never received a report whose exclusive focus was on the determination of sentences. Even the Law Reform Commission's report dealt only with select issues in sentencing and did not contain a comprehensive set of recommendations.

The fact that there is no general perception of a crisis does not mean there are no serious problems. Crises in the criminal justice system are usually seen to be rather dramatic short-term events such as prison riots and hostage takings. A problem that builds up slowly and is not very public, such as the overcrowding which has occurred in certain prison systems, may not seem to be a crisis by those who are neither inmates nor guards. Prison overcrowding is an ominous problem and it is clearly related to the issue of sentencing. There is evidence that the public is not enthusiastic about spending additional funds on prisons. When given a choice between building more prisons or spending more money on alternatives to imprisonment, 70% of the public chose the latter (Research #3). Hence, it is consistent with public opinion to seek solutions which involve examining carefully how we use prison space.

Public knowledge about sentencing and related issues are reviewed in Chapter 4. As noted in that chapter, a substantial portion of the public knows little about sentencing (maxima, minima or current practice). Nevertheless they are not content with the severity of sentences that are handed down. It is easy to suggest that the problem lies not with sentencing practices, but elsewhere. After all, studies (Doob and Roberts, 1983) suggest that if they were given more adequate information about the actual sentencing hearing, the

public would be considerably more satisfied with the sentence imposed. This approach, however, ignores two important issues. First, saying that the public could be made more content if they had better information does not get them that information nor does it make the public more content. Second, although such information would presumably enhance public acceptance of individual sentences, it would do nothing to make policy in sentencing more accessible and understandable.

The public's understanding and acceptance of the criminal justice system is critical. The adage "justice must not only be done but must be seen to be done" reminds us that belief in the ultimate fairness of the justice system is central to the legitimacy of a government. The appearance of "justice" in a justice system is not a peripheral nicety — it is central to its existence. In Canada today the lack of information and absence of clear principles on sentencing obscures the process of justice and makes it difficult to see whether justice is done.

2. Commentary on Perceptions of the Problems in Sentencing

2.1 Commentary

As part of its research program, the Commission not only surveyed closely the existing research in the area of sentencing (*Roberts, 1985*), but it also commissioned exhaustive reviews of commentaries on sentencing: from researchers, other experts, and from official reports (*Pires, 1984, 1986*). It is noteworthy that on certain key topics, a substantial amount has been written. For example, when one puts together significant extracts (usually a paragraph or two from any one source) of commentaries on disparity in Canada, one ends up with 92 pages of (brief) extracts. When one puts together a few paragraphs mostly from official documents, criticizing the use of imprisonment in Canada and which advocate, directly or indirectly, moderation in the use of imprisonment, one ends up with a 140 pages of extracts. As noted in Chapter 2, critical commentary of some aspect of sentencing is not hard to find. To illustrate, a few of the many statements made in the past 25 years concerning the problems of sentencing are reproduced here (*Pires, 1984*):

> These variations [in sentencing] are a rather predictable finding, but one certainly worth presenting, as it is common knowledge that wide differences in philosophy and practice exist among magistrates. There are lenient judges and harsh judges, as every prosecution and defence counsel well knows (Jaffary, 1963).

> It should be emphasized that the major criticism herein lies not in the fact that some courts are adopting principles that are not as good as they might be, but the fact that completely different and sometimes opposing sentencing principles should exist at all with reference to the same Act; i.e., the *Criminal Code*. .... Unfortunately, we find extraordinary discrepancies in almost all aspects of sentencing... (Decore, 1964).

> Disparity between courts in sentencing practices...is an acknowledged fact. It also seems reasonably clear that such dispositions are accounted for more adequately by the beliefs and goals of the decision maker than by the objective facts of the individual case (Edwards, 1966).

> The most obvious fact which emerges from the findings is that there are enormous differences among magistrates in nearly every aspect of the sentencing process. Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information, and in the sentences they impose (Hogarth, 1971).

> Sentencing practices in drug cases are characterized by a wide disparity across Canada (Commission of Inquiry into the Non-Medical Use of Drugs, 1972).

> Research in Canada and the U.S. has clearly identified sentence disparity as a matter of concern for the criminal justice system (Canada, Solicitor General, *Criminal Justice Research — A Selective Review*, 1981).

> The most significant concerns in sentencing can be grouped into three categories. First, there are no clear policies or principles of sentencing in Canada. Second, there is an apparent disparity in the sentences awarded for similar crimes committed by similar offenders in similar circumstances... These...types of concerns are clearly interrelated, since the lack of clear policy on sentencing may both encourage disparity and reflect the lack of meaningful or clearly effective sentencing alternatives (Canada, The Criminal Law in Canadian Society, 1982).

While the Commission does not necessarily endorse all that is written in these quotes, they are listed here to demonstrate the concerns expressed from time to time about equity, clarity and predictability in the sentencing process. These quotations in fact, are but a small proportion of what has been said about the problem of disparity in Canada. Most criticism in the literature on sentencing focuses on the issue of disparity: perceived or real, warranted or unwarranted.

2.2 Perceptions of Problems

One of the difficulties in identifying whether there are problems with the sentencing process is that those working in the area deal with the system on a case by case basis and so tend to adapt to the difficulties of the system. What might be determined to be a problem as a result of careful analysis, may not be perceived as a problem by those working in the system. They may be so used to coping with it that they do not identify it as problematic. Second, while the most accomplished practitioners deal so well with a fault in the system that for them it is not important, for the remainder it may still be a serious problem.

In this context, it is interesting to note that the submission to this Commission from the Canadian Bar Association did not acknowledge there to be any problem with disparity in sentencing. Their conclusion is as follows: "Some variation in sentencing is to be expected. Without it, sentencing practices would not reflect differences in individual cases and community standards or regional priorities and concerns." This can be contrasted with the fact that more than 80% of a sample of over 700 Crown and defence counsel

surveyed by the Commission indicated that there was unwarranted disparity in their own jurisdiction and more than 90% of the same group perceived there to be unwarranted disparity across Canada (Research #5).

Finally, it is to be expected that various interest groups would differ on what constitutes a problem. An issue identified by one group as a problem will not necessarily be so identified by another group.

In addition to receiving submissions from individuals and organizations, the Commission made a special effort to assess on a systematic basis the views of a large number of professional groups within the criminal justice system. Defence and Crown counsel in six provinces were asked to fill out a questionnaire dealing with a number of issues related to sentencing. Questionnaires were sent to every judge having the jurisdiction to sentence people (or review sentences) in Canada. Other criminal justice professionals and inmates were also interviewed.

2.2.1 Judges

Every group that had any contact with this Commission felt that there was a need for some change in sentencing. Clearly there was not unanimity about the direction of change, but there was near unanimity about the desirability of some changes. Many judges felt, for example, that minimum sentences sometimes created injustice; some noted difficulties with the parole system and almost three-quarters of the judges surveyed perceived there to be a fair amount of variation from judge to judge in the way a specific case would be sentenced (Research #6).

2.2.2 Crown and Defence Counsel

As previously mentioned, almost all lawyers (over 90%) — both defence and Crown — in a survey carried out in six provinces felt that there was at least some unwarranted variation in sentences across Canada and many (about 40%) thought that there was a great deal of unwarranted variation. Sentences that were closer to these respondents — those within their own jurisdiction — did not fare much better. Over 80% of Crown and defence counsel thought that there was at least some unwarranted variation in sentences handed down in their own jurisdiction. This is not surprising since over 95% of the over 700 Crown and defence counsel surveyed thought that the particular judge who imposed the sentence was at least somewhat important in determining the sentence, with over 80% identifying this factor as being very important. Not surprisingly, most of these 700 (of whom the majority spend at least half of their time doing criminal law) think that the identity of the sentencing judges should *not* be an important factor in determining the sentence.

Crown and defence counsel saw other problems in the overall sentencing process. Most, for example, expressed the need for changes in parole, and most

Crown counsel and over a quarter of defence counsel saw problems with mandatory supervision (at least as it existed before the recent *Act to Amend the Parole Act and the Penitentiary Act (S.C. 1986 c. 42)* was passed).

2.2.3 The Police

The Canadian Association of Chiefs of Police similarly saw the need for sentencing reform. They noted, for example, that "there is little agreement as to which sentencing principles should be applied to any particular case". More importantly, the Chiefs of Police identified the importance of a more understandable and predictable sentencing system: "If provided only with principles, however, in spite of (or perhaps because of) them, disputes will not be eliminated with respect to sentencing in specific cases unless more specific direction is supplied...". They, like others noted that disparity in sentencing is a serious problem: "Unfortunately, there have been too many cases in which the police, and others, have felt that the sentence did not 'fit' the crime, whether the 'unwarranted disparity' took the form of an unduly lenient or harsh sentence." They note that "these disparities in sentencing very often result in a loss of confidence in the system."

2.2.4 Parole and Probation Officers

The Commission had surveys conducted on its behalf of non-legally trained criminal justice professionals (largely probation and parole officers) in the Atlantic provinces (*Richardson, 1986*) and in Quebec (*Rizkalla, 1986*). From their perspective, there were a number of problems. In both regions, over 80% of those who ventured an opinion felt that some offences of different degrees of seriousness had identical maximum penalties. A substantial portion in each region (34% in Quebec and 56% in the Atlantic provinces) perceived there to be unjustified variation in sentencing. The majority (57%) of the respondents in Quebec and about one-third (32%) of the respondents in the Atlantic provinces indicated that they thought that too many prison sentences were being imposed. Other more specific problems were also noted as well.

2.2.5 Prisoners

Prisoners as well, identified a number of areas of concern. Almost all 165 prisoners interviewed in British Columbia perceived there to be variation in the sentencing severity of different judges (*Ekstedt, 1985*). The majority (70%) of a separate sample of native prisoners in the western provinces indicated that they believed that they would have received a different sentence if they had been sentenced by a different judge (*Morse and Lock, 1985*). A substantial proportion of B.C. prisoners surveyed perceived there to be some unjustly long sentences (76% disagreed with the statement that "unjust long sentences are pretty rare") and several stated that there were also unjustly short sentences (39% disagreed with the statement "unjustly short sentences are pretty rare").

About two-thirds of the respondents felt that "the laws should give more direction to judges on how short or long a prison sentence should be." The majority (64%) also indicated that parole procedures were unfair. Although it would be unreasonable to expect that prisoners would be happy with their current situation, it does appear that they are concerned not just with the severity of the sentences they received but also with the equity of application.

2.2.6 Submissions

Other groups also saw problems in the current system of sentencing. The Law Reform Commission of Canada, for example, in a brief to this Commission noted that "As a document intended to give expression to fundamental values, our *Criminal Code* ought to be a statement which bears some relation to what happens in the real world". They note that in many ways, it does not. They also note with approval the view that "the legislature ought to assume more control over the sentencing process....". In describing the current situation, the Law Reform Commission of Canada stated that "Excessive discretion is conferred on a wide range of police, prosecutors, judges and prison/parole officials. Equality, clarity, and truth in sentencing are sacrificed.... Disparity becomes more pronounced in the absence of authoritative statements of purpose and principle. Prison overcrowding intensifies..... The current scheme creates disparity, and therefore fails to promote equality, in a variety of ways".

The Canadian Association of Elizabeth Fry Societies notes that "sentencing decisions have been (or at least have been perceived to be) unreasonably disparate." They suggest that one way of dealing with this problem would be the "enactment of sentencing principles". Sentencing principles and purposes, they feel, could help provide "reasonable limits on judicial discretion, not to bind the values of future generations to come". However, they feel that "discretion should be left with sentencing judges to apply the policy to particular cases". They see maximum sentences as unrealistically high and recommend the abolition of mandatory minimum terms of incarceration.

Various John Howard Societies also made extensive representations to the Commission. Generally speaking, their independent views of the nature of the current problems were similar. The John Howard Society of Canada, for example, noted that "it does not appear rational to cling to the individualized approach [to sentencing] with each judge more or less free to select his/her own starting point, objectives and relevant criteria". More specifically, they note that "a primary concern for the principle of just deserts or proportionality and a concern for equality under law and coherence in sentencing policy requires not only a legislative statement about sentencing principles and policies, but a legislative statement that sets priorities. We also believe that such a statement is necessary in order that people may know what the law is, and have ready access to it". The John Howard Society of Ontario expressed the view that

there exist "serious problems of sentencing disparity between and even within courts". Guidelines, they noted, "would assist provincial appeal courts maintain some consistency between one province and the rest". However, as the John Howard Society of Alberta noted "there is an almost complete lack of legislative guidance as to the principles to be followed in the exercise of the very wide discretion given judges in the sentencing process in Canada".

On a related, but somewhat different topic, the John Howard Society of Alberta suggested that "imprisonment in Canada and its over-use remains the central issue in sentencing policy and practice. It is suggested that there are abuses in the use of imprisonment and that one such area of abuse concerns the sentencing of non-violent offenders against property to varying terms of imprisonment, without consideration of the non-custodial alternatives available". This view was repeated in various forms by the other John Howard Societies (Canada, Ontario, Ottawa; all of which recommended increased use of community sanctions).

Most groups close to the criminal justice system, then, expressed concern over problems in sentencing that could not be solved by minor alterations. The Law Reform Commission of Canada and the John Howard Societies of Alberta and Ontario all expressed the need for a permanent sentencing commission to monitor and revise sentencing guidelines.

2.3 The Need for an Integrated Set of Reforms

Clearly, much has been written on the problems of sentencing and many submissions identified a variety of issues. However, although there is little, if any, consistency in sentences or in approaches to sentencing, there does seem to be some consensus in the assessment of what the problems are. One of the most basic problems that has been identified in the literature in the past 25 years is that there is no overall explicit statement of purposes and principles of sentencing. It is clear that the problems of sentencing are not going to disappear through minor tinkering with the existing legislation.

Indeed, as has been noted in Chapter 2, the past century has seen a steady stream of minor changes in the laws relating to sentencing. It is possible that part of the reason for the lack of fundamental reform in sentencing — despite occasional calls for it — is that those interested in reform were aware of the necessity for an integrated reform of the whole sentencing structure. Such reforms are more difficult to propose if the terms of reference of the Commission include either very broad sets of issues (such as the Ouimet Commission) or are narrow in their original focus (such as the Archambault Commission). In any case, the major problems persist. A comprehensive examination of sentencing and an integrated set of reforms is essential.

3. Structural Deficiencies in the Sentencing System

Parliament has never given much overall guidance to the sentencing judge, the offender, or the general public, on what kind of sentence should be imposed in any particular case. Changes that have been made by Parliament do not, and indeed could not, provide the necessary integrated reform. The reason is simple: it is impossible for a particular change to fit into a structure that itself lacks consistency. The nature of the difficulties in sentencing can be seen by examining closely a number of different aspects of the context in which sentencing takes place. This Commission has concluded that the problems of sentencing have to do with the structure in which sentencing takes place rather than with the quality of the decision-makers themselves. Thus it is important to examine closely the nature of these problems.

3.1 Lack of Systematic Information about Sentencing

One of the most basic failings of the current sentencing system in Canada is that there is no method for anyone (not a judge, accused, lawyer, member of the public or policy maker) to know in a systematic, up-to-date, and accessible manner, on a continuing basis, what kinds of sentences are being handed down. The Statistics Canada Courts program (which provided sentencing statistics) was by the 1960's and 1970's being phased out. Published in 1978, the 1973 data on sentences in criminal cases were the last reasonably comprehensive sentencing data to be released by Statistics Canada. It had been hoped that the re-organization of the justice statistics section of Statistics Canada into the Canadian Centre for Justice Statistics would have improved matters in the area of court-based data. It has not. Aggregate statistics from the courts on sentencing criminal cases are not available from the Centre. There is no reliable indication of when they might be available.

The lack of timely aggregate sentencing statistics presents problems for the operation of the criminal justice system. For a Commission such as this one, it posed a very serious difficulty. As matters stood when the Commission was established in 1984, there were selective aggregate statistics (Hann, Moyer, Billingsley and Canfield, 1983), often obtained from correctional authorities, which dealt with only a portion of sentencing and which dealt with only a short (and varying) time period. These data were extremely useful for some purposes and gave the Commission an idea of what was happening in certain areas, but for others were less than satisfactory. The Commission then spent considerable time putting together statistics from a number of independent sources to gain an accurate "snapshot" of sentencing as it was occurring in the first half of this decade. Among the sources we looked at were an update of the 1983 study (Hann and Kopelman, 1986), detailed statistics (especially on long sentences) from Correctional Services Canada, and a sample of sentences from an analysis of the RCMP criminal record history data-base. After a large expenditure of effort, the Canadian Sentencing Commission was able to obtain statistics sufficient for carrying out its task.

However, there is a need for comprehensive statistics, gathered at their source (the courts) on a national and continuing basis. On the basis of the Commission's experience in trying to obtain data and the performance to date of the Canadian Centre for Justice Statistics in this area, given competing priorities, there is no reason to be optimistic about how soon we will achieve the level of statistical breadth and timeliness in the area of sentencing statistics that we had 20 years ago.

It should be pointed out that aggregate sentencing data on a national basis are difficult to obtain for a number of reasons including the following:

The federal/provincial division of powers over criminal law and its administration has the effect of making the federal government dependent on unanimous agreement from the provinces in order to obtain uniformly-formated statistics from across the country. In addition, the federal government's requirements may differ somewhat from those of the provinces. In some instances, then, the provinces might be asked to collect information that will not be of direct or immediate use to them. Much can be written about this general problem in this and other areas. It is sufficient to say that the federal-provincial split in jurisdiction has serious implications in this area.

Different concerns of different groups can lead to different data being needed. To the extent that there are sometimes large costs involved in the collection of data, issues such as whether each count on a multiple charge indictment is coded or whether only the "most serious" charge is recorded are very important.

The decision of what constitutes the unit of analysis is often neither obvious nor agreed upon. From the perspective of correctional authorities, for example, the total length of time may be most important, whereas from the perspective of those involved in or interested in the determination of sentences, the sentence on the individual count may be most important. Given that sentencing in cases involving multiple counts is done in different ways in various parts of the country, these puzzles are not easy to solve.

Few countries besides England and Wales have good continuing aggregate court statistics. Hence the problems are not just those of countries such as ours with multiple levels of jurisdiction. The problems are not easily solved. They are, however, important and, if there is to be continuing attention paid to sentencing in this country, we will have to have, at least on a sampling basis, reliable and up-to-date indicators of what is happening in our courts.

3.1.1 Sentencing Information for the Sentencing Judge

Like everyone else, a sentencing judge cannot get an overall picture of sentencing in Canada. Probably more relevant to the sentencing judge's needs, however, would be more detailed information on current practices and decisions of the judge's own Court of Appeal. Detailed information on a systematic basis about recent similar cases does not, for the most part, exist anywhere in a readily-accessible format. One project is operating on a trial

basis in a number of provinces to provide such information to sentencing judges, but it is too early to know what its value will be.

The traditional sources for judges to turn to for sentencing information are the reported judgments of Courts of Appeal and, occasionally, trial courts. These reports are generally available to most judges. The difficulty, then, is not their availability but is the ease with which they can be used. Simply put, much of the information that a judge would need to know about appeal court decisions on sentencing is contained in published reports; most judges are, however, too busy to be able to spend the hours necessary first to find, and then to digest the relevant published materials. Existing large-scale computerized retrieval systems are useful for some purposes but are not easily accessible to most trial judges. A few years ago, the *Canadian Sentencing Handbook* was produced by the Canadian Association of Provincial Court Judges with funds from the Department of Justice, Canada. This is seen by some judges as a useful source of information about principles of sentencing as enunciated by the various Courts of Appeal. It appeared in 1982 and has not been updated.

In some provinces Court of Appeal decisions are distributed systematically but not in an organized or easily accessible format. In one province, and soon in three or four more, there is a small-scale computer retrieval system in place in some provincial court-houses. These allow judges to access all recent relevant Court of Appeal judgments without special training. As already noted, however, having easy access to and receiving clear guidance from these judgments are, unfortunately, two quite different matters.

3.1.2 Implications of Having No Systematic Sentencing Data

In Canada over 1,000 independent decision-makers are handing down sentences for over three hundred different offences in the *Criminal Code*, *Narcotic Control Act*, and *Food and Drugs Act* (Parts III, IV). On rare occasions, one of these sentences is made known to others through casual conversation, formal discussion, or because it was published. In the absence of any formal guidance, it would be almost impossible to expect no variation in the severity of sentences from judge to judge. Not only because of differences in the way an offence was viewed in different communities, but simply because different judges in the absence of national policy and in the absence of knowledge of what was happening elsewhere would simply arrive at different conclusions.

It is unfair to criticize individual judges for arriving at different conclusions regarding how a given case should be sentenced. In the context in which these decisions are being made, sentencing judges have no other way of carrying out their responsibilities. Indeed, even if different sentences were to be given to essentially identical cases, there is no method, in the current sentencing structure, to evaluate which, if any, of the sentences is appropriate. In the present system, where there are no formal "standards" against which to judge a sentence, the lack of systematic sentencing information accessible to judges in their determination of sentences almost ensures that there will be unwarranted variation in sentences.

3.2 The Absence of an Adequate Penalty Structure: Maximum Penalties

Traditionally, the statutory maximum penalties have been reserved for the worst possible instance of the offence committed by the worst possible offender. In reality, however, in most instances, such cases almost never occur, or in some instances, simply do not occur. Indeed, a survey of all sentence appeals handed down by the British Columbia Court of Appeal from September 1983 through the spring of 1986 demonstrates that for some offences (e.g., break and enter a dwelling) maximum sentences have not been recently endorsed by the highest level of court in that province.

An examination of the current pattern of legislatively-prescribed maximum penalties quickly indicates that as a guide to what the worst cases would look like, Canada's statutory maxima are inadequate. At present, life imprisonment is the maximum sentence available for a large number of offences including manslaughter, aggravated sexual assault, breaking and entering a dwelling, possession of a narcotic for the purpose of trafficking and certain forms of perjury. A maximum term of ten years in prison is prescribed for sexual assault (including most instances of what used to be termed rape, where weapons are not used and serious physical bodily harm does not result), assault causing bodily harm, theft over $1000 and unauthorized use of a computer.

Most people who offered advice to the Commission in the area of maximum penalties agreed that existing penalties do not provide sufficient guidance. Many working within the system, however, did not see this as a serious problem since their knowledge of current practice effectively allowed them to ignore the legislated maxima. Only 16% of the judges who responded to the Commission's survey thought that "the pattern of maximum penalties is fine the way it is now and should not be altered." Forty-eight percent of the judges thought that a revision of maximum penalties might or definitely would be an improvement. Thirty-six percent indicated that they thought that the maximum penalty structure was not very useful as a guide in sentencing, but changes would not improve anything. As one judge noted, "I regard maximum penalties as Parliament's guideline to the gravity of the offence. True, it is not presently a very sensitive instrument by which to measure the gravity. I would welcome any revision to make it more indicative of Parliament's views, but that may be difficult to obtain."

Judges' opinions were divided on the utility of an overall revision to create maxima that would be closer to the sentences actually imposed. As one judge noted: "The going range for the usual case is [already] known [to the judge]". The problem, of course is that the going ranges are not necessarily known to all. In addition, judges may differ on what they see as the "going range". Two-thirds of the judges surveyed indicated they felt that the current situation where maximum sentences are seldom handed down conveys a false impression to the public.

A narrow majority (56%) of the defence counsel who responded to the Commission's survey favoured an overall revision of maximum sentences, though most (72%) Crown counsel opposed it. Interestingly enough, however, most defence (65%) and most Crown counsel (81%) felt that the current system of maximum penalties gives a false impression of sentencing to the public.

To the extent, however, that prescribed maxima are supposed to have any meaning for the general public, it is important to go beyond the views of those who have already learned to ignore legislated maxima. Most members of the public do not have enough knowledge to allow them the luxury of ignoring some apparently pertinent information. For example, in a survey of editorial policies on sentencing stories in the news media carried out for this Commission (*Rosenfeld, 1986*), one reporter is quoted as having mentioned that by referring to the statutory maximum sentence available to the court "you're probably leaving the listeners with the impression the guy probably should have gotten more. I also include when the offender will be back on the street again, to point out that I thought — even though I wasn't saying it — that I think this is a travesty of justice; I was indirectly telling the listener that I thought it stunk". As if responding to this comment, one judge in the survey carried out by the Commission noted that "Every media source always says what the maximum sentence is — even though they have rarely ever been used. It is absurd."

In Chapter 4, it is noted that a substantial portion of the Canadian public think that sentences are too lenient. To the extent that the public sees the maximum penalties enacted by Parliament as the prime determinant of sentences, one can easily understand the public's discontent. However, the public does not know most maximum penalties. If they knew them and misinterpreted their meaning in current sentencing structure, they would undoubtedly be even less pleased with sentencing as it is carried out than they are at the moment.

In conclusion then, there are two quite separate problems with the current maximum penalties: they are unrealistic, and in most cases too high. Any serious guidance they might give the sentencing judge or the public is lost. Second, they are disorderly: the relationship between the seriousness of offences and their maxima is inconsistent. Little guidance for anyone can be expected from these maxima.

3.3 Mandatory Minimum Penalties

Apart from murder and high treason, there are only seven offences (among those considered by the Commission) which have minimum fines or terms of imprisonment prescribed by law. In Chapter 8 it is noted that the offences that carry mandatory minimum penalties do not constitute a clearly identifiable group where one can easily imagine that the least serious instance always requires, in order to do justice, a minimum penalty. Other than the

police, few individuals or groups who had contact with the Commission, argued for maintaining or increasing the number of offences carrying mandatory minima. Furthermore, it is openly admitted in some instances that legislative intent is undermined by administrative practice. For example, if the Crown is seeking a higher penalty because of a person's previous convictions, notice has to be served on that person before a plea is received in court. The *Criminal Code* specifies a mandatory term of imprisonment for all persons convicted of a second or subsequent offence involving drinking and driving. Evidence exists that various provinces have developed guidelines on when such notice should be served, thus effectively circumventing the legislative requirement of a minimum term of imprisonment. In other instances, different methods have been found for avoiding minimum penalties. As one judge noted, however, "mandatory minimum sentences can be a problem and produce such gross injustice that prosecutors become the persons who determine sentences."

One frequently-cited argument in favour of minimum penalties is that they serve to deter people from committing the offence. At first blush, this would seem to be a sound view. However, there are two hidden and incorrect premises on which this logic is based.

In the first place, it is assumed that the presence of minimum sentences is known to those who might possibly otherwise commit an offence. Evidence from public opinion surveys (see Chapter 4) suggests this is not the case. The second hidden premise is that people have a reasonably high expectation of being caught. Again, this does not seem to be the case.

Looking at the evidence on deterrence, much of which was accumulated in the context of impaired driving (see Ross, 1982), it is clear that variation in penalties are not important in determining the number of drinking driving offences in a community. One factor that may lead people to believe that minimum penalties are relevant to the level of offending in a community is that often when there is a modification of the penalty structure for an offence as prevalent in our society as impaired driving, there may also be a temporary increase in real and perceived estimates of the likelihood of apprehension. The police might begin a well-publicized crackdown on drinking drivers and for a short time people might perceive the likelihood of their being apprehended for impaired driving to be higher than before. After a short period of time (usually measured in weeks or a few months, but not years), things return to normal as people change their estimate of the likelihood of apprehension.

It appears that the only time that there is a clear effect of minor changes in statutory penalties on people's behaviour is when people perceive there to be a reasonable likelihood of apprehension. Then, within certain ranges, it is reasonable to assume that people will govern their behaviour, to some extent, according to the formal legal consequences of being found guilty of an offence.

The strongest argument against mandatory minimum penalties is, of course, that they do not reflect the reality of the wide range of circumstances in which offences are committed and in which offenders find themselves. At

present, for example, the indigent single parent of three children, (who, when driving a borrowed car, is stopped at random at 4:00 a.m. on a nearly deserted highway and, although showing no signs of impaired driving, fails a breathalyzer test, which was administered because the police officer detected the smell of alcohol) must be given a fine of at least $300, even though it is fully acknowledged by all (Crown, defence and judge) that he or she cannot pay. Fifty-seven percent of the judges responding to the Commission's survey (Research #6) thought that mandatory minimum sentences restricted their ability to give out just sentences. Another 34% thought that their ability to give out a just sentence was restricted by mandatory minima only rarely. However, as one judge asked, "Are injustices acceptable because they are rare?".

A fuller discussion of the issues surrounding minimum penalties can be found in Chapter 8. At this point, suffice it to say that mandatory minimum penalties create at least as many difficulties as they attempt to solve.

3.4 Parole and Early Release

A sentence of imprisonment is expressed in terms of a fixed time period. Most members of the public understand this to mean an offender will serve this time in custody. Provisions of the statutes governing early release ensure that almost nobody actually serves the full amount of time in custody that is stated by the judge in court. In the most simple terms, most people are eligible to be considered for release on full parole after serving one-third of their sentence; if a person is not released on parole, but has not misbehaved in prison, he or she is likely to be released after serving two-thirds of the sentence in custody and may serve the remainder of the sentence on mandatory supervision. The effect of these provisions is that most people given custodial sentences serve between one and two-thirds of their sentence in custody. There has been a lot of controversy over early release in recent years.

Whatever else parole might be, it is, in the present situation, a discretionary system appended to a discretionary system. Its effects on the term of imprisonment appear to be unpredictable in some instances and systematically unrelated to the reasons for imprisonment in others. Finally, knowledge of the existence of parole appears to have an uneven impact on the original sentence itself.

Briefly, some of the problems that have been noted are:

- Discretionary early release (parole) is based primarily on a theory and a skill neither of which is generally accepted as plausible. The theory — rehabilitation — suggests that when in prison, the offender may change for the better as a result of his experiences. Moreover, it assumes that as a result of these changes he may be assessed as having received full benefit from the prison experience. The skill that is no longer considered plausible is that predictions of future criminal behaviour can accurately be made on an individual basis. Parole as it presently exists in Canada

assumes that the information necessary to make predictions of future criminal behaviour is available after but not before a person has served a substantial portion of his sentence.

- Discretionary early release leads to uncertainty about the actual severity of the sentence.

- The proportion of sentences actually served in custody appears to be inversely related to the severity of the sentence handed down by the judge. In the case of some specific offences, those offenders receiving the longest sentences tend to be released after serving a smaller proportion of time in custody than those originally given shorter sentences. In effect, then, the National Parole Board might be seen as evening out sentences, or, alternatively, as undermining the sentences of the court (Solicitor General of Canada, 1981).

- Although in law, judges are not supposed to take the possibility of early release into account when sentencing offenders, Ruby (1980; 317) appears to be correct when he says that "it does appear, with all respect, that regardless of what courts of appeal may say, judges, being practical men, will bear in mind the possibility of parole in assessing sentences. It may be that in practice sentences today are somewhat longer than they might otherwise be because of the assumption that the parole board will interfere at a future date."

The majority (59%) of the judges who responded to the Commission's questionnaire felt that there probably should be changes from the present situation where an offender can be granted full parole after serving one-third of his or her sentence. Most defence counsel thought that the current system of parole should be changed (52% of the respondents) or left the same (42%). Only 6% were in favour of abolishing it. Although the majority of Crown counsel (65%) also thought that the current system of parole should be changed, a substantial number (25%) thought it should be abolished. Eleven percent favoured leaving parole as it is.

The public, it seems, does not understand the distinction between parole and release on mandatory supervision. As well, they believe that parole authorities are far more lenient than they actually are. Most of the public (65%) thought that only certain offenders should be eligible for parole. Twenty-three percent thought that parole should be abolished and only 9% favoured the current system where everyone is, at some point, eligible for release on parole. The groups the public most often mentioned as being the ones which should never be eligible for parole were murderers and sex offenders. As in other areas, then, it would appear that the public's main concern is with violence and less with the largest group of prisoners — property offenders.

3.5 Sentencing and the Role of the Victim of Crime

It is at the stage of sentencing that the criminal justice process often reveals its inability to adequately address the concerns of victims of crime. There is an expectation that justice will be done, or at least be seen to be done by the person most affected by crime — the victim. There are, however, structural problems which prevent this expectation from being realized.

While the role of the victim is unclear at the time of sentencing, that is but a symptom of the more deeply ingrained problem — the role of the victim vis-a-vis the criminal law. The structure of criminal law is one that allows two adversaries to engage in the dispute — the state and the accused. Consequently, the accused is afforded protection throughout the process in order to ensure that rights are respected and that innocent persons are not convicted let alone punished. The process, however, affords little opportunity for victims to voice their concerns. Although there is an expectation at the time of sentencing that a judge ought to alleviate their plight, the role of the judge throughout the process is to ensure that justice is done — not specifically in the eyes of the victim, but primarily in the eyes of society and the accused. Hence, one cannot expect that the question of how the role of the "forgotten" victim might be enhanced can satisfactorily be answered at the sentencing stage. There are ways in which victims might be better included in and informed about the determination of the sentence, and these are issues that the Commission will address throughout the report. The ultimate issue, however, of the role of the victim in the criminal law process is beyond the mandate of this Commission. The Commission's terms of reference do not address important procedural issues such as the role of the victim at the sentencing hearing.

As many have noted, the victim in our criminal process has no official role other than, in many cases, being a witness for the prosecution. Although the only special status that a "real" victim has is that of witness, victims clearly have interests beyond those of witnesses. Victims help define the seriousness of the offence. Victims have a special interest in sentencing in that they are the ones who have usually been responsible for bringing the offence to the attention of the police and of identifying the offender. But their involvement is more important than that: they have a special personal interest in seeing that justice is done.

One difficulty with the present system of sentencing is that the victim, like all others affected by the process, has no way of knowing whether justice was done through the imposition of an appropriate sentence. Indeed, as a result of charging practices and plea bargaining, the victim may not even recognize the offence that results in the conviction. The reasons for this are complex, but the complexity is largely the result of a lack of clarity and predictability throughout the process. In addressing the lack of clarity and predictability in the process and in constructing a framework to encourage the exchange of information between all those involved in and affected by the sentencing process, the recommendations of this Commission will address at least some of the very real and practical concerns expressed by victims.

One concern expressed by many victims is that for most offences there is no provision in law which acknowledges that they should receive redress for the harm done to them. Although there are some provisions in the *Criminal Code* for restitution to the victim for losses related to property (e.g., sections 653 and 654), there is no mandatory provision that requires the sentencing court to attempt to provide redress to victims for the harm done to them. In providing more guidance to judges as to the greater use of community sanctions, and in establishing clear principles supporting the use of reparative sanctions, the Commission hopes that victims will benefit from these reforms. In terms of sentences of imprisonment, the Commission has concentrated a number of recommendations in Chapter 10 in the hope that the true meaning of these sentences in terms of actual time served will help victims to better understand the sentence imposed by the judge. If not the answer to all the questions, this at least provides an important step to a better understanding of the whole process.

3.6 Courts of Appeal

The importance of developing a uniform approach to address the problems created by unwarranted disparity in sentencing is repeated in the literature and the jurisprudence. The ability of Courts of Appeal to provide the necessary guidance to achieve this goal is, to a large degree, determined by the legislative framework within which they must operate. Whether the current structure for sentencing appeals allows for the development of a national sentencing policy, is a question raised not only by the mandate of this Commission, but that has been asked in the past, by other Commissions. The Ouimet Report (1969, p. 215) expressed the following concern about the structure of Appeal Courts in Canada:

> The...concern is that the development of a consistent sentencing policy is hampered by the absence of specialist courts charged with the responsibility for synthesis and exposition of principle.

In 1892, the *Criminal Code* adopted by Canada prescribed a very circumscribed role for the review of sentencing decisions by Courts of Appeal. Appeals by both the defence and Crown were allowed if the sentence imposed by the trial judge was one that could not be imposed by law. So, for example, if the trial judge imposed a sentence in excess of the maximum penalty, the Appeal Court could review and amend that sentence. It was only in 1921 that Canadian Courts of Appeal were given the power to hear appeals on the grounds of the "fitness" of the sentence. The jurisdiction of these courts was thereby extended to review not only those sentences that were wrong in law but also those sentences that did not appear "fit". The current section of the *Criminal Code* that outlines the power of review on these grounds reads as follows:

> s.614. (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or

(b) dismiss the appeal.

(2) A judgment of a court of appeal that varies the sentences of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

Unfortunately, when the review power of Appeal Courts was extended, no definition of "fitness" was provided by Parliament. Although over the years, various tests of "fitness" have been described in the jurisprudence, there is no consensus among the different provincial courts as to what the precise nature of that test should be. Nadin-Davis (1982) describes the problem:

> How should the Court approach the task of determining whether a sentence is "fit"? Two philosophies appear in the jurisprudence — either the Court should determine what is a fit sentence, and compare, or it should carefully review the reasoning process and reasons of the trial Judge, and, if error is found, make the necessary correction. (pp. 564-565).

The different approaches to the question of fitness illustrate another structural impediment to achieving a uniformity of approach to sentencing: in Canada there exist not one, but ten final Courts of Appeal. Although the Supreme Court of Canada has jurisdiction to hear appeals on all sentencing matters, it is the policy of the court to hear only those sentence appeals involving questions of law (*R. v. Gardiner* [1982] 2 S.C.R. 368). Questions of fitness are left to individual Courts of Appeal.

A review of the fitness of a sentence necessarily requires a consideration of the particular case before the court. Although recently some Courts of Appeal have gone beyond the particular facts before them to make a pronouncement of "tariff"[1], only a few Appeal Courts specifically set out a range (e.g., the starting point in sentencing a robbery of a convenience store is three years), and ranges have been established for only a few offences. Other Courts of Appeal have attempted to provide guidance in the case of broadly-defined offences. Hence for narcotics offences, for example, they have attempted to break down the offence according to its subject matter (i.e. through examples of "hard" and "soft" drugs) and indicate ranges that reflect the more serious or less serious subject matter of that offence.

Even if Appeal Courts in all provinces became more involved in writing "tariff" judgments, the scope of the judgments would still be limited by the nature of the cases heard by the court. Development of policy on a case by case basis is the history of our common law. One of its drawbacks is that if the court wishes to make a pronouncement of principle or range for sentencing cases of break and enter, for example, it must wait until an appropriate break and enter case appears before it. Hence critics have argued that policy should not be left to Courts of Appeal since the disproportion between the number of sentence appeals and the large volume of criminal cases makes it unlikely that Court of

Appeal judgments will have a real bearing on the mass of cases decided by lower courts (see Ashworth, 1983).

As to the nature of the small number of cases appealed, there is a question as to whether Appeal Courts ought to make general policy on the basis of the limited selection of serious or unusual cases that they are most likely to see. As a County Court Judge noted:

> It is clear that appeal judges in most provinces have felt it necessary to lay down rather stern sentencing guidelines in drug cases. Appeal judges are much more isolated from the drug offender and social circumstances than lower court judges. Moreover, their experience tends to be based on a biased sample of cases coming before the courts. They tend to see the more serious cases. (*R. v. Fairn* (1973), 22 C.R.N.S. 307 at 311-312)

The question of whether Courts of Appeal can provide the necessary guidance to ensure a uniformity of approach to sentencing in Canada will be addressed later in this chapter. What is stressed here is that the current structure of sentence appeals was developed for the review of individual cases and is not one that easily lends itself to the formulation of a national sentencing policy.

4. Effects of the Structural Deficiencies in Sentencing

4.1 Disparity: An Introduction

As pointed out in the previous section, there are severe deficiencies in the structure of sentencing in Canada. The most serious deficiencies can be described as follows:

- The absence of a uniform approach to the theory, purpose or principles of sentencing;
- Almost no systematic knowledge of current practice;
- Maximum penalties provide almost no realistic guidance as to the relative seriousness of offences or actual practice;
- The perceived inequity of mandatory minimum penalties;
- Wide ranges of behaviour subsumed under one offence category;
- Little unambiguous and systematic guidance from Courts of Appeal;
- Over 1,000 judges, with varying sentencing philosophies, regularly imposing sentences in criminal matters across the country with few opportunities for communication among them;
- An acceptance of the concept of "individualized sentencing";
- The lack of accountability in either the charging practices of police and prosecutors or plea negotiations;
- Variation across and within provinces in the availability of many sanctions other than the imposition of terms of imprisonment.

Within this context, it is almost impossible for any sentence handed down in Canada to be judged unambiguously unjust. Given there are an almost infinite (or at least a very large) number of dimensions on which two cases can vary, and given that there are no over-riding principles that specify either a priority system of purposes of sentence or the weight that should be given to different factors, almost any two cases can be differentiated along at least one dimension that could justify differential sentencing.

Even if the relevant factors are agreed upon and the priority that they are to be given is clear, the problem is not solved or avoided. If it were decided that a person's role in an offence, or the amount of premeditation, or the offender's criminal record were to be relevant, two judges could easily assess these in different ways. At this point, however, disparity due to differential assessments of similar "facts" is a less immediate problem than lack of consensus of what should be assessed in the first place. If the more basic problems were solved, it would make sense to turn to this second level of concern.

Whether disparity in sentences exists depends on one's theory of sentencing. In order to identify which sentences are unwarranted, and in order to do something about disparity, one needs to have a theory about how sentencing *should* take place, and what the *correct* sentence really should be. If one accepts the view that all sentences handed down for a given offence should not be the same, one needs a "theory" or set of principles to determine how the variability in sentencing should be governed. Assuming that such a coherent theory were to exist, one could begin to examine the evidence for unwarranted variation in sentences and the different ways in which unacceptable variation in sentences can appear within the Canadian criminal justice system.

A typology of unwarranted variation in sentences would include the following:

- Case to case: the same judge may give different sentences to similar offenders convicted of the same offence committed in similar circumstances; (alternatively, the same judge may give the same disposition in cases that differ on relevant dimensions);
- Judge to judge: different judges may approach similar cases in different ways and as a result of the different approaches, they may assign different sentences;
- Court to court: different courts in the same or different provinces may, for various reasons, have developed different standards for what is an appropriate sentence for particular types of cases. These different standards may not be related to factors such as the perceived severity of the offence in the community, the frequency with which the offence takes place or other factors that Courts of Appeal sometimes say are relevant in sentencing offenders.

Whatever theory or set of principles is seen as an appropriate guide for sentencing, it is unquestionably a form of "unwarranted disparity" if identical

cases were to receive different dispositions as a result of being heard by different judges. The problem with the current situation is that two judges suggesting different sentences for an identical case might both be "right" (or, for that matter wrong) if one accepts the legitimacy of different priorities being given to different purposes or principles of sentences. Unwarranted variation, then, would appear to be almost inevitable.

The Commission heard, from time to time, from various people, including judges, who stated that they did not believe there to be evidence of disparity. Although their reasons vary, most seem to believe that the perception of apparently unjustifiable disparity is due to incomplete knowledge of the case(s) in question. They seem to believe that if one looked more closely, a factor that differentiated two cases or a factor that justified the particular sentence could be found. In a sentencing system governed by clear principles, such *post hoc* analyses would not be acceptable or possible. Under the present sentencing structure, however, such analyses are not only possible, but, are encouraged. If a large, or perhaps infinite, number of factors can be considered to be relevant, then almost any sentence can be justified.

An acceptance of the present state of sentencing in Canada can be seen at times as a preference for more ambiguity rather than less. The Canadian Bar Association, in its brief to the Commission suggested that the statement of principles that was contained in the Criminal Law Reform Act, 1984 (Bill C-19) be amended in certain ways. One suggestion was that the reasonably clear statement "a sentence should be similar to sentences imposed on other offenders for similar offences committed in similar circumstances" be replaced by "arbitrary disparity of sentences should be avoided". The major difficulty with their suggestion is that the process of determining what constitutes "arbitrary disparity" involves much more of a value judgment than does the determination of what factors are most relevant in determining whether offences or circumstances are similar.

As noted above, the problem of unwarranted variation in sentencing is not caused by the judges who are doing the sentencing but rather is located within the system or structure in which the sentences are handed down. One would expect, therefore, that almost inevitably there would be variation in sentences handed down in similar or identical cases. Indeed, the present system not only tolerates varying dispositions in similar cases (and similar sentences given in different cases) but it breeds such unacceptable variation.

4.1.1 Disparity: Perceptions of the Problem

The majority (74%) of the over 400 judges who responded to a survey for this Commission (Research #6) indicated that there was at least a "fair amount of variation from judge to judge" in the way a specific case would be sentenced. The real difficulty, however, was noted by more than one judge. For example, one judge wrote that "There is variation but to what extent it is unwarranted is difficult to say". Or, as another judge put it, "There appears to

be variation. I cannot say if it is unwarranted or a reflection of the differences in our provincial conditions." Other judges were more certain: "There is far too much variation from judge to judge," wrote one judge. In many ways, of course, the Commission was asking an impossible question. Few if any judges in Canada have sufficient information on which to evaluate the sentences of others. Those who indicated that they thought that there was a problem were most likely to identify the different personal attitudes and/or approaches of judges to sentencing as the cause.

The question asked of defence and Crown counsel was more direct and the results less ambiguous (Research #5). Almost 19% of defence counsel and 29% of Crown counsel endorsed the view that "there was a great deal of unwarranted variation" in the sentences handed down in their own jurisdiction. An additional 75% of defence counsel and 63% of Crown counsel thought that there was some unwarranted variation. In other words, approximately 93% of defence and 92% of Crown counsel were of the opinion that there was at least some unwarranted variation in sentences in their own jurisdictions. In each of the six provinces surveyed for both Crown and defence counsel, at least 80% recognized this problem in sentencing.

When asked about unwarranted variation across Canada the results were even more dramatic. Forty percent of defence counsel and 41% of Crown counsel thought that there was a "great deal of unwarranted variation" in sentences handed down across Canada. Indeed, all but about 3% of the almost 700 respondents thought that there was at least some unwarranted variation across Canada.

Defence and Crown agreed both with the judges and the analysis suggested here: the primary reason for this unwarranted variation was seen to be different personal attitudes and/or approaches of judges.

There is no question, then, that those within the system perceive there to be unwarranted variation. As indicated earlier in this chapter, unwarranted disparity was also noted by many other groups and individuals as a problem worthy of attention.

4.1.2 Unwarranted Variation: The Evidence

As stated above, until one has a coherent theory of sentencing, it is impossible to determine whether variation in sentences handed down for a given offence (or a number of different offences) is appropriate. How, then, in the absence of such a theory can one determine whether there is unwarranted variation? The answer is reasonably straightforward: one can look at sentencing practice as well as the perceptions of those who have direct experience with the criminal justice system.

There is, however, a problem of methodology which makes it easy for people to deny the existence of any form of disparity. Since unwarranted

variation implies that the variation cannot be justified, demonstrating the existence of disparity requires an examination of the particular circumstances of individual cases. This is best accomplished by an in-depth analysis of criminal cases as documented by a researcher present in court. However, given its time consuming nature, this form of research can investigate only a limited number of cases and sometimes requires resorting to experiments which use hypothetical cases (e.g., Palys, 1982). To gather statistics on a large sample of cases, on the other hand, provides the numbers, but not the details. Hence, research conducted to demonstrate the existence of unwarranted disparity can be dismissed as unrepresentative (given the small sample of cases) and hence, as insignificant. Research, rich in numbers, can be dismissed as indicating only variation since it lacks the detail required to prove unjustified variation. So, just as it is demanding and difficult to prove the existence of a significant degree of unwarranted disparity, it is quite easy to simply deny its existence.

We can now turn to the question of whether any data exist on unwarranted variation in sentencing. Probably the best known research on sentencing in Canada — John Hogarth's 1971 book, *Sentencing as a Human Process* — did not focus on disparity *per se*. Instead, the focus was on the manner in which judges went about determining the sentence in a particular case. Briefly, Hogarth found that the penal philosophy and judicial attitudes of the sentencing judge determined the kind of information that the judge heard and found important which, in turn, determined the sentence. There was more consistency across judges who had similar judicial outlooks than there was across judges generally. Knowing the "facts" of the case was not as useful in predicting the sentence as knowing how a judge defined the case before him. From Hogarth's data it is clear that different judges would be expected to sentence similar cases differently. It is also quite clear that a necessary condition for changing this while maintaining individualized sentencing would be to create a common approach to sentencing.

Hogarth's general finding — that the judge's sentence was related to his or her penal philosophy and judicial attitudes — was replicated in another large-scale study of sentencing. Palys and Divorski (1984) report the results of a simulation exercise carried out with over 200 Provincial Court Judges who were attending judicial seminars. Five hypothetical cases were used and judges were asked, among other things, to indicate what sentence they would recommend. In all five cases there was variation in the sentences that were recommended; in some cases the extent of it was quite dramatic. What is most important, however, is that the purpose of sentencing emphasized by the judge was related to the severity of the sentence imposed. In other words the penal philosophy of the individual judge seemed to be an important determinant of the outcome.

It should be noted that the amount of apparently unwarranted variation in sentences seems to vary from case to case in experiments such as these. It is not clear whether variation is linked to specific facts of the cases or to specific offences (or some combination of the two). Hence it is somewhat difficult, in

much of this research, to estimate the degree of variation in sentencing due to differences among judges since extensive studies on this topic have not been carried out. It is clear, however, that for all combinations of fact situations and offence, there is some variability in the sentences recommended for the identical cases and in some instances the amount of this variability is dramatic.

Simulation exercises such as that carried out by Palys and Divorski (1984) and studies such as that by Hogarth (1971) run the risk of reflecting difficulties in the methods. Specifically, some have suggested that judges in these studies may have given less thought to the exercises than they would have given to real cases. As a result, they may have answered some of the questions more casually than they would have in a real situation. These casual answers, then, would be expected to be more random, showing unwarranted variation where it does not really exist. This is an important and plausible argument. However, the data from the studies do not support this criticism. In particular, if the variation in the sentencing of identical cases was due to random error, it should not be systematically related, as it was, to other factors such as the judge's penal philosophy.

Another source of information on the issue of disparity are studies that compare sentences across jurisdictions. Some such data were presented in the 1984 report of the federal Department of Justice on *Sentencing* (Canada, 1984). It was recorded in that report that for assault causing bodily harm, but not for fraud, there was wide variation across provinces or other geographic units in the proportion of convicted offenders who were incarcerated. Similar results have been found in other Canadian studies (see, for example: Jaffary, 1963; Jobson, 1971; MacDonald, 1969). A recent study by Murray and Erickson (1983) showed wide variation in the use of different dispositions across Ontario jurisdictions for certain cannabis offenders.

A study on *Long Term Imprisonment in Canada* undertaken for the Ministry of the Solicitor General has shown that sentences for second degree murder were noticeably higher in Quebec than elsewhere in Canada (Canada, 1984a; 16-17). Statistical analyses conducted by the Commission and the Department of Justice revealed that there were significant differences in the sentences handed down by the courts in different provinces (Hann, Moyer, Billingsley and Canfield, 1983; Hann and Kopelman, 1986). Data collected on the sentences imposed across Canada for most criminal offences in the *Code* revealed that the spectrum of sanctions used by the judges in sentencing particular offences (e.g., gross indecency, procurement, assault causing bodily harm and numerous other offences) was very wide, encompassing fines, probation, suspended sentences and provincial and federal terms of incarceration. This is indicative of the existence of some unwarranted disparity, since offenders convicted, for example of the offence of assault causing bodily harm are liable to receive sentences ranging from a fine to a penitentiary term. The Commission also undertook research on the fine as a sentencing option in Canada (Verdun-Jones and Mitchell-Banks, 1986). According to the researchers, "there is a wide disparity in the length of prison sentences that

offenders are serving in default of payment of fines of the same amount. Some offenders are serving their fines at the rate of $3.00 per day, while others are serving them at the rate of $70.00 per day".

Findings such as these — where variation is found across communities — are somewhat difficult to interpret in the absence of a clear theory of sentencing. In particular, it could be argued, at least on a *post hoc* basis, that there were some factors on which the communities (or cases) varied that could legitimate this variation. If this were the case, however, one would expect that such factors would be well-known and accepted. In most cases where variation across localities has been found, this was not known prior to the study. It is, therefore, somewhat difficult to argue that this variation was a result of a purposeful decision to have different sentencing policies.

These findings, and others like them, taken in the context in which sentencing occurs in this country, strongly suggest that there is considerable unwarranted variation in sentencing. The findings that the sentence is closely associated with the particular sentencing philosophy of the judge supports the suggestion made earlier that the primary difficulty with sentencing as it exists at the moment is that there is no consensus on how sentencing should be approached. As noted in the previous section, this is the cause most often noted by judges, lawyers, and other commentators.

4.2 An Over-Reliance on Imprisonment

As already stated, Canada has a relatively high rate of imprisonment compared to most western democracies (see Chapter 11 for a more detailed breakdown of Canada's incarceration rate).

In many ways, this is not surprising given the structure of sentencing in Canada. The *Criminal Code* defines penalties principally in terms of a maximum term of imprisonment, which may be imposed. It may do this expressly or implicitly by reference to the offence as a summary conviction offence. All summary conviction offences in the *Criminal Code* (except contempt of court) carry a maximum penalty of a term of imprisonment not exceeding six months and/or a fine of up to $2,000. In this context, all sanctions other than imprisonment appear to be "alternatives" to incarceration because they are not expressly indicated as available penalties for individual offences.

Much concern over the years has been expressed concerning our level of dependence on incarceration as the "standard" penalty for criminal offences. In the submissions to this Commission, most groups and individuals called for restraint in the use of custodial sentences and advocated a greater use of community sanctions. At the same time, it was noted that there was a need for a wider range of community sanctions than exists at the moment:

> Only when a wide range of sentencing options are available in our communities can we expect to see a more significant reduction in the use of

> incarceration and a greater emphasis on the reconciliation of the victim, offender and community (Canadian Association of Elizabeth Fry Societies, 1985).
>
> [S]pecial care must be taken...to see that expensive prison resources are not squandered away on relatively harmless offenders, but reserved for the most serious cases (The John Howard Society of Canada, 1985).
>
> The Quaker Committee on Jails and Justice urges that community options become the norm for sentencing...Any one of these would be a more appropriate response that the present norm, incarceration (Quaker Committee on Jails and Justice, 1985).

The following points were made by individuals:

> Canadians...are seriously misinformed about the economics of the criminal justice system. Judges rarely, if ever, consider the costs of pronouncing a sentence...The costs of imprisonment are staggering and they would fail on any cost-benefit analysis.
>
> There are many factors which may explain the...high rate of imprisonment in Canada. First of all, the law is for the most part, quite punitive. By this, there doesn't seem to be alternatives for imprisonment legislated into the Criminal Code.
>
> Prison should be for violent offenders. Non-violent offenders should be sentenced by other alternative measures (translation).
>
> Prison has come to be seen as the ultimate sanction and is therefore used even though there may be no pragmatic necessity for it.

Given that the *Criminal Code* presumes incarceration to be the standard penalty and leaves it to the courts to decide when an "alternative" would be appropriate, it is important to look to the Courts of Appeal to see if they have been able to provide guidance more in keeping with much of what has been said over the years about restraint in the use of imprisonment and imprisonment as a last resort.

5. Courts of Appeal: A Solution?

The preamble of the Commission's mandate states that "...unwarranted disparity in sentences is inconsistent with the principle of equality before the law". In order to achieve equality before the law in the sentencing process, there must be some guidance to ensure consistency in the application of the laws and practices. To evaluate whether Courts of Appeal can provide the necessary guidance to ensure a uniformity of approach to sentencing in Canada one must first ask what kinds of guidance are required to achieve this goal.

There are three essential questions integral to the determination of a just sentence. First, and most generally, what is the purpose or aim underlying the imposition of this sentence? Second, what type of sanction does this particular crime deserve? Third, if imprisonment is the only appropriate sanction, what is the length of imprisonment that this particular crime deserves? There will never be a simple answer to any of these difficult questions. More important

than the answer, however, is that judges across the country have a common approach to these questions. Whether the Courts of Appeal can provide the necessary guidance to ensure at least a shared approach will be examined below.[2]

5.1 General Principles

Since appellate review of the fitness of sentences began in 1921, volumes have been filled with case law on sentencing, but by and large the principles that have been established are general in nature and have neither served as a structure for, nor limit upon, the vast discretion bestowed upon the sentencing judge.

The need to achieve uniformity was not traditionally considered to be a valid objective of sentence appeals since our process was modeled on the principle that each sentence should be tailored to suit the individual offender as opposed to the individual offence. This view dominated the jurisprudence until the mid-sixties, when the courts of appeal first recognized that *uniformity of sentence* was a valid objective and that appeal courts could review sentences if there had been marked departure from "sentences customarily imposed in the same jurisdiction for the same or similar crime" (*R. v. Baldhead* (1965), 4 C.C.C. 118 (Sask. C.A.).

Although this shift in jurisprudence cleared the path for the development of appellate guidelines and ranges, appeal courts have shown a reluctance to embrace the notion of uniformity for fear that broad general principles will fail to take into account the unique characteristics of each offender (as illustrated by a 1983 decision of the Nova Scotia Court of Appeal in *R. v. Campbell* (1983) 10 W.C.B. 490, "...it is always necessary to make the punishment fit the criminal rather than the crime").

In the first chapter of *Sentencing in Canada*, Nadin-Davis (1982) reviews the "Philosophical Aims and the Practice of Sentencing". Having conducted an exhaustive review of the jurisprudence, he concludes:

> It appears almost customary to preface a discussion of sentencing with an abstract discourse on the philosophy of sentencing, or at least a list of its aims. An emphasis on what courts *do*, however, relegates such analysis to the second level of importance, as courts infrequently involve themselves in any real examination of the aims of the sentencing process. Where they do venture into these murky waters, their statements are often misleading and confusing (p. 27).

The same conclusion was reached in the studies conducted for this Commission (*Young, 1984, 1985*). A review of over 1,000 sentencing decisions of courts across the country revealed that although general principles of sentencing are discussed in some judgments, there exists no consensus as to either the priority of principles or their meaning. In fact, in a discussion of sentencing principles in the *Canadian Sentencing Handbook* (1982), the text refers to the importance of "blending" sentencing principles:

> There are no fixed formulas to pre-determine the outcome of blending or balancing the principles as individualized in a given case. By the very nature of the principles themselves the offence must be brought to a focus in a given community at a given time in terms of an all too human drama. As MacKay, J.A. pointed out in *R. v. Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.) the "blend" or the "balance" of the various factors will not only vary according to the offence and its nature, but also as to time and place (p. 26).

It is not that Courts of Appeal, or trial courts, never state the principles underlying their approach to sentencing, it is that they do it infrequently and when they state these aims, the practice of blending and balancing results more in obscuring their approach than developing a uniform approach to sentencing aims.

To make it even more difficult to extract guidance from the jurisprudence, there is a general tendency for Appeal Court judgments to dispose of sentencing matters in a cursory manner. Hence, even when a case provides what appears to be an ideal opportunity to enunciate a general principle to guide a judge as to the type of sanction to impose in a particular case, the matter will likely be dealt with in a single sentence (e.g., "...using our best judgment as to what is in the interest of society, we will change the two year sentence to suspended sentence and probation").

When a principle is cited, it is most likely to be "general deterrence". This principle currently provides the most frequently cited justification for the imposition of a custodial term. Judgments still occasionally cite rehabilitation as a rationale but it is used to support a decision not to incarcerate and to justify the imposition of a community sanction to better suit the needs of the individual.

Some courts have complained that the principle of general deterrence to justify a sentence of imprisonment represents the "illogicality of punishing one person for what others might do" (see *R. v. Burnchall* (1980), 65 C.C.C. 505). Many trial court judges complain that higher courts *only* consider interests of general deterrence in reviewing fitness. Tariff sentencing is evidence that general deterrence is gaining the increasing support of Appeal Courts. As will be discussed below, tariffs are, in essence, a form of minimum sentence that in most cases require the sentencer to impose a term of imprisonment. Although the tariff approach adds some certainty to the process, it is based on a presumption of incarceration that runs contrary to the principle of restraint in the use of custodial sanctions.

As to how a judge's approach to sentencing aims actually affects his or her sentencing practice, a study as reported in *Sentencing* (Canada, 1984; 17) had revealing results:

> A recent study involving "simulated" cases revealed considerable variation among sentences when some 200 judges were asked to assign sentences in the same set of cases. As the study was a simulation, it is of course only suggestive of actual practice. However, the study did show that the differences in sentences were related to the difference of opinion among the judges regarding

the appropriate aim of sentencing in each case, the weight to be attached to particular objectives, and the relative importance to be attached to particular facts.

The individual judge's approach to the aims of sentencing thus has far-reaching implications for the sentence he or she will impose. To date, the Courts of Appeal have not issued judgments resulting in any kind of uniformity of approach to the general principles of sentencing in Canada.

5.2 Custody or a Community Sanction: The In/Out Decision

Given that a sentence of incarceration represents the most severe sanction the state can impose on an offender, justice demands that the decision of whether to incarcerate must be based on clearly-articulated principles, whether legislative or judicial.

The *Criminal Code* provides little guidance to judges as to when to impose imprisonment as a sanction. With the exception of the few mandatory minimum terms of imprisonment prescribed, the *Code* provides only that the punishment is to be "in the discretion of the court". There have been recent legislative reforms in other jurisdictions to provide judges with some direction to aid them in the determination of the decision of whether to incarcerate ("in") or to impose a community sentence ("out"). A legislature may, therefore, construct, with varying degrees of specificity, guidelines concerning the decision of whether to impose custody or a community sanction.

Given that there are no legislative guidelines to structure the "in/out" decision in Canada, the Commission reviewed the jurisprudence to uncover whether Courts of Appeal had filled this important gap by establishing principles which would guide judges in their approach to this most difficult determination. Perhaps the most significant finding arising from an extensive review of the jurisprudence was that although judgments reveal no clear principles to guide the in/out decision, there exists a presumption in favour of incarceration for most offences reviewed by the courts. "Tariff" judgments generally take the form of providing a "starting-point" for a sentence of incarceration. Tariff judgments simply put numbers (quantum) to the presumption of incarceration so that, for example, robbery no longer simply carries a presumption of incarceration, but carries a three year presumptive term (e.g., in Alberta) unless "exceptional circumstances exist". Unfortunately, little guidance is given regarding the nature of the circumstances necessary to depart from the presumption. Simply put, the guidance is not directed to whether a judge should impose a sentence of imprisonment or a community sanction but rather presumes the "in" decision and directs judges as to the "starting point" for the length of term to impose.

Trial court judges appear more sceptical of this over-reliance on incarceration and many judgments have expressed concern regarding the tariff or presumptive incarceration specified by Appeal Courts. Although the principle of restraint as cited by the Ouimet Committee and the Law Reform

Commission of Canada has had an impact on some judgments, and although in 1975 the Alberta Court of Appeal stated that"... the offences which require a prison sentence grow fewer and fewer as more humane and varied types of punishment are developed" (*R. v. Wood* (1975), 26 C.C.C. (2d) 100 at 107), studies of the jurisprudence reveal that if there is any operative principle in the case law to guide the in/out decision, it is the principle that certain offences must attract custodial terms.

The case law reveals no general principles as to what factors justify a departure from the "in" presumption. Courts typically consider factors peculiar to the accused and his or her circumstances, and have not developed a general rule or approach.

Given the structural problems discussed earlier, which determine the number and nature of cases heard by Courts of Appeal, it is no wonder that any guidance that is provided by the jurisprudence has as its focus only the more serious sanctions. Although there has been a movement by some Courts of Appeal toward providing more guidance in the form of tariff judgments, it is clear that although these judgments may provide for a uniform approach to what the "starting point" for a sentence of imprisonment ought to be for a given offence, they provide no guidance to judges in their consideration of an even more difficult question — whether to impose a community sanction or to resort to the most onerous sanction of imprisonment.

5.3 Imprisonment: Setting the Range

As described earlier, the term "sentencing tariff" is often used to describe the role of appeal courts in establishing guidelines for the determination of sentences. In the past seven years there has been a very gradual movement in some provinces toward a specific delineation of a sentencing range. Not only do *few* appeal courts specifically state a presumptive range for sentences of imprisonment, but ranges have been established for only a few offences.

For the most part the use of a specific tariff or starting point has been confined to sentencing for robbery, sex offences and drug offences in the provinces of Alberta, Nova Scotia and New Brunswick.

The approaches to tariff also differ. The Alberta tariff is far more offence-oriented (with a focus on offence characteristics: e.g., unsophisticated, commercial outfit, absence of harm, modest success) whereas the Nova Scotia tariff is offence as well as offender-oriented (offender characteristics are listed: e.g., intoxication, youth, previous good character, etc.).

Another difference of approach is that the Nova Scotia tariff is expressed as a minimum sentence (requiring rigid application that can be ousted by exceptional circumstances) whereas the Alberta tariff is expressed as a mere starting point of calculation. Indeed the courts have described the process that should be followed after taking into account the starting point, "...the specific

sentence for the specific accused should then be adjusted on a balance of the compendium of aggravating and mitigating circumstances present in the case". As stated by the Alberta Court of Appeal in *R. v. Hessam* (1983), 43 A.R. 378, "...the end of this process is not uniform sentences, for that is impossible. The end is a uniform approach to sentencing".

These contrasting approaches to the tariff reflect disparate underlying objectives. In Nova Scotia the creation of a minimum sentence for robbery was based on the objective of general deterrence. In Alberta the tariff has developed more in response to the recognized need for equity (uniformity of approach).

A study of the extent to which trial court judges take into account appellate guidelines in arriving at their determination of an appropriate sentence revealed that it is still the exception for a trial court judge to cite and apply a range set by the Courts of Appeal.[3]

Cases are not consistent as to what the role of the trial court with regard to following Appeal Court decisions ought to be. Two disparate cases illustrate this point. In *R. v. Basha* (1978), 23 Nfld. & P.E.I.R 310 (Nfld. Prov. Ct.) the trial judge maintained that in deciding on a fit and proper sentence, "...one must have regard to sentences being handed down by the Court of Appeal in this province and in other Canadian provinces, so that where possible a uniformity of sentencing is applied." The trial judge examined the cases and applied the range. The Court of Appeal overturned the judgment and said "What this court must consider on appeal is the appropriate range of sentencing, taking the crime, the circumstances surrounding it and the offender himself into consideration" (see (1979), 23 Nfld & P.E.I.R. 286 (Nfld. C.A.)). Hence, it is not surprising, in light of these judgments, that trial courts lack the impetus to discover the appropriate range (*Young, 1984*).

The second case presents the opposite view. In *R. v. Burnchall* (1980), 65 C.C.C. (2d) 490, the trial court judge rejected appellate guidelines as fettering his discretion and said that only Parliament has the power to specify a minimum sentence for an offence. The Court of Appeal overturned the decision of the trial judge, stating that the guideline only says that it would be an error in principle not to impose a custodial sentence for a particular offence (trafficking in narcotics), leaving undefined "exceptional circumstances" for individual cases.[4]

In the review of those judgments that do establish a range or "starting point" for sentences of imprisonment, the case law was also examined to establish whether Appeal Courts have also developed guidelines to assist sentencing judges in their analysis of mitigating and aggravating factors. In other words, is there guidance to judges as to when they might depart from the prescribed tariff?

The case law reveals that with the exception of the Alberta Court of Appeal, there has been little movement at the appellate level towards

developing clear and meaningful guidelines with respect to the operation of mitigating/aggravating circumstances.

There are two ways an appeal court can provide concrete guidance on these matters. First, through a statement of principle, in the judgment, outlining the specific effect of an aggravating/mitigating factor. Second, through an explicit articulation of the logical link between the factor(s) cited and the ultimate disposition (*Young, 1984*).

Although both forms of guidance are rare, the second appears even less frequently in reported judgments. In fact, many of the reported sentencing cases are so terse that analysis of how factors were used is impossible. A vast majority of appeal court decisions lists a catalogue of factors present in a case without classifying these factors as aggravating or mitigating. The court then throws the factors into a melting pot and, "...taking into account all the circumstances" arrives at a final disposition, without giving any indication of the weight attributed to the factor or the impact a particular factor had on the ultimate disposition.

Some judgments go beyond an "impressionistic approach" to state a general principle of general application. However, even these judgments usually just acknowledge that a certain factor can operate as aggravating or mitigating in certain circumstances (without reference to weight).

An examination of 700 cases in three provinces revealed that there were just over a dozen cases in which courts even attempted to outline principles that extended beyond the unique facts of the case. There is no apparent consensus on whether certain factors are aggravating or mitigating. When recurring factors were isolated to study consensus, not only were there discrepancies between appeal courts of different provinces, but also within the same court. Even if such disparate approaches are acceptable when it comes to questions of range or tariff, one might ask "...whether respect for the law can be nurtured if intoxication will mitigate in New Brunswick and not in Alberta" (*Young, 1985*).

Finally, the fact that those ranges that are created in appellate judgments take the form of a "starting point" has two important consequences. First, either explicitly or implicitly, "starting points" establish a minimum sentence of imprisonment to be imposed in similar cases. For a number of reasons that will be discussed in detail in Chapter 8, the Commission is opposed in principle to minimum sentences, whether in the form of a guideline range or a legislatively prescribed penalty. If the principle of restraint in the use of imprisonment is to be taken seriously, a guideline range cannot take the form of a minimum starting point. Imprisonment as a last resort requires that, for most criminal cases that the courts hear on a daily basis, "the starting point" must be a community sanction. Second, inherent in the notion of a "starting point" is that it does not prescribe an upper limit — or an "ending point". Any departure from the range therefore must be to impose a less onerous sanction than the prescribed years of imprisonment for that particular offence. *A*

guideline range should not prejudge the issue of which way to depart. In fact it is inconsistent with a policy of restraint to define a range in terms of the least amount of time that should be served in prison, with not even an upper limit to cap that range.

Hence, a careful review of the jurisprudence reveals that where Courts of Appeal have developed policy or guidelines for the determination of sentences, the guidelines reveal a policy of presumptive sentences of incarceration for most offences reviewed and set a corresponding minimum term of imprisonment. The logic appears to be that there can be too little punishment — but there cannot be too much.

5.4 Conclusion

In the past decade, Courts of Appeal in a few provinces have taken a more active role in developing sentencing policy through tariff judgments. Tariff sentencing in Canada is still at an incipient stage and although it may be too early to judge the extent to which it will become the rule rather than the exception for Courts of Appeal, one thing is clear: there are factual limitations that will prevent Courts of Appeal from ever providing the kind of guidance required to ensure that judges across Canada share a uniform approach to the determination of sentences. First, there is the very real and pressing consideration of the timeliness of reform. An integrated approach to a comprehensive set of sentencing reforms requires that the guidelines essential to that reform accompany the proposals when they are acted upon by Parliament. The timing is essential. The Commission's proposals for reform cannot wait for guidance to be developed by Courts of Appeal on a case by case basis over a long period of time. The guidance itself is an essential part of the reform proposed.

Second, since guidance is such an essential part of the integrated reform that will be proposed, the Commission cannot depend exclusively on Courts of Appeal, who in the past have never been required to provide this kind of guidance, to adopt the new role of policy-maker. A history of common law is a history of solving problems on a case by case basis. Courts of Appeal seldom have attempted to embark on a course of policy-making for a good reason: they must remain free to judge a new case on its own merits the following day.

Courts are primarily a reactive institution. They cannot initiate policy and must solve problems as they arise. Other policy-making bodies like Commissions are not hampered by this inherent constraint. They can make policy with a view to the future, not only in response to the past.

Within the current structure, Courts of Appeal perform an essential function in reviewing sentences imposed by trial courts. In the past they have performed their task with little guidance from Parliament. To expect that a uniform approach to sentencing can be developed with clarity and consistency by ten different courts is to over-simplify the complexity of the task of sentencing.

Endnotes

[1] A term often used to describe the role of Appeal Courts in establishing ranges or guidelines for sentencing.

[2] This is a question that the Commission gave priority to and to which it devoted considerable research resources. In addition to analysing five extensive studies of Canadian jurisprudence undertaken for the Commission on this topic (*Young, 1984, 1985*), the Commission referred to the literature (e.g., Ruby, 1980; Nadin-Davis 1982) and to references prepared by organizations such as the Reserach Facility of the Law Society of Upper Canada.

[3] Alberta trial courts appear to adhere to appellate guidelines with greater frequency than any other province (Alberta also has a better reporting of Appeal Court decisions).

[4] In another case the trial judge lamented that there were no guidelines as to what constitutes 'exceptional circumstances' and the Court of Appeal's response was '...if that means he wants exhaustive guidelines, I decline to accept the invitation.' (*R. v. Doherty* (1972), 9 C.C.C. (2d) 115).

Chapter 4

Public Knowledge of Sentencing

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Chapter 4

Public Knowledge of Sentencing

The Commission conducted several nation-wide polls to assess public knowledge of sentencing laws and practices in Canada. The results indicated substantial discrepancies between public knowledge and reality. This finding is important for several reasons. For instance, without public awareness of maximum penalties one must question how they can serve to deter potential offenders. Without knowing the reality of criminal activity in this country, the public cannot be expected to have confidence in the administration of justice. In order to understand opinion regarding sentencing it is necessary to determine the extent of public knowledge; in order to overcome deficiencies in public awareness one needs to know something about their sources of information. Members of the public rely almost exclusively upon the news media for information regarding sentencing. Accordingly, several content analyses of the news media were conducted. This Chapter will summarize some of the findings from opinion surveys and research upon the Canadian news media.

1. Knowledge of Penalties

When the average person thinks of sentencing he or she probably thinks first of penalties: statutory penalties and those handed down in the average cases. A good place to begin an examination of public awareness of sentencing is with the issue of maximum penalties.

1.1 Maximum Penalties

In theory at least[1], maximum penalties provide judges with an upper boundary within which they may evaluate particular cases. As well they can serve several purposes for the public. Maximum penalties can provide an indication of the relative seriousness of offences, a yardstick against which to evaluate sentences and an indication of the maximum penalty which they may face if they commit the offence.

But maximum penalties can inform only if the public are aware of their existence and their relative magnitudes. Research suggests that the public consistently under-estimates the severity of maximum penalties prescribed by the *Criminal Code*.

In one survey (Research #2), a representative sample of Canadians was asked to estimate the maximum penalties attached to a series of offences. Table 4.1 compares average public estimates with the maxima prescribed by the *Criminal Code*. The findings are quite clear.

Table 4.1

Public Estimates of Maximum Penalties[a]

Offence (Criminal Code Maximum)	*Average Public Estimate*
1. Robbery (Life)	7 years
2. Break and Enter home (Life)	4 years
3. Break and Enter business (14 years)	4 years
4. Theft over $200 (10 years)	4 years
5. Assault (5 years)	5 years
6. Theft under $200 (2 years)	1 year

[a] Source: Research #2.

For all offences except theft under $200, (this question was posed prior to the change from $200 to $1,000) the majority under-estimated the severity of the maximum penalty. For example, while the maximum penalty for robbery is life imprisonment, the average estimate by members of the public was seven years. Sixty percent estimated the maximum as under 10 years. Clearly then, the majority of people have little accurate idea of how severe sentences can be, and in this respect they are no different from citizens of other countries.[2]

Some might argue that people are unfamiliar with maximum penalties because they never read about them. The maximum penalty for most offences seldom appears in the news. Impaired driving is an exception. A great deal of publicity attended the recent government legislation raising to five years imprisonment the maximum penalty for impaired driving. When the public was asked what the new maximum penalty for this offence was, fully three-quarters chose "don't know". Of those who did venture a response only 4% were correct. So it is not simply a matter of the media conveying the information. Even when they do, the public appears to profit little in terms of increased knowledge.

1.2 Minimum Penalties

There are few minimum penalties prescribed by the *Criminal Code*. Recent concern about drinking drivers impelled Parliament to raise the minimum penalties for impaired driving. In the words of a government

publication, (Department of Justice, 1985) these amendments contain "severe penalties" that "are intended to stop impaired people from getting behind the wheel". General deterrence in other words. These penalties can deter only if people are aware of them, but they are not. Despite the publicity surrounding the new legislation, and a large-scale effort by the Department of Justice to educate the public, people seem to have little idea of the new penalties. In August 1986, by which time one might have expected the public to have learned of these changes, the Commission asked respondents to a nation-wide survey to name an offence that carries a minimum penalty. Only one-quarter cited impaired driving. Most chose other offences that do not carry minimum penalties. (For example 29% thought manslaughter carried a minimum penalty). Whatever they do achieve, minimum penalties can hardly be expected to contribute to general deterrence if the public are largely unaware of their existence.

2. Sentencing Practice

2.1 Perception of Leniency

The most popular question on opinion polls dealing with criminal justice has concerned public opinion of sentencing practice. The question typically posed is the following: "In general, would you say that sentences handed down by the courts are too severe, about right or not severe enough?" Dissatisfaction with sentencing practice appears to have reached a peak in 1983, when 80% of respondents to a nation-wide poll expressed the view that sentences in general were too lenient (Doob and Roberts, 1983). The Canadian Sentencing Commission posed this question and found that dissatisfaction had declined. The percentage expressing the view that the courts are too lenient is now approximately 64%. The Commission posed several additional questions to determine the foundation for this opinion. Is it based upon accurate perceptions of sentencing trends?

2.2 Perceptions of Imprisonment Rates

If the public knows little about maximum and minimum penalties, does it have a better idea of actual sentencing practice? Apparently not. In one poll it was asked to estimate, for a series of offences, the percentage of offenders who were incarcerated. The estimates were then compared to recent data showing current practice (See Appendix A for a description of data-sources used by the Commission). Table 4.2 confirms trends revealed in earlier research:[3] most people under-estimate the severity of sentencing. Consider, for example assault causing bodily harm. More than half the offenders convicted of this offence go to prison. Most members of public think that the proportion imprisoned is lower. So the courts are harsher than most people think. This is an important fact to bear in mind when evaluating public demands for harsher sentences. If people's knowledge of sentencing was better, their opinion might be too.

Table 4.2

Public Estimates of Imprisonment Rates: Assault and Break and Enter[a]

	Assault Causing Bodily Harm (Actual Rate = 56%)	Break and Enter (Actual Rate = 64%)[b]
Public Knowledge:		
Approximately Accurate	17	21
Sees system as more lenient[c] than it is	70	68
Sees system as harsher[d] than it is	6	5
Doesn't know	7	6
	100%	100%

[a] Source: Research #3

[b] Dwelling house and business premise combined

[c] Assault = 0 – 39%; Break and enter = 0 – 49%

[d] Assault = 70% – 100%; Break and enter = 80% – 100%

3. Early Release

Sentences do not often make front-page news. Early release, however, is a different story. Discussion of the recent *Act to Amend the Parole Act and the Penitentiary Act* (S.C. 1986; c-42) dealing with the procedure whereby certain inmates may have their remission-based release withheld has been in the spotlight for some time now. Members of the public appear to have profited little from the debate. Public knowledge of early release mechanisms is poor. Although parole and mandatory supervision are quite distinct, most people are unable to distinguish the two. When they were given multiple choice questions 85% failed to correctly identify mandatory supervision; 66% failed to correctly identify parole[4]. The public knows offenders do not serve all of their sentences in prison, but it does not know much about the release programs which enable inmates to serve part of their sentences in the community.

The Commission asked several other questions regarding parole and the responses shed further light upon public dissatisfaction with the sentencing process. Several trends were apparent. First, the majority of people overestimate the percentage of offenders released on parole. While the release parole rate is currently less than 33% (Hann and Harman, 1986), 50% of the public estimated between 60 – 100% of offenders are released on parole[5]. It is also clear that people perceive parole boards as becoming more lenient towards offenders; this was the view held by two-thirds of respondents. Reality tells a different story: release rates have remained relatively stable for the last five years (Hann and Harman, 1986; Figure 2-10).

3.1 Violations of Release Conditions

What does the public believe happens to the average inmate who obtains early release? Once again its view contains more gloom than truth. For instance, approximately 25% of full parole releases are revoked for one reason or another. Over 40% of the public estimate a revocation rate of between 30% and 100%.

Moreover, these estimates reflect the view that most revocations are the result of fresh convictions, whereas, in fact, most are for violations of release conditions (Harman and Hann, 1986).

3.2 Recidivism Rates

One reason society at large has a negative opinion of sentencing and early release is that it over-estimates the number of offenders who are re-convicted of further crimes. This is true both for those inmates who obtain early release and for offenders in general, whether they committed crimes against persons or property (Roberts and White, 1986). In 1983, respondents to a nation-wide survey were asked to estimate the percentage of first-time offenders that would be re-convicted of another offence within five years. A glance at Table 4.3 tells the story. The public believes that a far greater percentage of offenders recidivate than is, in fact, the case.

Table 4.3

Public Estimates of Recidivism Rates[a] of First Offenders

	Offence Category	
Public Knowledge	*Against the Person*	*Against Property*
Accurate[b]	12	21
Over-estimate (30% – 100%)	79	62
Under-estimate	2	9
Don't know	7	7
	100%	100%

[a] Source: Doob and Roberts (1983)

[b] Correct estimates of percentage re-offending: offences against the person = 17%; offences against property = 27% (Source: Law Reform Commission of Canada, 1976).

Comparable findings emerge when similar questions were posed regarding offenders on early release. Members of the public were asked to estimate the percentage of parolees convicted of offences of violence before their period of parole had elapsed. Table 4.4 shows the unrealistically negative views of the threat to society posed by offenders who serve part of their term of imprisonment in the community.

Table 4.4

Public Estimates of Percentage of Parolees Re-convicted of Offences Before Period of Parole has Elapsed[a]

	Offence Category	
Public Knowledge	*Against the Person*	*Against Property*
Accurate[b] (1-9%)	8	3
Small over-estimate (10-29%)	25	19
Large over-estimate (30-100%)	56	66
Don't know/not stated	11	12
	100%	100%

[a] Source: Research #1

[b] Correct estimate: offence against the person 2%; offences against property 9% (Source: Solicitor General Canada, 1981)

These results suggest that the Canadian public might well look more favourably upon sentencing and early release mechanisms such as earned remission, if it had more accurate views of the proportion of offenders who commit further offences. In fact, objections to early release are founded upon the issue of re-offending. Members of the public were asked for the strongest argument against parole. Over half mentioned recidivism of parolees. No other argument came close. In this context it is worth noting that the public has an unduly pessimistic view of the criminal justice system in general. For example, while the crime rate in the U.S. exceeds that of Canada by a considerable margin, many Canadians believe the two countries to have similar rates. The issue of public knowledge of recidivism rates should be seen within this broader context.

4. When is the Public Accurate?

The public is not always inaccurate. On some of the questions the Commission posed, they were fairly knowledgeable. For instance, almost two-thirds of respondents correctly identified plea bargaining. Although they had difficulty understanding a concurrent prison term, over two-thirds understood what a consecutive term meant. As well, there was some familiarity with at least one community sanction: almost three-quarters correctly identified a community service order. It is not the case then that through information overload, people cannot learn about sentencing. If the sentencing process were more realistic and comprehensible – as it would be under the Commission's proposals – public understanding would be considerably enhanced.

5. Sentencing and the News Media

Generally, knowledge of sentencing is poor and systematically biased: Canadians believe crime rates to be higher and sentences to be lighter than they are. These beliefs are widespread. Moreover, when the average person on the street is asked a question about sentencing, he or she will typically answer without hesitation. People are quite confident of their views of the sentencing of offenders. How have these misconceptions arisen?

Part of the answer can be found by examining the news media. The news media is not the public's only source of information. We learn about the justice system from many sources: friends and acquaintances; government publications, personal experience – all contribute to our knowledge of crime and official attempts to control crime. But it is upon the news media that people rely most heavily. In fact, when people were asked where they got their information relating to sentencing, fully 95% cited the news media (Research #2). To understand public knowledge of and attitudes towards sentencing we need to know how the media deals with sentencing news. With this in mind the Commission's research activities included several analyses of Canadian news media and interviews with news editors and journalists (*Rosenfeld, 1986*; *Tremblay, 1986*).

One of these analyses examined all sentencing stories which appeared in a sample of nine major Canadian English-language newspapers[6] (Research #4). An analysis was also performed upon a sample of French-language newspapers (*Tremblay, 1986*). Although similar results emerged, for the sake of brevity only data from the English language sample will be discussed in this chapter. Previous research has established that people turn most often to newspapers for information about criminal justice issues. For example, van Dijk (1978) found that of those individuals who had discussed crime recently (and almost all respondents had), 66% heard of the topic they discussed from the paper. This is in comparison to 13% who cited the radio as their source and a further 13% who cited another person. It seems likely then that when people talk about sentencing issues – or a particular sentence – they discuss material from their newspapers. In all, over 800 stories which dealt with sentencing (or contained a sentence from a Canadian court) were studied. The following portrait of sentencing emerged.

5.1 Sentencing Stories in Major Canadian Newspapers

Perhaps the most outstanding feature of sentencing stories in newspapers is that over half of them deal with offences involving violence. Looking more closely, one can see that over one-quarter deal with some form of homicide (i.e. first and second degree murder; manslaughter; criminal negligence causing death). These figures confirm expectations derived from other research: relative to their actual frequency, crimes involving violence are highly over-represented in the news media. The public then is forced to build its view of

sentencing on a data-base which does not reflect reality, where fewer than 6% of crimes involve violence (Solicitor General of Canada, 1984)[7]. Small wonder that most people, when asked their opinion of sentencing in general, have violent offenders in mind (Brillon, Guérin and Lamarche, 1984). So most of the sentences reported by the newspapers are handed down to offenders convicted of crimes of violence. The next step in this analysis of the media examined the kinds of sentences which appeared in this sample of newspapers.

5.2 Sentences Reported

Here once again, reality and the media's representation of reality diverge. Studies of sentencing practice show that fines are the most frequent disposition (Hann, Moyer, Billingsley and Canfield, 1983; *Verdun-Jones and Mitchell-Banks, 1986*). The sentences reported by the newspapers reflect a different picture. Sentences of imprisonment constitute the overwhelming majority of dispositions reported by the newspapers, as can be seen in Table 4.5.

Table 4.5

Sentences Reported in a Sample of Canadian Newspapers (1984-1985)[a]

Disposition	*Percentage of Sentences Reported*
Imprisonment	70
Probation	12
Fine	9
Conditional Discharge	1
Other	8
	100%

[a] Source: Research #4

Fines – the disposition most frequently imposed – here account for fewer than 10% of reported sentences.[8]. The alternatives to incarceration receive little attention from newspapers. The reason for the preponderance of sentences of incarceration should be clear: the newspapers generally select the most serious offences, and usually the most serious cases of those offences.

Beyond asking what kinds of sentences are reported, another area of concern is the extent to which newspapers publish information pertaining to the legal reasoning behind a sentence. One needs no systematic analysis to know that newspapers are unlikely to report run-of-the-mill cases; clearly they reserve publication for those cases – and sentences – that are in some way exceptional. It is in these instances that one might expect to encounter explicit reasons from judges to account for their sentences. If there are more reasons, then newspaper readers are unlikely to know: in 70% of the stories examined,

no reason for sentence was given. Only a single reason was provided for a further 20% (Research #4). This appears to be an area in which newspapers might provide greater depth of analysis.

5.3 Maximum Penalties, Minimum Penalties and Current Practice

When reading a sentence – say, five years for manslaughter – the reader may well ask what the offender might have received if the maximum penalty had been imposed. To find an answer he or she would have to turn to the *Criminal Code*: information about statutory penalties was present in fewer than 1% of the stories. There seems to be a discrepancy between what reporters write and what they say they write. A Commission study of reporting practice and policy (*Rosenfeld, 1986*) found that a majority of English-language reporters claimed they made reference to the maximum sentence of the offence they were covering. Similar results emerged from an analysis of French-language publications (*Tremblay, 1986*). The absence of information about maximum penalties may explain why the public's estimates of these maxima are so far from reality (see Table 4.1, p. 90). Information regarding sentencing practice – or what in average circumstances an offender might get – was even less likely to be reported. The same is true for the few minimum penalties prescribed by the *Criminal Code*. These omissions are perhaps the most serious by the news media. How, except by reference to minima, maxima and current practice, is a member of the public to assess whether a given sentence is appropriate? Finally, a word about why certain cases and not others get reported. This is a critical research question, one that can be answered by data from two sources: (a) the profile of offences reported, and (b) interviews with individuals responsible for writing and editing newspapers. Both sources converge upon the same answer. The major determinant of whether a sentence appears in print seems to be the seriousness of the offence.

It has been noted already that offences of violence, which are usually rated as the most serious offences[9] are more likely to be reported: relative to their actual frequency they are over-represented in the pages of newspapers. A more detailed examination (Research #4) of a particular offence (manslaughter) suggested that in addition to selecting the most serious offences, newspapers report the most serious instances of those offences.

Another source of information was an examination of editorial policy and practice (*Rosenfeld, 1986*). A researcher with a background in both law and journalism interviewed reporters and editors from several newspapers, radio and television stations. While there appeared to be variance across media in terms of *who* made the decision to report a particular case (the court reporter or the editorial staff), there appeared to be little variation as to the criteria for selection. It was almost always the seriousness of the offence, followed by the prominence of the offender (see also *Tremblay, 1986*).

5.4 Newsworthiness of Sentences

Even a year's worth of stories does not generate a sufficient number of any particular offence to compare sentences in the media with sentencing in the courts. It is clear though that it is generally the unusual cases that are reported. Newsworthiness determines whether the public reads about a sentencing hearing, and in turn this means, in most cases, sentences that are perceived to be sufficiently "lenient" to make them newsworthy. Interviews with editors and reporters confirmed the impression – derived from reading the actual stories – that excessively lenient sentences were more likely to be reported than excessively harsh sentences.[10] However, there are exceptions. For example, the *Ottawa Citizen* recently reported the sentence of three months imprisonment imposed upon an offender for the theft of a small sum of money.[11]

One last question. What does the public think of the news media's coverage of sentencing? The following question was posed: "Is the news media, in your view, providing the public with adequate information about sentencing?". Of all respondents, 8% chose "don't know". Of those with an opinion, 61% said "no" (Research #3).

6. Conclusions

Public education is neither the sole nor the primary aim of the news media. It would be overly simplistic as well as unfair to blame the newspapers for public misperceptions of sentences and the sentencing process. There are many reasons why the public holds the view it does[12] and imperfect coverage of sentencing hearings is but one. However, the analyses reported here do suggest that with little additional effort newspapers might present a more informative picture to their readers. In terms of public reactions to individual cases, the public might respond quite differently if it had reference points such as the maximum penalty and the average sentence. The difficulties (at the present time) of obtaining the latter may explain their absence, but there seems little reason why reporters cannot furnish their readers with the maximum penalties. Also, like the public, news reporters have good reason – under the current system – to be confused by the sentencing process. Providing the media with systematic, comprehensive information is as important as educating the public. The reforms proposed by this Commission would make the process and practice of sentencing more comprehensible to reporters and the general public alike.

Most Canadians believe sentences to be too lenient. The research summarized in this chapter suggests that this view of sentencing is partly a result of inadequate information about individual cases, general trends, and the process itself. Some of these misperceptions are summarized in Table 4.6. It is hard to say by how much, but public views of sentencing would surely improve if these misperceptions were dispelled. The Commission urges the various media to promote understanding of sentencing by providing more complete information in their reporting of cases.

Table 4.6

Summary of Public Misperceptions Related to Sentencing[a]

Topic	*Reality*	*Public View*
1. **Maximum Penalties**:	Public under-estimates severity	
Example: Break and enter[b]	Life Imprisonment	4 years
2. **Sentencing Trends**:	Public under-estimates punitiveness of courts	
Example: Break and enter[c]	Over 50% get a sentence of imprisonment	Fewer than 40% get a sentence of imprisonment
3. **Early Release Rates**:	Public over-estimates percentage obtaining early release	
Example: Parole release rates	30% of all inmates	Most people estimate over 60%
4. **Early Release Rates:**	Public over-estimates amount of crime by people obtaining early release	
	Release rates have not changed much[d]	More offenders being released now
5. **Parole Recidivism**:	Public over-estimates amount of crime by people obtaining early release	
	About 5% of parolees re-offend while on parole[e]	About 50% of parolees re-offend
6. **Crime Rates**:	Public over-estimates amount of violent crime	
Example: Violent Crime	6% of total reported crime[f] involves violence	3/4 of public estimate 30%-100% involves violence

Table 4.6 (Cont'd)

Summary of Public Misperceptions Related to Sentencing[a]

Topic	*Reality*	*Public View*
7. **Homicide Rates**:	Public perceives an increase since abolition of death penalty	
Example: Homicide rates since abolition of capital punishment	No change in rates[g]	Rates have increased[h]

Notes:

[a] All research by Canadian Sentencing Commission except where noted.

[b] Private dwelling; business premise carries 14 years.

[c] Source: FPS – CPIC

[d] That is, the release rate remained between 28 and 34% in the period 1973/74 – 1983/84 (Harman and Hann, 1986).

[e] Source: Solicitor General Study on Conditional Release (1981).

[f] Source: Selected trends in Canadian Criminal Justice (1984).

[g] Source: Doob and Roberts (1982).

[h] Source: Doob and Roberts (1982).

Endnotes

[1] In practice, as this report demonstrates (see Chapter 9), the discrepancy between statutory maxima and sentencing practice suggests that statutory maxima provide little guidance for determination of sentences.

[2] A survey of U.S. residents (Assembly Committee on Criminal Procedure, 1975) reported that between 21% and 49% (depending upon the offence) of respondents were unable to even hazard a guess as to the maximum penalty for a series of common offences. The process by which the public arrives at its estimates sheds light upon its views of the offences. Presumably it infers the maximum from its view of seriousness of the offence. Thus, breaking and entering a business does not strike members of the public as an example of one of the most serious offences in the *Code*. Accordingly, they assume it does not carry one of the higher maxima: they estimate on average four years. This reflects (a) a strong sense that the punishment should be proportional to the seriousness of the crime, and (b) an unjustified confidence in the extent to which current maxima reflect the seriousness of offences.

[3] In 1982 Doob and Roberts conducted similar work using slightly different questions and offences. The pattern of results was largely the same.

[4] There were four alternatives for these questions. Correct performance on the basis of chance alone would therefore be 25%. The definition of mandatory supervision was included in the alternatives to the parole question; 33% of the respondents chose this over the correct definition of parole.

[5] Similar – but more extreme – results were found in 1982: Doob and Roberts posed a similar question to respondents and found that 65% estimated the parole release rate was between 60% and 100%.

[6] The period was July 1, 1984 to June 30, 1985. The newspapers were: Toronto Star, Globe and Mail, Winnipeg Free Press, Calgary Herald, Vancouver Sun, Halifax Chronicle, Edmonton Journal, Montreal Gazette and the Ottawa Citizen (See Research #4).

[7] Recent occurrence statistics reveal that 5.7% of reported offences involved violence (Solicitor General Canada, 1984; 4). Since other types of crime (e.g. property offences) are less likely to be reported to the police, this figure is a high estimate of the percentage of total offences committed which involved violence.

[8] A similar but less extreme pattern of results emerges from a content analysis conducted in the United States. Graber (1980) reports that prison accounted for 35% of sentences appearing in the press; fines accounted for a further 7%.

[9] This is apparent from several surveys that have asked members of the public, as well as criminal justice professionals, to rank-order offences in terms of their relative seriousness. Offences against the person tend to be rated as the most serious, regardless of whether the respondents are members of the public or justice professionals (see, for example, Rossi, Waite, Bose and Berk, 1974).

[10] In fact, some reporters admitted including the maximum penalty in order that the sentence imposed might appear more lenient.

[11] Ottawa Citizen, July 30, 1986.

[12] For instance, research in psychology has shown that people tend to generalize from single instances. Reading about a single lenient sentence often leads people to regard the entire sentencing process as being unduly "easy" on offenders. This is not to disparage members of the public; professionals working with statistics on a daily basis are also prone to such errors of inference. (See Nisbett and Ross, 1980, for further details of research on this topic).

Chapter 5

The Nature of Sentencing

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Chapter 5

The Nature of Sentencing

1. Introduction

In this chapter and the next, the Commission intends to present its theory of sentencing. At the end of Chapter 6, the Commission formulates a *Declaration of Purpose and Principles of Sentencing* and recommends its adoption by Parliament and incorporation in the *Criminal Code*. The *Declaration* articulates a sentencing rationale, which consists of a definition of sentencing and a statement of its goal and principles. In presenting its theory of sentencing, the Commission does not pretend to produce an academic treatise on all, or even most, aspects of sentencing. The aim of these two chapters on theory is to provide the main considerations which led the Commission to propose its recommended *Declaration of Purpose and Principles of Sentencing* and which support its position on the issues required to be addressed by its terms of reference.

This chapter presents an analysis of the nature of the sentencing process. While there is no denying that sentencing is a punitive process, the basic argument developed in this chapter challenges the current *identification* of sentences with punishment. The next chapter discusses the overall purpose and principles of sentencing and proposes an alternative to the prevailing views regarding its specific purpose.

1.1 Thinking about Punishment and Related Issues

Before reflecting on the nature of sentencing, a word must be said about the kind of concepts that are used to articulate a sentencing theory. Penology derives part of its name from the latin word "*poena*", which means punishment. Hence, the notion of punishment is a central one; it is also complex and it can serve to illustrate some of the difficulties involved in the formulation of a sentencing theory.

Like a significant number of concepts related to sentencing, punishment appears to change its meaning depending upon the context in which it is used. For example, one of the earliest justifications for punishment is the oft-quoted

maxim: "An eye for an eye and a tooth for a tooth". According to this ancient saying, a victim can claim from an aggressor *as much as* the physical harm which he or she has suffered, but *no more*. Interestingly enough, a different kind of principle seems to govern the imposition of punishment in the context of property offences. If an offender has stolen an object (e.g., a television set) and is merely ordered by the court to return it to its lawful owner, most people tend to believe that the offender has *not yet* received any real punishment. The contrast between these two situations is rather striking. With regard to violent offences against persons, justice appears to command that the punishment be no more than *equal* to the amount of physical harm which has been inflicted. With regard to offences against property, imposing punishment would imply exacting from the offender a *premium* which is greater than the mere restitution of the lost or damaged property. In other words, punishing property offenders begins where punishing violent offenders should end.

Let us discuss briefly another example. If a twelve year old child comes home in a state of drunkenness, his or her parents may decide that the child should be punished in order to prevent the repetition of such misbehaviour. However, if responsible parents find evidence that their child is using heroin, they will normally not deal with this problem by punishing their child. Punishment appears to be an inadequate measure in such a situation and the parents will seek professional help. This example shows how different the use of punishment is in the context of the family and in the context of the criminal justice system. Within the family, punishment is only applied in the case of petty misbehaviour. When responsible parents believe that their child is really in trouble, they resort to means other than punishing him or her. To the contrary, many assume that under the criminal law, punishment is an adequate way of dealing with all offences and the more serious the offence, the more severe the punishment should be.

One last example. Criminal procedure and rules of evidence rest to a large extent on the assumption that there is greater injustice in punishing the innocent than in failing to punish the guilty. One consequence of this assumption is the frustrations of victims of crime who believe that the criminal law is being lenient toward offenders, when it is in fact being stringent on the level of proof which must be produced in order to obtain a conviction.

It may then be asked why punishment has a different significance when imposed in the context of violent offences against persons and when imposed for property offences. It may also be wondered why punishment is believed to be a relevant answer to most, if not all, criminal offences, when it is viewed as a limited means to control misbehaviour within the family. Finally, why is the criminal law more sensitive to the rights of the innocent wrongly accused than to the plight of the victims of crime? There are no definitive answers to these questions, because they reach into too many directions at the same time. However, the point which we have been trying to make in discussing the previous examples goes deeper than this obvious conclusion.

One of the most frequently alleged causes of sentencing disparity is the apparent lack of a commonly shared theory or philosophy of sentencing. With regard to this crucial issue, the point that we are attempting to make is the following: even if all judges agreed on one theory of sentencing, this would not be enough to solve the problem of sentencing disparity, because the concepts used to articulate such a theory lend themselves to different interpretations. Additional guidance must be provided.

The relative ambivalence of the concepts of penology does not imply that sentencing is impervious to reason and that all penal arguments are equivocal. It means that reasonableness in theorizing about sentencing begins with a recognition that sentencing issues have their own brand of complexity and that they cannot be resolved by the forcible application of a few rigid formulas and simple dictums. A theory of sentencing in itself cannot be a blueprint for what would be the equivalent of a sentencing "technology". A sentencing policy which takes into account the limits of a sentencing theory, as they have been outined above, cannot afford to be dogmatic and must be characterized by its flexibility and its adaptability to change. This is a point that will be explored in greater detail in this chapter and the next one.

1.2 Defining Sentencing

Most legislators and legal scholars take for granted that we know what sentencing is. They either do not define it at all or they provide a definition that tells us what sentencing ought to be rather than what it actually is. Subsection 2(10) of the Criminal Law Reform Act, 1984 (Bill C-19) defined the word "sentence" by enumerating all legal sanctions available to the sentencing judge. While this was necessary to provide a working definition for the purposes of the Bill, it did not elucidate the meaning of the term; it only provided examples of its use. Given that the real nature of a sentence was not explained in the bill, the process of sentencing itself would have remained undefined.

The Law Reform Commission of Canada has attempted to formulate a definition of sentencing:[1]

> Sentencing is used to refer to that process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence. As the sentence is carried out, it may be necessary from time to time, as in probation, to change or amend conditions relating to the sentence.

This definition is essentially normative and refers to what sentencing should be while assuming that we know what it is.

Although it cannot be denied that the word "sentencing" is generally understood, it seems desirable to articulate an explicit definition of sentencing. The purpose of this endeavour is to draw a distinction between the notion of punishing and the notion of sentencing, which are all too often confused one for

the other. When speaking about sentencing, there is a tendency to err in one of two directions. The first mistake is usually due to naiveté and goodwill. It consists of using language to conceal the fact that sentencing is a coercive process and that it imposes on someone a measure which that person would shun, if given a choice. This excess has often been denounced in the past, when the use of incarceration solely for rehabilitative purposes became a focus for criticism. There is however a second kind of error, which has not yet drawn as much critical notice and which is due to over-reaction against the former naiveté. This error stems from laying exclusive emphasis on the starkest and most punitive aspects of sentencing. As much as it was stressed at one time that an offender was sentenced for his or her own good, it is now emphasized that sentencing results in the infliction of deserved harm on a culprit. The problem with this attitude is, as we shall see, that it tends to degenerate into a self-fulfilling prophecy. Stressing exclusively the most punitive aspects of sentencing invariably results in increasing the overall severity of the process and consequently making change more difficult.

This chapter is divided into four parts. First, the current identification of sentencing with the imposition of punishment is discussed. Second, a contrast between sentencing and punishing is articulated. This contrast is followed by a proposed definition of sentencing. Finally, some additional features of the sentencing process are described.

2. Sentencing and Punishing: An Implicit Identification

Scholars and law-makers are justified in assuming that we know what sentencing is only if we agree with their basic premise. This premise, seldom explicitly stated, is that sentencing and punishing are equivalent notions. The working definition of sentencing then becomes the imposition of punishment. It is a remarkable feature of the literature on sentencing that under the heading "the aims of sentencing", most authors actually discuss the traditional goals of *punishment*.[2]

It would be difficult to find a more striking illustration of the pervasiveness of the compulsion to fuse the notions of sentencing and of punishing than the official Canadian translation of the word "sentence" in French. Although the word "sentence" exists in the French language, and has the same meaning as the English word "sentence", the French equivalent for "sentence", now used in Canadian legislation and in Canadian official reports and documents, is the word "peine" (punishment)[3]. This translation is perfectly consistent with an important statement made in *The Criminal Law in Canadian Society*:

> First, the criminal law, for all the efforts and rhetoric expended over the past century, is primarily a punitive institution at root. Certainly the sanctions it metes out – whether justified in the name of treatment, rehabilitation, denunciation, deterrence, incapacitation, or whatever – are and always have been perceived as punitive by almost all of those to whom they are applied. So, whether the question of the purpose of the criminal law is approached from a retributive or a utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive. (p.39)

One thing should be made absolutely clear in order to avoid misunderstandings to which we have already referred as due to naiveté. Any attempt to show that the criminal law is *not* a punitive institution would be abortive and ultimately irresponsible. It would so contradict the public perception of the thrust of the criminal justice system, that it would be met by outrage and could only exacerbate punitive feelings. Here, our sole purpose is to examine if there is a foundation for assumptions that sentencing and punishing are identical processes and that their aims are indistinguishable. It is more than a question of mere semantics. The history of Kingston Penitentiary, as it was related in Chapter 2, shows that harsh language begets even harsher practice.

Before contrasting sentencing with punishing, two general points ought to be made.

2.1 Problems with the Definition of Punishment

If most authors assume that we all know what sentencing is, they also appear to believe that the notion of punishment is self-evident. Actually, one presumed advantage of identifying sentences with punishment is that whatever obscurity which may be attached to the notion of sentencing is dispelled by the clarity of the notion of punishing. In truth, it is almost impossible to avoid circularity in defining punishment, the notions of crime and punishment being involved in both of their respective definitions. The problems generally associated with the definition of punishment are particularly acute with regard to the definition of *legal* punishment.

What, it may be asked, is the nature of punishment? One of the best answers is provided by a legal scholar: punishment is the imposition of severe deprivation on a person guilty of wrongdoing.[4] However, it is not all persons guilty of some form of wrongdoing who are liable to be punished by the criminal law. For instance, betrayal is generally held to violate very fundamental human and social values. However, it is only the betrayal of one's country, as opposed to the betrayal of a spouse, a friend, an associate or a team, which is now a criminal offence. The definition of legal punishment must be narrowed down to the infliction of severe deprivation on a person found guilty of a crime. But how is one to define a criminal offence? The usual answer is that a criminal offence is that kind of wrongdoing which is punishable by law.[5] The definition of punishment becomes circular and punishment is defined as the imposition of severe deprivation for a punishable wrongdoing.

If then, it is argued that the benefit of identifying sentencing with punishing is that this procedure sheds light on the nature of sentencing, it must be acknowledged that this benefit is at best limited, which is not to say that the notion of punishment is beyond comprehension. Actually, for the purposes of contrasting sentencing with punishing, the concept of punishment shall be understood according to the previously-quoted definition: punishment is the imposition of *severe* deprivation on a person found guilty of wrongdoing. This definition stresses that legal punishment is associated with a certain harshness and is not to be confused with a mere "slap on the wrist".

2.2 The Criminal Law and the Sentencing Process

It should be noted that the excerpt from *The Criminal Law in Canadian Society* previously quoted stresses the character of the criminal law as a whole. The sentencing process is but one part of the criminal justice system and it is questionable whether the sentencing process can be made accountable for the punitive character of the whole system.

As sentencing is viewed as the "climax of the criminal justice process" (Canada, Sentencing, 1984;1), there is a tendency to trace back to sentences any punitive effect which may be produced by the criminal justice system. It is argued for example, that an absolute discharge is punishment because the offender went through the painful ordeal of being arrested and found guilty (not to mention that according to the present state of the law, he or she bears the stigma of having a criminal record). This argument is specious, however, for it fails to distinguish between a police arrest, adjudication of guilt or innocence and sentencing. The failure to make these distinctions leads to holding sentencing accountable for all punishment stemming from the criminal law. That this is a mistake can be illustrated by the fact that even being found not guilty in court can be seen as a punitive process. In some cases, the mere fact of having been charged is sometimes stigma enough to ruin a career, whatever the outcome of the trial and even where the charge is subsequently withdrawn. In other cases, a jury might be inclined to feel that the accused has been treated to enough pain and pronounce a verdict of not guilty that is unwarranted in law or unsupported by evidence. In both instances again, the accused will bear the stigma of having been cleared by the court under circumstances which appear objectionable. Surely when a person is found not guilty, the pain that has been otherwise visited upon him or her cannot be attributed to the sentence, because *no sentence* is imposed following a verdict of not guilty. The same claim could be made for an absolute discharge: whatever punishment may have preceded it, as a sentencing disposition *per se* it does not involve punishment. Some victims of crime have learned that any brush with the criminal law can be painful. However, *one cannot argue from this very general feature of the criminal law, that the sentencing process is thereby exclusively punitive.*

One final point: the punishment that is purposefully meted out to offenders by the criminal justice system must be carefully distinguished from the unintended harshness of its operation. The criminal law does not aim to make the recognition of innocence a painful ordeal; that it is occasionally so is a by-product of a system that may, in fact, seem to be uncaring but does not intend to be so. If it is improper to blame the sentencing process for all the unintended punishment generated by the criminal law, it is sophistry to hold this process accountable for the overall brutality of the whole penal system.

3. Sentencing and Punishing: A Contrast

Two arguments favouring the identification of sentencing with punishing have been rebutted. However, it is not enough to merely refute these general arguments. Specific differences between sentencing and punishing must now be discussed.

3.1 Sentencing as a Judicial Statement

The word "sentence" comes from the Latin "*sententia*", which means opinion or the expression of an opinion. Therein lies one fundamental difference between a punishment and a sentence. The former is the actual infliction of a deprivation, whereas the latter is a *statement* ordering the imposition of a sanction and determining what it should be. Even granting that to be the object of a sentencing pronouncement is in itself a stigma, the failure to draw the difference between the sentence as a judicial statement and the sentence as an applied sanction has several undesirable consequences.

First, the possibility that the sentence may be distorted by its correctional application appears to be ruled out in principle. The whole weight of corrections suddenly evaporates into mythical coincidence between the sentence as determined by the judge and the sentence as it is administered in practice. This myth is contradicted by widespread feelings among judges that there is a large discrepancy between the sentence as it is imposed and as it is carried out.

More importantly, even assuming that sentencing is a punitive process, it is above all the subordination of punishment to fundamental justice. There is between sentence and punishment the same distance as exists between the rule of law and practices such as vigilante justice.

Finally, as a judicial pronouncement, sentencing may aim to be well-reasoned, explicit and public. These goals are proper to judgments and unrelated to punishment as such. It must be stressed in this regard that the traditional utilitarian goals of the sentencing process – deterrence, incapacitation and rehabilitation – do not bear in themselves any specific relationship to justice and can be achieved in unjust ways.[6]

3.2 Sentencing as Protection Against Unofficial Retaliation

It can be argued that equating sentences with punishment is too restrictive ever to allow the sentencing process to take into account some of its traditions. One of these traditions, named Montero's aim (after the Spanish jurist who articulated it in 1916), dictates that the penal system ought "to protect offenders and suspected offenders against unofficial retaliation" (as restated by Nigel Walker).[7] This tradition has always commanded such unanimous support that legal theorists scarcely feel the need to mention it. However, in a recent judgment of the Supreme Court of Canada, Madam Justice Wilson referred to this goal in her statement of the objectives of legal sanctions.[8] It is actually the first one that she mentions.

It may be that this aim will take renewed significance with the recent growth of private vigilantism. It is obvious that the imposition of criminal sanctions on offenders has a crucial part to play in achieving Montero's aim. However, it is equally evident that a bare equation between sentencing and

punishing is much too rudimentary to satisfy the implications of Montero's aim, the main one being that there should be a significant difference between official justice and private retaliation. The concept of doing justice is more elaborate than the bald notion of inflicting punishment and, in any event, preferable. It implies a respect for moral principles and personal rights which can be ignored by naked retaliation. It also implies a balancing of the interests of justice independent of the desires of individuals and private pressure groups.

3.3 The Context of the Rediscovery of Punishment

Assertions about the intrinsically punitive character of the criminal justice system should be put in context. This context was provided by an attack upon rehabilitation as it was practiced in the United States. Several influential books such as *Struggle for Justice*, *Fair and Certain Punishment* and *Doing Justice* were published in that country during the 1970s, denouncing the "crime of treatment" and advocating "just deserts". It was then felt that the rhetoric of providing assistance to inmates in order to facilitate their rehabilitation was in fact no more than an excuse for punishing them more harshly. It was alleged that custodial sentences were noticeably longer in states like California that more rigorously applied the rehabilitative model of corrections and used indeterminate sentences.

It was in strong reaction to the perceived hypocrisy of these claims that some penal reformers resolved to state in the most unequivocal terms that exacting punishment was the core of the criminal law. The words of Willard Gaylin and David Rothman, who were both members of the Committee for the Study of Incarceration that published its oft-quoted report under the title *Doing Justice*, bear witness to this kind of reaction. This study committee was sponsored by the Field Foundation and by the New World Foundation. In their preface to the report, Gaylin and Rothman write:[9]

> Certain things are simply wrong and ought to be punished. And this we do believe. In so stating our position, we then become free to set reasonable limits to the extent of punishment. When we honestly face the fact that our purpose is retributive, we may, with a re-found compassion and a renewed humanity, limit the degree of retribution we will exact. And still we are not happy. Our solution is one of despair, not hope.

Although not all proponents of the just deserts model agree with the last sentence of this quote, Gaylin and Rothman's pessimism is at least partly justified. The discrediting of the rehabilitative use of incarceration produced a vacuum among the goals which may be ascribed to the penal system. This vacuum was filled by a rediscovery of retribution and deterrence, as they were formulated by eighteenth century thinkers like Immanuel Kant and Cesare Beccaria. Therein lies another one of our objections to a definition of sentencing which equates it with punishing. It permanently entrenches what was a reaction against rehabilitation. This reaction occurred in particular circumstances and was followed by a retreat into eighteenth century penal ideology.

The fact that the idea was born so long ago does not make it inherently objectionable. However, Canadian penal history reveals that it was precisely the goals of retribution and deterrence which were invoked to establish Kingston Penitentiary. The conditions of life prevailing in this institution were so repressive that they were subsequently denounced by several commissions of inquiry. What guarantee have we got that a reactivation of retribution and deterrence will foster restraint in the use of punishment, rather than the excess of yesteryear? This question must now be addressed.

3.4 Punishment and Restraint

The commitment of just deserts theorists to restraint in the use of incarceration cannot be debated. The preface of *Doing Justice* is in this regard exemplary:[10]

> And central to our conception, essential to its balance, is a commitment to the most stringent limits on incarceration. It would be better to ignore the recommendations of the Committee entirely than to accept any part of them without that focus on decarceration about which all its other arguments pivot.

In the same way, the submission presented to the Commission on behalf of the Law Reform Commission of Canada recommends both that the rationale of sentencing in Canada be anchored in a just deserts model and that drastic limitations be put on the use of incarceration. In its submission, the Law Reform Commission of Canada suggests that the highest maximum for custodial sentences – excepting sentences for murder – be set at seven years.

It is not altogether certain that advocating principles of retribution (strict just deserts) is consistent with preaching restraint with respect to incarceration or, in any event, is the better way to promote moderation. The wish expressed by Gaylin and Rothman in the above-quoted paragraph has not been fulfilled. Although a growing number of American states are reverting to retribution and just deserts models, not one jurisdiction has come close to adopting the recommendation of *Doing Justice* that no sentence of incarceration should exceed five years.[11]

California was the first state to endorse retributivism in its legislation. The 1976 *Uniform Determinate Sentencing Act* states bluntly:[12]

> The purpose of imprisonment for crime is punishment.

The new California legislation was followed by an increase in the number of offenders incarcerated and an increase in the length of their custodial sentences. Not one American state that has embraced the goal of retributivism has reduced its prison population (according to the latest figures, the Minnesota prison population is expected to rise, at best, slightly in the coming years). Making retribution the rationale for sentencing may not be the cause of such increases. Nevertheless, advocating both the justifiability of punishment and the need for restraint has not yet produced any perceptible restraining effects. Language being what it is, it is hardly surprising. Selling cigarettes in

packages with printed warnings that smoking is injurious to health does not seem to have directly affected the profits of the tobacco companies.

In a similar way, it may be argued that there is a measure of ambiguity in issuing a public policy statement that could be couched in the following language: "The purpose of sentencing is punishment. For this reason, we declare that no custodial sentence can exceed a maximum length of 5 (or 7, or 8) years."[13]

3.5 Community Sanctions and the Needs of Victims

There are a number of concerns, such as developing community sanctions as alternatives to incarceration* and being more sensitive to the justifiable needs of victims, which have recently attracted a growing share of attention. These concerns simply do not fit within retributivism and yet they point to the future. For example, the Criminal Law Reform Act, 1984 (Bill C-19) allowed for compensatory agreements between an offender and his or her victim, which were not in any way punitive (section 665 made a clear distinction between restitution orders for special damages and orders for punitive damages). Generally speaking, retributivism takes into account mostly the blameworthiness of the offender's behaviour; the sole victim need that it can really satisfy is a desire for revenge. Research has shown that this desire was much less acute than it was first intuitively believed. Research conducted for the Commission by Professor Irvin Waller has shown that none of the declarations of rights of victims from significant organizations (e.g., the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power) gave a prominent place to the need for revenge.[14]

More directly, the rediscovery of retributivism is essentially the outcome of a thorough study of incarceration in the United States and it has resulted in a narrow theory of criminal justice which links the sentencing process to the imposition of custodial sentences and to punishment. In fact, all three reports cited in section 3.3 of this chapter were studies of incarceration. These studies of imprisonment were as profound as their focus was limited. When we are urged to collapse sentencing and punishing, one into the other, the type of sentence on which the whole argument implicitly rests is a jail term, which, save for capital punishment, is the most punitive sentence in use.

There is no dispute about the justification for giving priority to an examination of incarceration, because its practice now raises problems which are in urgent need of a solution. The fundamental question which must be addressed in this report is whether incarceration is the future of sentencing. In view of the impressive body of official reports, research literature, official positions voiced by organizations involved in the field of criminal justice and public opinion surveys, the Commission must answer that it is not.

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* As will become evident in later chapters, we prefer categorizing community sanctions as sentences in their own right, to viewing them indiscriminately as "alternatives to incarceration ".

4. The Recommended Definition of Sentencing

As a conclusion to the preceding discussion, the Commission recommends that the following definition of sentencing be adopted:

Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.

This definition will be part of the recommended *Declaration of Purpose and Principles of Sentencing*, which appears at the end of Chapter 6.

4.1 Comments and Explanations

The avoidance of the adjective "criminal" (as in "criminal sanctions" or in "criminal offences") is meant to reflect that the sentencing process reaches outside the scope of the criminal law in important ways. The number of statutes which carry penalties – including incarceration – is much greater than the laws codified in the *Criminal Code*. The enforcement of these statutes involves a process of sentencing.

Two notions are part of the meaning of the concept of sentencing: the notion of obligation (or coercion) and the notion of punishment. Upon their determination sentences *must be executed*. This obligation applies to the offender, when he or she is primarily responsible for the execution of his or her own sentence, which may be the simple payment of a fine; it also extends to correctional authorities, who have the charge of administering sentences of incarceration or of probation, to name obvious examples. Sentences also have, in varying degrees, punitive implications. However, the use of the words "legal sanctions" (instead of punishment) is designed to assert that the notion of obligation has precedence over the notion of punishment. This position is taken, because the notion of obligation is more comprehensive than the notion of punishment. The idea of coercion captures all the negative features implied by the notion of punishment. To be coerced into something is always unpleasant, the more severe forms of coercion (e.g., imprisonment) being identical with punishment. However, whereas the execution of all sentences is obligatory in law, not all sentences impose such a severe measure of deprivation that they can be properly called punishment (e.g., an absolute discharge and, to a lesser degree, a restitution order without any punitive damages). With regard to the legal obligation of applying sentences as they are determined by the judge, it must be noted that early release programs do not nullify the mandatory character of the sentence; it is the sentence as it was actually imposed by the judge that is the basis for the determination of the time which must be spent in prison, before eligibility for early release. A consequence of giving priority to the notion of obligation over that of punishment would be a stronger demand for an increase of the accountability of all those charged with the execution of the sentences.

There are important consequences to recognizing that sentencing is essentially a coercive process. Although this conception of sentencing does not emphasize the punitive aspects of the process, it does not lose sight of the fact that sentences are sanctions and that there are limits to what can be accomplished through coercion. Two of the new leading approaches advocated to ease the plight of victims – the compensatory approach and the reconciliatory approach – can be contrasted in this regard.

The critics of prison rehabilitation have shown in a definitive way that a policy which tried to do good for people against their will was self-defeating and begat nefarious consequences. The bitter lessons of repressive care ought not to be forgotten. The coercive features of the sentencing process should not be used to force the outcome of an issue which, such as reconciliation, requires a genuine and mutual desire from the implicated parties to restore harmony between them. This does not imply that the sentencing judge ought not to promote opportunities for reconciliation through the imposition of community sanctions, where a sincere desire for reconciliation is expressed by both parties. It does, however, mean that the judge should not *order* reconciliation to take place. It is conceivable that the judge may compel the offender to apologize to the victim and that this apology will bring contentment to the victim. However, one should not be under any delusions that such compelled apologies will restore harmony between the parties. Actually, forcing the show of external signs of reconciliation may further embitter the parties involved.

None of these difficulties exist in the case of the compensatory approach. Restitution can be imposed and enforced. Of course, an offender may be resentful at the prospect of being subjected to a restitution order. However, this resentment does not defeat the purpose of the measure, which is to compensate the victim regardless of how the offender feels. In contrast, a resentful reconciliation is a contradiction in terms. The fundamental difference between compensation and reconciliation is that the former implies a transfer of property to its rightful owner and the latter a mutual change of feelings. By contrast to the transfer of property, changes in feelings cannot be compelled by order.

The recommended definition puts equal stress on the fact that it is a *person* on whom a sentence is imposed and that the cause of this plight is the conviction for an offence. Retributivists stress the blameworthiness of the conduct and sometimes forget that they are imposing suffering on a person. Utilitarians view the offence as providing a clue to the whole personality of the offender which unduly becomes the real target of the penal intervention (if the offender can be redeemed he will be enrolled in a rehabilitation program; if his dangerousness cannot be remedied, he will be preventively incapacitated). Putting exclusive emphasis on the offence or on the offender has resulted in serious neglect of the principle of restraint. Thus, it appears necessary to give proper consideration to both elements in order to achieve a balance in sentencing.

One of the most basic issues which has to be addressed by a sentencing theory and policy is whether sentencing ought to be directed primarily toward the past delinquent behaviour of the offender or the future consequences of his sanction. Retributivism and just deserts theory have a retrospective orientation: they justify a sanction on the grounds of the blameworthiness of the offender for past offences. Utilitarianism on the other hand, is forward oriented: the sanction is justified by its future beneficial consequences. The definition of sentencing recommended by this Commission does not, in itself, favour retributivism or utilitarianism. However, this does not imply that the Commission favours neutrality on this crucial issue. It will be addressed in detail in Chapter 6 which is devoted to a discussion of the rationale and principles of sentencing. At the present stage of the discussion, the points made in the previous paragraph suggest that sentencing should be looking backward at the blameworthiness of the conduct, without however remaining oblivious to the possible future rehabilitation of the sentenced offender.

Finally, the recommended definition of sentencing is meant to convey the notion that there are numerous sanctions from among which the judge can choose. For reasons that will be explained in Chapter 12 and which have basically to do with the need to move from under the shadow of incarceration, the Commission does not think that it is desirable to dichotomize all sanctions into custodial and non-custodial or into incarceration and alternatives to incarceration. Hence, sanctions will be classified in this report into custodial sanctions and community sanctions. The phrase "community sanctions" is preferred to the more common "community-based sanctions", because the latter is too closely associated with community service orders. Although some sanctions, like absolute or conditional discharges and fines, are served or discharged within the community, they are not viewed as involving the community to the same degree as the performance of a community service order. Nevertheless, one of their explicit purposes is to avoid separating the offender from the community for any period of time. It is interesting to note in this regard that the word "fine" originally comes from the French "fin" which means "end". Accordingly, the fine was used to "end" (actually to vacate) a more severe sanction such as custody. The implications of viewing a fine as a community sanction in its own right will become clearer in the light of the Commission's proposals to make imprisonment for defaulting on a fine an exceptional measure. A fine is not a stopover on the way to prison; it ought to be a sanction in its own right.

The report further proposes to break down the community sanctions into two main components; namely compensatory community sanctions and non-compensatory community sanctions. The first category encompasses restitution, compensation, forfeiture, community service orders and fines. The second category includes absolute and conditional discharge, probation, prohibition, and a measure such as house arrest, if it is implemented in Canada. Custodial sentences include terms of imprisonment in a provincial prison or in a federal penitentiary, a stay in an open custody facility and intermittent custody.

5. Additional Features of Sentencing

There are important features of sentencing which cannot be included in a definition and which must be independently explained. Four important features will now be discussed. The first of these features is that sentencing is a process; the second one is that the scope of this process is limited; and a third feature is that this process is discretionary.

One last feature to be discussed is negative: due to lack of adequate information systems and a lack of feed-back mechanisms, the sentencing process is for the most part blind to the trends in its operation and also to the result of its operation.

5.1 Sentencing as a Process

Sentencing is not static, it is a process which extends over time and which unfolds in stages.

The sentencing process extends over time in at least two different ways. First, it involves the time of individuals who play a part in it. Some of these individuals – for example, an offender who may be on remand – are entitled to know what their fate is going to be without undue delay.

Second, the sentencing process is a historical process and it is the object of changes. As discussed earlier, changes affecting the sentencing process have been piecemeal and incremental. They also have been shaped by external events rather than introduced by advanced planning. There is in this regard a need in Canada for monitoring the changes which occur in the sentencing process and for integrating these changes into a consistent structure, in order to keep the process in tune with the requirements of society and to preserve the efficiency of its operation.

The sentencing process is also a multi-stage process and its unfolding involves several components of the criminal justice system. This fact is explicitly acknowledged by the Commission's terms of reference which direct it to examine pre-sentencing issues, such as prosecutorial discretion and plea and charge negotiations, and also post-sentencing issues, such as parole and remission. The professional involvement of various officials in the sentencing process has several implications. It implies first of all that the judiciary does not control the whole operation of the sentencing process. This lack of control, in turn, has a dramatic effect on the capability of the sentencing process to achieve its goals (however they may be stated). Admittedly, there must be co-ordination between the different parties if the system is to work. However, beyond this obvious requisite lies a limiting principle: the more numerous are the intermediates between an initial decision and its final outcome, the less related the beginning and end become. If a judge wants to deter an offender by giving him a severe custodial sentence, which is then reduced to one-third of its duration for rehabilitative purposes by a parole board, it becomes very difficult

to assess to what extent the judge or the parole board have failed, if the offender recidivates, and to what extent either has succeeded, if the offender becomes a law-abiding citizen. These questions will be more fully explored when the goals of sentencing are addressed.

5.2 The Sentencing Process Is Limited in Scope

This feature is immediately related to the previous one. Only a small percentage of the offences *reported to the police* eventually result in the imposition of a sentence upon an offender. This percentage is said not to be in excess of 14% in England.[15] These figures are similar for Australia. The percentage is estimated to be as low as 2% in certain urban areas in the United States, where crime rates are particularly high. No systematic study of the percentage of offences for which the courts actually pass sentence has been yet undertaken in Canada. However, a pilot study commissioned by the Law Reform Commission of Canada has assessed this proportion to be 8.5% of offences known by the police for the jurisdiction under study (Canada, 1975 c; 168). This figure is high and would no doubt be smaller, had the research been undertaken in a large Canadian city.

The reasons for the small percentage of offences for which an offender receives a sentence are many. Not all crimes reported to the police are solved. The clearance rates for very frequent offences, such as theft or breaking and entering into a dwelling house, are less than 20%. More than 80% of the offenders who have committed these offences do not appear before a judge. Most importantly, however, all the officials who intervene at one stage or another preceding the actual imposition of a sentence – social workers, police personnel, Crown attorneys, act as filters that screen out offenders before they ever reach the sentencing stage of the criminal justice process. Only a minority of offenders reach that final stage.

These remarks only concern reported crime. The amount of crime that is unreported is referred to as "the dark figure of crime" by criminologists and legal scholars. They argue that this figure is quite high. Depending on the offence – and with the possible exception of murder and very high visibility offences such as hijacking – it is estimated that the actual rate of unreported crime is at least three times higher than the reported rate.[16] For instance, it is a well known fact that for every ounce of hard drugs a narcotic squad seizes, twenty more reach the street.[17]

When the complete picture is taken into account, it becomes obvious that the application of the sentencing process is limited to a small proportion of offenders. In the best of circumstances, it is doubtful that more than 3% of all offenders who have committed a criminal offence during any given year end up before a sentencing court that same year. Needless to say, this is an aggregate figure for all crimes. It should be noted that the percentage of offenders sentenced for a crime like murder is significantly higher. It must also be added that if an offender is a career criminal, the chances that he will eventually be

arrested and brought before the tribunal are increased. There are other qualifications which could be made, but the sum-total of these qualifications would not invalidate the conclusion that sentencing has serious limitations as an instrument for crime control. Its actual reach, as compared to the total amount of crime, is little more than a scratch on the surface and this situation is unlikely to change. Due to the pressures under which the criminal justice system is presently operating, the frequency of pre-trial diversion is bound to increase. There is no reason to foresee that the proportion of crime that will be reported is going to grow in the future. Indeed, a large percentage of crime is of the nature of a transaction between a client (who may be considered in some cases to be a victim) and a provider of illegal services. Such transactional crime implies in most instances a form of consent between the offender and his or her clients and remains unreported. This type of criminality is on the rise and its occurrence inflates the rate of unreported offences.

5.3 Discretion and the Sentencing Process

It is acknowledged that the exercise of discretion is a feature of the sentencing process. This feature has already been partly discussed in Chapter 3, in relation to the fact that the present maximum penalties provided by the law offered little guidance to the sentencing judge. Nevertheless, important points still remain to be made.

Several officials play an important part in the sentencing process. These officials, such as the police and Crown attorneys, also exercise discretion in their decisions. There is now a consensus among several authorities in the field of research on sentencing that the total amount of discretion which is exercised within the sentencing process remains more or less at the same level.[18] This view implies that discretion has a tendency to shift among the different actors in the sentencing process: constraints on the discretion exercised at one level of the process are usually matched by an increase in discretionary power at another level. If, for instance, you limit the scope of judicial discretion by enacting minimum penalties, you thereby grant more leverage to the Crown attorney in plea negotiations: an offender is more likely to plead guilty to a lesser charge if the Crown has the option to prosecute him or her for an offence carrying a high minimum penalty (e.g., seven years imprisonment). The notion of the transfer of discretionary power is an important consideration for the development of sentencing guidelines because it stresses the necessity of achieving a balance in discretion.

The determination of a sentence implies three fundamental decisions and for all three, the sentencing judge enjoys a certain amount of discretion. This statement does not pretend to recreate what actually goes on in the mind of a sentencing judge. It only means that when a sentence is determined, three kinds of issues have been resolved. The first issue is the *nature of the sanction*, which takes care of questions related to whether or not to segregate the offender from society. The issue is resolved by choosing between a custodial sanction and a community sanction. This issue is referred to as the "in/out decision" in the sentencing literature.

The second issue relates to the specific *type of sanction* to be used. Depending upon the previous decision about the nature of the sanction, this second issue is resolved by the selection of a particular type of sanction from among the community sanctions, where the choice is rather wide, or the custodial sanctions, where the choice is more narrow (open or closed custody and intermittent custody).

The third issue is the *quantum of the sanction.* Since most sanctions can be broken down into units of time or money, a quantum must be determined. All three issues are difficult to solve. However, for reasons that will now be discussed, the issue of quantum is particularly problematic.

There are some sanctions, such as restitution, compensation and forfeiture, where the nature of the offence offers guidance for setting the quantum of the sanction. To take an obvious example, what has been stolen by an offender naturally determines what should be the object of a restitution order. There is, however, no natural connection whatsoever between a certain number of years in prison, in the case of a custodial sanction, or a given number of hours of community services, and the offence for which these sanctions are the consequence.

The only questions relating to quantum which can be resolved with a relative sense of certainty are those which require *comparisons* between offences on the one hand, and sanctions on the other hand. It is easier to decide whether the maximum period of imprisonment (or the tariff) for an offence should be higher, lower or the same for an offence than for another than it is to determine precisely what that maximum penalty (or what that tariff) should be. This predicament itself offers a clue as to how to solve the issue of quantum. In resolving such issues, the penalty structure must take precedence over its elements. In other words, one does not start from the isolated case to determine quantum. One must begin with a whole set of offences and rank them according to their relative seriousness. It is only within this ranking structure that the principle of proportionality can then be used, on a comparative basis, to allocate a quantum of sanction to each offence.

There remains another problem. Numbers can mean very different things to different people. A fine is onerous or insignificant depending upon one's financial resources. For an Arctic native or for the provider of a family, a period of incarceration may have more destructive consequences than for people whose life circumstances are different. Above all, for people who enjoy their freedom, the length of a sentence of imprisonment remains an abstract figure, whereas it is the object of a concrete and painful experience for an inmate. In trying to assess whether a sanction is proportionate to an offence, it is imperative to move from the abstract realm of numbers towards their meaning in real life experience. On paper, ten years (in prison) may appear to be a small figure. For a person who was sent to prison at 20 years of age and was released at 30, it means having been deprived of youth. By any standard this should be considered a severe punishment.

5.4 Information, Feed-back and Sentencing

If, as this report claims, the only way to determine the quantum of a sanction, which is not prone to arbitrariness, is to proceed on a comparative basis, then providing judges with information on sentences, to which they can compare their own practice, is not a simple matter of statistics but rather of justice.

Several kinds of information must be provided for the judges and policy-makers. First of all, there must be uniform statistical data on the sentences for the different offences. Second, there should also be knowledge of the effects of different sanctions on offenders. In other words, there should be information on the outcome of the operation of the sentencing process. This takes on particular importance with regard to evaluating the success of new sentencing initiatives in community sanctions. Third, it is crucial that the sentencing judges be aware of the available resources and facilities within their respective jurisdictions. This requirement goes beyond the mere listing of existing programs. It also implies that the program be described and their goals identified.

Right now, the dearth of sentencing data stands in dire contrast to the wealth of crime statistics. This situation is not peculiar to Canada. The Commission was able to verify through its investigations that the state of sentencing information was not noticeably better in many other countries.

Problems such as the lack of data and, when data are available, questions about their completeness, their accuracy and their compatibility, can be provisionally solved through research programs. There is however a critical difference between solving these problems on an *ad hoc* basis, for the purposes of a special inquiry such as was successfully conducted by this Commission, and providing a lasting solution to the information problem by developing permanent reliable information systems. The latter task must confront difficulties such as structuring into an operating network data bases which are now scattered between different provincial and federal departments. It is however absolutely crucial that these difficulties be overcome. Any meaningful reform of the sentencing process is bound to be eventually defeated if there is no way to assess how this process is evolving. Part of Chapter 14 is devoted to examining what the options are with regard to the development of information systems and to recommend what appears to be the best course to follow.

Endnotes

[1] See Law Reform Commission of Canada (1974c), *Studies on Sentencing*, p. 4. The same definition is given in Law Reform Commission of Canada (1974a), *The Principles of Sentencing and Dispositions*, p. x.

[2] See, for example, Ashworth (1983; 16) and Blumstein *et al.* (1983; 48). Ruby and Nadin-Davis usually avoid identifying the aims of sentencing with the aims of punishment. Occasionally, they do make the identification (e.g., Ruby, 1980; 2 and Nadin-Davis, 1982; 30).

[3] An example of this kind of translation can be found in sub-clause 2(10) of the Criminal Law Reform Act, 1984 (Bill C-19). The French translation of *The Principles of Sentencing and Dispositions*, a working paper published by the Law Reform Commission of Canada, provides numerous examples of translating "sentence" by the French "*peine*".

[4] The definition provided by Wasserstrom (1980; 121) is actually more elaborate and its complete formulation is the following: punishment is the imposition of a deprivation, according to the following conditions: (i) the deprivation is imposed because it is a deprivation; (ii) there is the belief that the person upon whom the deprivation is imposed is guilty of wrongdoing; (iii) the person upon whom the deprivation is being imposed is to understand that the deprivation is being imposed because the two former conditions are present.

[5] Wasserstrom (1980) shows beyond dispute that the frequently quoted definition of punishment provided in Hart (1968; 4-5) falls into this type of circularity. Wasserstrom himself does not completely succeed in avoiding circularity in defining punishment; problems with the definition of punishment make it more difficult to provide a justification for punishment which is entirely satisfactory. Wassertrom concludes his chapter on punishment by saying that "whether it is right to punish persons and, if so, for what reasons, are, I think, still open questions both within philosophical thought and the society at large". (Wasserstrom, 1980; 146).

[6] Very cruel and unusual punishment can be used to deter (e.g., flogging, the infliction of torture), to incapacitate (lengthy periods of solitary confinement) and to "rehabilitate" (the use of powerful drugs, surgical operations).

[7] See Walker (1971; 3-22).

[8] *Reference Re s. 94(2) of the Motor Vehicle Act*, (1986), 63 N.R. 266 (S.C.C.).

[9] See von Hirsch (1976), *Doing Justice*, preface, p. xxxix.

[10] von Hirsch (1976), preface, pp. xxxix-xl.

[11] von Hirsch (1976; 136).

[12] *California Penal Code*, ss. 1170 (a)(1).

[13] The 5 year ceiling was proposed in the above quoted report, entitled *Doing Justice* (von Hirsch, 1976). The 7 year ceiling was proposed as a working hypothesis in a submission received from the Law Reform Commission of Canada. The 8 year ceiling was proposed in a report commissioned by the Twentieth Century Fund Task Force on Criminal Sentencing (*Fair and Certain Punishment*, 1976).

[14] See *Waller (1986), The Role of the Victim in Sentencing and Related Processes*. See Appendix A.

[15] Compared to estimates in other countries, this figure is rather high. It is quoted by Andrew Ashworth in an unpublished paper given at a seminar on sentencing which was held in Canberra, Australia. See Ashworth (1986), *Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems*. If Ashworth's own estimation of the percentage of unreported crime is taken into account, "one is left with around 7 percent of all offences for which the courts actually pass sentence" (p. 11).

[16] According to the Canadian Urban Victimization Survey of 1982, undertaken in seven major Canadian cities by the Ministry of the Solicitor General of Canada, approximately only one third of assaults, sexual assaults, thefts (personal and household) and vandalism were reported to police (see *Bulletin, Victims of Crime* (1983), 1, p. 3). The amount of reported crime is higher for offences such as break and enter and theft of motor vehicle, partly due to the fact that many insurance companies will not accept a claim for stolen property if these offences are not reported to police. The figures given in the *Bulletin* are minimal and apply to seven selected offences. It can be inferred from Manning (1977), which is a study of police work both in England and the United States, that the amount of unreported crime is between four and nine times higher than the official rates, depending on the nature of the offence. Hulsman and Bernat de Celis (1982; 69) quote an experiment conducted in Germany, according to which *one* criminal incident in a possible 800 was actually reported.

[17] See the R.C.M.P.'s annual reports which document the quantity of drugs that were seized in a year. For instance, in 1981, the R.C.M.P.'s "C" division which operates in Québec, did not even seize one kilo of heroin (824.2 grams); in 1984 it seized 2 kilos and 200 grams of heroin. These are rather small figures compared to the magnitude of drug addiction. For a general discussion, see *The Narc's Game*, by Peter K. Manning (1980).

[18] See Wilkins (1981). This theory, according to which the sum-total of discretion which is exercised by the different participants in the sentencing process varies little, is known as the "hydraulic" theory of discretion.