Chapter 6

A Rationale for Sentencing

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According to the 1984 government policy statement entitled *Sentencing*, the Canadian Sentencing Commission was appointed to consider some remaining concerns that the Criminal Law Reform Act, 1984 (Bill C-19) could not address in a comprehensive manner (Canada, 1984; p. 59). The purpose and principles of sentencing were not originally included among these remaining concerns, since section 645 of Bill C-19 already provided a *Declaration of Purpose and Principles of Sentencing*. However as Bill C-19, having died on the order paper, never became law, the Commission was left to undertake its mandate without the benefit of a legislated statement of purpose and principles. It was therefore incumbent on the Commission to fill the void by developing a rationale for sentencing prior to addressing the more specific aspects of its mandate. This necessarily entailed a review of the *Declaration* contained in Bill C-19 to assess whether it was satisfactory or in need of amendment.

This chapter is devoted to the articulation of a sentencing rationale. It is divided into four main sections. First, general comments are made to elucidate the notion of a sentencing rationale and to state criteria of adequacy which should be respected in the formulation of a sentencing rationale. Second, the most oft-quoted sentencing goals in jurisprudence and in the sentencing literature are reviewed and an assessment is made of the degree to which they are now or can be achieved by the sentencing process. Third, the adoption of an overall purpose of sentencing is recommended on the basis of the previous analyses. Finally, the Commission recommends a Declaration of the Purpose and Principles of Sentencing for Canada.

1. The Nature of a Sentencing Rationale

According to legal doctrine, a sentencing rationale provides an answer to the following question: what is the justification for imposing legal sanctions? This question is usually raised in the context of the more severe sanctions such as incarceration. Excepting Montero's aim – the protection of offenders against unofficial retaliation – which is an important but subsidiary goal, there have been until recently two fundamental ways of resolving the issue of justification.

The first one, associated with retributivism and just deserts, is to provide moral reasons for imposing a sanction. According to this perspective, justice requires that *retribution* be exacted from those who are guilty of blameworthy behaviour. No further ground is offered to support this statement, which has the status of a postulate (why punish instead of forgiving is certainly a pertinent moral question; it is not addressed by retributivism). Retributivism is directed towards the past behaviour of the offender and stresses the necessity of a public condemnation of this behaviour. *Denunciation* of blameworthy behaviour is claimed to be a prominent goal of sentencing. The second way to address the issue of justifying sanctions has been in terms of their future beneficial consequences or, in other words, their social utility. The social utility of sanctions was defined originally in terms of crime prevention or crime control. This general aim was to be achieved by deterring potential and past offenders, by incapacitating them and by rehabilitating them. The three traditional utilitarian goals – *deterrence* (both general and special), *incapacitation* and *rehabilitation* – were at times pursued simultaneously or viewed as alternative strategies for controlling crime.

Retributivists and utilitarians construed the issue of the justification of legal sanctions differently. The retributivists asked *why* there should be sanctions and provided a moral ground for them (punishment is justified *because* of a past offence). The utilitarians asked *what* should sanctions be imposed *for* and answered the question with a statement of goals which were oriented towards the future.

Until ten years ago, these were the two main approaches to solving the issue of the legitimacy of penal sanctions. There is now a third approach which attempts to blend morality and utility in advocating that sanctions provide redress for the victims of crime. Redress is then understood in a very wide sense and ranges from procedural requirements – such as the introduction of victim-impact statements in the sentencing process – to the development of compensatory sanctions and reconciliation programs, which are victim oriented. This third approach, which is still nascent, is more of a supplement than a replacement of the two mainstream trends. It aims to promote the rights of victims which are said to have been neglected in the exercise of criminal justice.

This enumeration does not claim to be exhaustive. Its purpose is to provide a framework on which to build the following discussion. There is however a further distinction which should be made with regard to the goals of sentencing.

When discussing the goals of criminal sanctions, it is important to make distinctions between *normative* and *functional* goals. Normative goals refer to desired external effects of a system. All traditional utilitarian goals, such as rehabilitation, deterrence and incapacitation, and retributivist goals exemplify normative goals. Functional goals are objectives which are relevant to the internal operation of the system. For instance, using plea negotiations in order to process cases more expeditiously or changing the scale of punishments in order to stay within prison capacity are examples of achieving functional goals.

Since functional goals are not always explicit and sometimes even unavowed (e.g., some aspects of plea bargaining), their importance in the penal system has not yet been systematically appraised. There is however a noticeable exception to this assertion. It is the issue of prison population versus prison capacity, which is now attracting greater political attention and is generating a growing body of research literature. The increasing prominence of this issue is actually quite revealing of the confusion which prevails in the area of penal goals. It is now proposed that penalties be tailored precisely to fit prison capacity. A telling illustration of this trend is given by Alfred Blumstein (1984; 132), who was the Chairman of the U.S. Panel on Sentencing Research:

> Here, prison capacity can provide clear guidance to an appropriate proportionality constant. For example, if the jurisdiction had 1,000 prison cells available for just burglars and robbers, and if they typically sentenced approximately 400 burglars and 300 robbers, then a sentencing schedule of one year for burglary and two years for robbery (which would just use that available capacity) would be preferable to longer sentences that also had a two-to-one ratio, since the longer ones would exceed the available prison capacity.

The right proportion between the offence and its punishment is thus decided on purely pragmatic grounds (prison capacity). The significance of this proposal is obvious: a functional goal is suddenly endowed with normative value and far from being subsidiary, it is given priority over traditional normative goals (e.g., just deserts, deterrence).

There is also another recently-acquired feature of functional goals which deserves mention. Up until the seventies, normative and functional penal goals were thought to be in relative harmony. They are now often perceived to be in conflict: the paradigm case being the functional goal of plea negotiation, which raises serious doubts as to its consistency with the normative aspects of justice (the rights of the innocent, equity, due process, etc.).

In these preliminary remarks devoted to the establishment of basic distinctions, retributivism and utilitarianism have been contrasted as have been normative and functional goals. It remains to be shown that a synthesis between these different perspectives on sentencing goals is an absolute requirement of any successful attempt to develop a sentencing rationale which is not truncated.

1.1 A Complete Sentencing Rationale: Goals and Principles

In section 5.3 of Chapter 5, the need to arrive at a principled determination of the quantum of a sentence was stressed. With regard to this problem, H.L.A. Hart makes a crucial distinction in his book on punishment (Hart, 1968; Chapter 1). The importance of Hart's distinction has been acknowledged by several penologists, including Andrew von Hirsch. Hart proposes to make a distinction between the issue of the justification of legal sanctions – *what* justifies legal sanctions – and the issue of the allocation of legal sanctions – *how much* deprivation to impose?

It was pointed out in Chapter 5 that it is necessary to apply the principle of proportionality within the context of a group of offences previously ranked according to their relative seriousness, in order to determine properly the quantum of the sanction. This conclusion suggested that the issue of the allocation of sanctions – the question of how much – had its own complexity and was relatively independent of the issue of the justification of penal sanctions. Actually, Hart's distinction can be used to point out a mistake which is all too common in sentencing theory and practice. There is a general tendency to bridge the gap between the *what* and the *how much* by using a simplistic formula: *increasing* penal sanctions invariably results in an *equivalent increase* of the benefits alleged to justify their existence. If you justify sanctions by their deterrent effect, you may be led to believe that the more severe a sanction is, and consequently the more offenders we incarcerate, the more we reduce crime rates. If your sentencing rationale is the imputation of blame, to state a final example, you may again assume that the more severe sanctions imply greater denunciation.

All these assumptions are recognized fallacies. In an authoritative book on deterrence, Zimring and Hawkins (1973; 19) have provided a scathing description of simple-minded beliefs about deterrence:

> If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will be deterred; if doubling a penalty produces an extra measure of deterrence, then trebling the penalty will do still better.

Equating an increase in the frequency or the severity of a sanction with an increase in the social benefits which are presumed to result from it, does not fare better with regard to incapacitation or to denunciation. Not only is the corresponding assertion about incapacitation refuted by the facts (prison population and crime rates tend to rise at the same time) but its logic is absurd; transforming all society into a prison would generate the biggest crime problem in history because no environment known to man is more crime-ridden than a prison (rape, violent assault, theft, murder, drug abuse, etc.). Finally, any punishment grossly disproportionate to an offence would in all likelihood be perceived as self-denunciatory rather than as the ascription of deserved blame.

The upshot of this argument is that a statement of goals may resolve the issue of justification — the reason for the imposition of sanctions — and it also may supply legitimacy to the criminal justice system. However, it desperately needs to be supplemented by principles to settle the question of "how much sanction" and, thereby provide useful guidance to sentencing judges. Indeed, the issue of allocation or of quantum lies at the heart of the sentencing process.

It has been shown, so far, that focusing upon sentencing goals as the utilitarians did could not bring about the resolution of the issue of allocating a quantum of sanction. It can be demonstrated also that principles such as proportionality or equity, which are fundamental for solving the question of allocation, are in themselves inadequate in resolving the issue of justification.

Andrew von Hirsch, who is presently the leading exponent of the just deserts perspective in the U.S., makes this point:[1]

> The principle of commensurate-deserts addresses the question of *allocation* of punishments – that is, how much to punish convicted offenders. This allocation question is distinct from the issue of the *general justification* of punishment – namely, why the legal institution of punishment should exist at all (our emphasis).

The assertion that sanctions are commensurate with the blameworthiness of conduct does no more to legitimize the existence of penal sanctions than the fact that income tax is proportionate to revenue justifies the practice of taxation in itself. In the same way that utilitarian goals have to be supplemented by principles of justice with regard to the question of allocation, retributivism and just deserts must borrow utilitarian arguments to convincingly address the issue of justification. For strict retributivists, a justification of punishment amounts to little more than the blank assertion that justice commands us to punish. Immanuel Kant, to whom modern retributivist thought can be traced, spoke thus:[2]

> Even if a civil society were to dissolve itself by common agreement of all its members, (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Von Hirsch, who at one time was influenced by Kant, nevertheless has made the point repeatedly that the pursuit of penal justice for its own sake appears purposeless:[3]

> Were one convinced that punishment had *no* usefulness in preventing crime, one might well wish to dispense with the criminal sanction (von Hirsch, 1983b,; 68).
>
> Had punishment no preventive value, the suffering it inflicts would be unwarranted (von Hirsch, 1985; 54).
>
> I also think it is preferable to have a general justification for the criminal sanction that is expressly consequentialist (utilitarian) in part. This makes the warrant for the existence of punishment dependent on that institution's having significant crime-preventive benefits (von Hirsch, 1985; 59).

It would be mistaken to infer from the preceding analyses that one has only to cap retributivist principles with utilitarian goals to produce an adequate sentencing rationale. This would only generate confusion. There are, however, significant conclusions that can be drawn from the preceding discussion. First of all, no sentencing rationale can pretend to be complete and useful if it does not supply both purpose and principles. Second, the achievement of the proposed purpose(s) must result in some perceptible social benefits; finally, the principles should ensure that the search for social benefits is exercised in accordance with the principles of fundamental justice.

1.2 A Complete Sentencing Rationale: Normative and Functional Goals

A distinction was made previously between normative goals, which are ends in themselves, and functional goals, which regulate the process by which the ends are achieved. It was also noted that functional goals were, under normal circumstances, secondary in importance to normative goals.

With regard to this distinction, there is one issue which is rather thorny. As we have said before, staying within prison capacity is a functional goal of sentencing, although in the U.S., this imperative is now superseding normative goals. It is not surprising that penologists and correctional administrators in that country have become preoccupied with the rising prison population: in 1982 there were no fewer than 32 American states or territories which were either under court order due to the degraded conditions of confinement resulting from prison over-population or were involved in litigation likely to result in such court orders. It would seem then that the issue of prison overcrowding involves values such as maintaining a reasonable level of the quality of life and basic human rights.

In Canada, it is not inconceivable that prison overcrowding may lead to court litigation on the basis of the Charter prohibition of cruel and unusual punishment (section 12). The issue of staying within prison capacity falls into a problematic area between normative and functional goals and has been considered very carefully by the Commission.

Furthermore, according to a national survey of public opinion undertaken in 1986 by this Commission, 70% of the respondents voiced the opinion that the government should develop alternatives to incarceration rather than spend taxpayers' money to build more prisons (only 23% of respondents favoured building new jails). These results indicate that staying within prison capacity is more than just an administrative concern for criminal justice officials.

1.3 Clarity, Consistency and Realism

The preceding remarks have stressed the need for completeness in formulating a sentencing rationale. There are other criteria which also deserve important consideration. These criteria are clarity, consistency and realism. Their importance lies in the fact that not respecting them would undermine the point of developing a sentencing rationale in the first place.

In the opening paragraph of its discussion of the purpose of the criminal law, *The Criminal Law in Canadian Society* declares (p. 38):

> The basic problem confronting criminal law and the criminal justice system, it is often argued, is not the variety of specific concerns and complaints about particular phenomena – which are mere symptoms – but rather a debilitating confusion at the most basic possible level, concerning what the criminal law ought to be doing.

In the particular field of sentencing, research on disparity conducted on behalf of the Commission has shown that the most frequently alleged cause for unwarranted variation in sentencing was confusion about the purposes of sentencing.[4]

A sentencing rationale supplies the foundation for solutions to unwarranted variation. It is not in itself the final answer to disparity because, even when it is carefully worded, a declaration of the purpose and principles of sentencing remains a general statement which must be supplemented by more specific guidance to have an impact on practice. There is, however, another function that is performed by a legislated sentencing rationale. It makes known to the community what are the grounds for imposing penal sanctions and the principles governing the sentencing process.

If a sentencing rationale is to provide guidance to the judiciary and enlightenment to the general public, the need for it to be clear, consistent and realistic is self-evident. Some implications of these features have to be discussed.

There is an obvious requirement that no word with several different meanings should be used in the formulation of a statement: clarity implies the absence of equivocation. Yet there is one fundamental equivocation which runs through most of the federal government reports on the criminal justice system: a general tendency, when ascribing goals, to confuse the sentencing process with the whole criminal law and with the entire criminal justice system. The same overall purpose – the protection of the public – is ascribed to both the sentencing process and the criminal law itself. This tendency to identify the part with the whole will have to be examined to determine whether it ultimately generates confusion.

The need for a synthesis between retributivist or just deserts principles and utilitarian types of goals has been acknowledged. However, inconsistency has proved to be a stumbling block in many attempts to develop such a synthesis. Inconsistency cannot be avoided if its possibility is denied. Insensitivity to possible conflicts between objectives ascribed to the criminal justice system – and to the sentencing process – is another trait of official literature on the criminal law. There are, however, genuine inconsistencies between traditional penal goals. For example, the youth of an offender is a mitigating factor under a rationale of rehabilitation. It is an aggravating factor under a policy of selective incapacitation, because youthfulness is believed to be one of the most reliable factors in predicting recidivism.

Another significant example can easily be provided. The ethical foundation of retributivism lies in the following principle: it is immoral to treat one person as a resource for others. From this principle it follows that the only legitimate ground for punishing a person is the blameworthiness of his or her conduct. It also follows that sanctions must be strictly proportionate to the culpability of a person and to the seriousness of the offence for which that person has been convicted. (Any deliberate disproportion would imply that

persons are being used as resources for that part of their sanction which does not flow from the blameworthiness of their conduct.) According to these principles, all exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified, because they imply that an offender's plight may be used as a means or as a resource to deter potential offenders.

There are several ways to avoid inconsistencies. First, principles or goals which are clearly antagonistic should be excluded from the formulation of a sentencing rationale. Second, when the contradiction between goals or the principles is not overt, one can rank in priority the concerns that may be at some point conflicting, thus providing a way to resolve dilemmas arising from the need to consider competing principles. A third way is to use differentiation. Instead of formulating a cluster of goals and enumerating sanctions separately, it may provide appropriate guidance to match explicitly particular goals with particular sanctions. The ascription of diverging goals to different sanctions may resolve inconsistencies.

Finally, and most importantly, a sentencing rationale should be in basic accordance with the reality of the sentencing process. This requirement has two basic consequences. The first is that goals and principles which are repugnant to the very nature of the sentencing process (or to some of its important aspects) should not be assigned to it. For instance, caring for a person calls for gratifying that person on some occasions; curing a person requires that the person under treatment wishes to be cured and co-operates. Neither caring for nor curing should be described as goals of a process which involves deprivation and coercion. The second consequence implies the notion of degree. Even if a goal agrees in theory with the sentencing process, it should not be subscribed to in a fundamental way if there can be no reasonable expectation that it will be achieved to any significant degree. Any wide discrepancy between the stated aims of the sentencing process and its results is bound to have an adverse effect on public opinion and to backfire. It is also bound to demoralize those professionally involved with the operation of this process.

2. Achieving the Goals of Sentencing

An assessment of the actual degree to which the goals of sentencing are achieved will now be made. The goals under review are the traditional utilitarian goals of deterrence, incapacitation and rehabilitation; as well sentencing aims which are associated with the retributivist perspective, such as exacting retribution from an offender and denouncing blameworthy behaviour will be discussed briefly.

There has been a large amount of research into verifying the extent to which the utilitarian goals are achieved by the sentencing process. For instance, the *Bibliography on General Deterrence Research* (Beyleveld, 1980) is 452 pages long and it reviews 568 research papers. Since 1980, a great number of papers have been published and could be added to this list. The Commission

did not believe that sponsoring more empirical studies on the utilitarian goals of sentencing would make a significant difference with regard to its appraisal of the efficiency of sentences. Research undertaken for the Commission in this field took the form of reviews of the existing literature on utilitarian goals in Canada and elsewhere. The most exhaustive research conducted so far on the utilitarian goals of sentencing was undertaken by two panels created by the U.S. National Academy of Sciences. One of these panels examined the deterrent and incapacitative effects of sentences – Blumstein, Cohen and Nagin (1978) – while the other estimated the success of rehabilitation programs – Sechrest, White and Brown (1979). The Commission will rely on its own research and on the systematic investigations of these two U.S. panels in assessing to what extent one can expect the sentencing process to achieve the goals which traditionally have been assigned to it.

2.1 Deterrence

According to research conducted for the Commission, deterrence came to be a target of judicial criticism in the 1970's. However, it was back in favour in the early 1980's and subsequently regained its former pre-eminence in Canadian appellate jurisprudence (*Young, 1985, 71*). Of all the utilitarian goals, deterrence is now the most frequently invoked. It is also the most wide-ranging. Not all sanctions can be said to be incapacitative or rehabilitative. However, it can be claimed that any sanction has a deterrent effect.

Deterrence is either general or individual (specific). General deterrence aims to discourage potential offenders. It is defined by the Panel on Research on Deterrent and Incapacitative Effects (1978; 3) as "the inhibiting effect of sanctions on the criminal activity of people *other than* the sanctioned offender" (emphasis in text). Individual deterrence aims to discourage the sanctioned offender from re-offending.

Such factors as the rate of recidivism, the relative success of early release from custody and the "undeterrability" of certain groups of offenders have called into question the possibility of achieving with any significant degree of success the goal of individual deterrence. It is an acknowledged fact that most prison inmates have been convicted on prior occasions. According to *Basic Facts About Corrections in Canada, 1986*, 60% of offenders released from federal institutions on mandatory supervision between 1975 and 1985 subsequently were re-admitted to a federal penitentiary; 49% of federal parolees were also re-admitted to a federal institution during that same period of time. Research on career criminals has shown that generally they were not inhibited by the threat of penalty (Petersilia, Greenwood and Lavin, 1978; xiii, 119). Research appears to have taken stock of these facts and most studies are now conducted in the field of general rather than individual or specific deterrence.

With regard to general deterrence, the overall assessment of the deterrent effects of criminal sanctions ranges from an attitude of great caution in expressing an opinion to outright scepticism. The first attitude is exemplified by the panel sponsored by the U.S. National Academy of Science:[5]

> In summary...we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and the number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for a position that deterrence does not exist, since the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent. The major challenge for future research is to estimate the magnitude of the effects of different sanctions on various crime types, an issue on which none of the evidence available thus far provides very useful guidance.

Daniel Nagin makes the same point more concisely in a separate study made for the U.S. Panel:[6]

> ...despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect. Perhaps more important, the evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist.
>
> Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence, which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis.

Ezzat Fattah (1976) reached similar conclusions in a study undertaken for the Law Reform Commission of Canada.

Professor Douglas Cousineau of Simon Fraser University reviewed the latest research literature for the Commission. His conclusion is even more skeptical that Nagin's:[7]

> Drawing upon some nine bodies of research addressing the deterrence question, we contend that there is little or no evidence to sustain an empirically justified belief in the deterrent efficacy of legal sanctions. However, we go beyond a review of this literature and set out several arguments which document the mitigation of deterrent oriented legal sanctions.
>
> Our thesis, however, is not confined to deterrence oriented legal sanctions. We suggest that many factors mitigate the effects of *any* legal sanctions intended to produce specific uniform outcomes.

One of the important mechanisms that mitigate and even nullify the deterrent effects of legal sanctions is, according to Cousineau, plea bargaining.

These general appraisals are either negative or they caution us against any dogmatic belief in the ability of legal sanctions to deter. There are however a few general statements that can be made with confidence.

a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and

the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.

b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that "law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.

c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that "recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)" and that "inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations".

d) Finally, the efficacy of a threat is dependent upon its being known. If, for instance, the certainty of punishment is the cornerstone of deterrence, punishment must be perceived by potential offenders to be fairly certain in order to produce its effects. This implies, first of all, that deterrence has to rest, at least partly, on mystifications. It has been noted that a very small proportion of all offenders are sentenced. Thus the criminal justice system is led to bark louder than it can bite in order to sustain the public's belief in the certainty of legal sanctions. Second, given the present tendencies in the media, it can be doubted that the criminal justice system actually is able to sustain a belief in the certainty of punishment. The news media tends to report sentences that are unusual in some way. Most of the time this means unusually lenient (see Chapter 4). Furthermore, offences receive far more attention than sentences: crimes are more dramatic than sentencing hearings. Finally, the media regularly reports that the clearance rates for the majority of criminal offences are quite low, thus undermining any belief in the certainty of being caught and sentenced. In his most recent treatise on sentencing, Professor Nigel Walker aptly summarized this predicament:[8]

What is fairly clear is that the news media's choice of what to report about clear-up rates and sentences is not designed to further a policy of general deterrence; and that it is only occasionally possible to make deliberate use of newspapers, television or radio for this purpose, usually by paying for the publicity. This fact, coupled with the vagueness of our knowledge about the

operation of deterrents, should dissuade both legislators and sentencers from being very optimistic about this function of penalties.

To summarize: it is plausible to argue that a general effect of deterrence stems from the mere fact that an array of sanctions are known to be imposed with some regularity. However, it can be questioned whether legal sanctions can be used beyond their overall effect to achieve particular results (e.g., deterring a particular category of offenders, such as impaired drivers). In other words, deterrence is a general and limited consequence of sentencing. It is not a goal that can be attained with precision to accommodate particular circumstances (e.g., to suppress a wave of breaking and entering dwelling houses).

2.2 Rehabilitation

In 1974, Robert Martinson published an article under the title "What Works – Questions and Answers About Prison Reform". This paper created an awakening and, although Martinson was himself more cautious in his conclusions, his study was held to mean that *nothing works* in correctional rehabilitation. In a more detailed investigation, Lipton, Martinson and Wilks (1975) drew very pessimistic conclusions about the possibility of using corrections – and particularly imprisonment – to achieve the rehabilitation of criminal offenders. This negative assessment was thought to be definitive and it effectively marked the downfall of rehabilitation as a living ideal in corrections. The U.S. Panel on the Rehabilitation of Criminal Offenders confirmed this diagnosis:[9]

> The Panel concludes that Lipton, Martinson and Wilks were reasonably accurate and fair in their appraisal of the rehabilitation literature...Two limitations, however, must be applied to their conclusions: first, inferences about the integrity of the treatments analysed were uncertain and the interventions involved were generally weak; second, there are suggestions to be found concerning successful rehabilitation efforts that qualify the conclusion that "nothing works".

Despite voicing these reservations, the Panel's main conclusion was unfavourable to rehabilitation:[10]

> There is not now in the scientific literature any basis for any policy or recommendations regarding rehabilitation of criminal offenders. The data available do not present any consistent evidence of efficacy that would lead to such recommendations.

Both *The Criminal Law in Canadian Society* (CLICS) and the proposed Criminal Law Reform Act, 1984 (Bill C-19) were highly critical of the ideal of rehabilitation. According to CLICS, "it is...generally agreed that the system cannot realistically be expected to rehabilitate unwilling offenders" (p. 28). Bill C-19 stated unequivocally in subsection 645 (3)(g):

> a term of imprisonment should not be imposed, or its duration determined solely for the purpose of rehabilitation.

The very limited success of rehabilitation was due to the fact that it was thought possible to achieve this goal mainly through incarceration and indeterminate sentences. Rehabilitation is no longer linked to custodial sentences. In influential books, D.A. Thomas (1970) and Paul Nadin-Davis (1982) provide a similar description of what they call the primary sentencing decision: choosing between two sentencing goals, depending upon the circumstances of the case and of the offender. The judge may elect to pursue the goal of general deterrence; in this case he will generally resort to a custodial sentence or a fine and impose the prevailing tariff. He or she may also decide that the offender can be rehabilitated and impose an individualized sentence, which should be neither a custodial sentence nor a fine. It follows from this line of reasoning that the individualization of sentences should not be used to justify disparity in custodial terms (or in the amount of fines). The individualized sentence is a tool for the rehabilitation of offenders and this goal ought to be achieved through non-custodial programs. Actually, as noted above, Bill C-19 expressly forbade the imposition of imprisonment solely for purposes of rehabilitation. Both Thomas and Nadin-Davis stress that equity requires judges to adopt a uniform approach in individualizing their sentences. The legitimate practice of individualizing non-custodial sentences should not be used to cover up evidence of unwarranted disparity in the imposition of custodial sentences.

2.3 Incapacitation

Two general remarks must be made with regard to incapacitation. First, this goal can be achieved primarily by custodial sanctions. Consequently, this goal cannot be selected as the overall purpose of the sentencing process, because the process encompasses an array of non-custodial sanctions. Second, it appears that countries such as the United States, which have the highest rates of incarceration, are also afflicted with the highest crime rates. To respond that this situation is only natural and that where there is more crime, it should be expected that there will be more imprisonment, will not suffice. This answer twists around exactly what is claimed by the advocates of incapacitation. Their claim is not that a high level of crime generates an increase in the rate of incarceration. It is the opposite: a high rate of incarceration (of incapacitation) should lead to a *decline* in the amount of criminality. This is precisely what is *not* happening in countries like the United States, which incarcerate more offenders than any other industrial society, except the Soviet Union.

The literature on sentencing makes a distinction between collective and selective incapacitation . "Collective incapacitation" refers to an incapacitative strategy that imposes a prison term on *all* persons convicted of a type of offence, usually broadly defined to encompass several crimes (e.g., any kind of burglary or any kind of assault). "Selective incapacitation" refers to an incapacitative policy involving an attempt to predict which offenders are more likely to recidivate; these "dangerous" offenders should then receive a harsher custodial sentence.

Although in theory, the effects of incapacitation can be estimated more precisely than the effects of deterrence, the research picture is not that different. The U.S. Panel on Research on Deterrent and Incapacitative Effects (1978) first acknowledges the existence of an incapacitative effect. This admission is, however, no more than an expression of common sense:[11]

> As long as there is a reasonable presumption that offenders who are imprisoned would have continued to commit crimes if they had remained free, there is unquestionably a direct incapacitative effect.

As soon as the Panel tries to go beyond this general statement and attempts to estimate the magnitude of the effect of collective incapacitation on crime rates, it must rely on extremely hypothetical models, which are as yet more adequate for theoretical simulations than actual numerical appraisals.[12]

If the actual numbers generated by statistical analyses of the effect of collective incapacitation cannot be taken as exact, basic patterns revealed by these studies tend to be more reliable. Hence, one of the less problematic statements about collective incapacitation is that it should be directed toward violent offenders. Any attempt to use this strategy against offenders convicted of property crimes would have a marginal effect upon the crime rates only at the cost of unreasonable increases in the prison population.

Since the 1978 publication of the report of the Panel on Research on Deterrent and Incapacitative Effects, concern over the large increase in the size of prison populations has increased and the limitations of collective incapacitation have become all the more obvious. Until very recently, the only incapacitative strategy seriously considered was a form of selective incapacitation. This approach gained momentum after the publication by Greenwood and Abrahamse (1982) of a widely discussed report entitled *Selective Incapacitation*. Even if one does not doubt that a properly implemented policy of selective incapacitation would affect crime rates without increasing, beyond present capacity, the number of persons incarcerated, the problem of predicting future delinquent behaviour and thus of identifying the most dangerous offenders *is yet unsolved* (von Hirsch, 1985; Webster, Dickens and Addario, 1985). Such a policy cannot be implemented without first solving adequately the prediction problem. Greenwood and Abrahamse themselves have expressed several caveats regarding the significance of this research.[13]

Finally, a third variant of incapacitation was developed by Jacqueline Cohen in 1983. In his latest book, von Hirsch (1985) discusses favourably this last alternative. It is called "categorical incapacitation" and it falls somewhere between collective and selective incapacitation. Instead of incarcerating indiscriminately all persons convicted of serious offences or attempting to select dangerous individuals for imprisonment, Cohen has proposed that we try to estimate the probability of recidivism associated with the commission of precisely-defined offences (a particular type of robbery, for instance); we would then incarcerate those persons convicted of this offence. Needless to say, this nascent strategy is still very tentative. Furthermore, the problem of identifying the high-risk categories of offences may be just as difficult to

resolve, if not more, than predicting individual behaviour. Indeed, since categorical incapacitation implies the imprisonment of whole groups of offenders and not merely dangerous individuals, the certainty of the prediction of a particular high-risk category of offence must match the potential harm that it would create if it were incorrect.

2.4 Retribution

Since it stresses the obligation to punish persons guilty of a crime, retributivism is oriented more towards past blameworthy behaviour than towards the consequences of punishment in the future. Thus, as was stressed in section 1.1, retributivism provides a moral ground for imposing sanctions rather than a purpose which they can strive to achieve (although it can be violated, a moral ground is not, properly speaking, something that can be "achieved" with various degrees of success). It is therefore problematic to treat retribution as a goal and to estimate to what extent it is achieved. However, such an appraisal would require us to note that, strictly understood, retributivism implies that a sanction ought to be imposed upon *all* offenders. As we know that only a small percentage of offenders is brought to justice, it follows immediately that the criminal justice system fails to a very large extent to achieve what is implied by retributivism.

Retributivism lends itself more suitably to an assessment of its value as a justification of punishment. As previously mentioned, it has been debated by legal scholars whether any attempt to justify punishment does not ultimately fall into a vicious circle.[14] This circularity appears to be grounded in the notion of punishment itself. We have argued in Chapter 5 that the notions of crime and punishment are both involved in their respective definition and that circularity in the definition of punishment was in consequence unavoidable. The interrelated nature of crime and punishment makes it equally difficult to justify the imposition of penal sanctions. This point can be made through an argument similar to the one used to show that definitions of punishment were circular.

The question is: "Why should we punish a person?". An obvious answer is: "Because that person has done something wrong". However, this answer raises a further issue: should we actually impose legal sanctions on individuals for any kind of wrongdoing (being discourteous, lacking table manners, cheating at cards)? Obviously not. Only those who are guilty of the most serious forms of wrongdoing should be punished. What precisely are these? They are labelled criminal offences. And what then, is a criminal offence? A criminal offence is a form of behaviour which is legally defined as subject to punishment. Such legal definitions vary across time (we do not burn witches anymore) and across countries. Finally, our original question – Why should we punish a person? – is given the uninformative answer: "Because that person has done something which we now believe requires punishment".

It does appear that strict retributivism is flawed both as a goal of sentencing and as a justification for the imposition of criminal sanctions. This conclusion does not mean that all aspects of retributivism need be rejected. However, it implies that limits should be set upon the rigorous claims of strict retributivists. These claims do not rest on a secure foundation.

2.5 Denunciation

Denunciation of blameworthy behaviour is a goal of sentencing which is associated with retributivism. It has been advocated as a legitimate goal for sentencing in several of the reports published by the Law Reform Commission of Canada.[15] In its brief submitted to the Commission, the Law Reform Commission of Canada stresses once again the importance of denunciation. Clearly, denunciation is a consideration which is of paramount importance for sentencing. However, it cannot be in itself the overall goal.

Denunciation is essentially a communication process which uses the medium of language to express condemnation. Hence, the French equivalent of the English word "information", as it is used in the Canadian *Criminal Code*, is "dénonciation" (see for instance, the definitions of "indictment" and "acte d'accusation" in section 2 of the *Code*; see also ss. 723-727).

The sentencing process has a dual nature. A sentence is, in a limited sense, a judicial pronouncement in court; more fundamentally, it designates a sanction which is applied to an offender. Denunciation is a goal which is much more germane to the first aspect of sentencing than to the second. Since the sanctions provided by the criminal law are obviously more severe than verbal criticism, one would need to over-dramatize the meaning of denunciation to make it the corner-stone of sentencing.

The degree to which the goal of denunciation can be achieved is dependent upon the publicity of the condemnation. It has been stressed already that crime gets much more media coverage than sentencing and that, generally speaking, there is wide discrepancy between the public's knowledge of criminal sanctions and their actual features.

One last remark. Walker and Marsh (1984) conducted an experiment in England to verify whether there is a relationship between the degree of blame attached to an offence by members of the public and their knowledge of the severity of sentences for that particular offence. In Nigel Walker's own words "The results did not provide any support for the belief that the disapproval levels of substantial numbers of adults were raised or lowered by information about the sentence, or about the judge's view" (Walker, 1985; 102).

The Commission did not attempt to replicate this experiment in Canada. However, our research on public opinion supports Walker and Marsh's findings. One question in a public opinion survey involving maximum penalties concerned their effect upon public seriousness ratings. To what extent are

views of seriousness affected by the maximum penalty prescribed by the *Criminal Code*? The recent change in maximum penalties for impaired driving provided the opportunity for a natural experiment. All respondents were asked to rate (on a 100-point scale) the seriousness (relative to other crimes) of impaired driving. Half of the sample were first told that the new maximum penalty was five years. The other half were told nothing. We know from earlier research that most people estimate the maximum to be substantially less than five years. If public views of seriousness are affected by maximum penalties, one would expect the group receiving the maximum penalty information to provide higher ratings of seriousness. But they did not. The average ratings made by the two groups were strikingly similar: 68.9 and 68.2. This result is consistent with a smaller in-depth experiment conducted by the Commission, as well as with research in the United Kingdom. Public views of the seriousness of offences appear to derive more from other sources (e.g., perceptions of harm, intent, etc.) than the severity of statutory maximum penalties or the harshness of the sentence actually imposed in court.

2.6 Just Deserts

The just deserts perspective, which is now one of the main influences on sentencing theory, has often been viewed as a recasting of retributivist arguments, namely that an offender deserves punishment to restore a balance which played in his favour when he flouted the rules by which other citizens abide. The view that "just deserts" is simply a rediscovery of retributivism is incorrect. Andrew von Hirsch has always argued that if punishment was a useless instrument for controlling crime, one could not justify its existence on purely retributivist grounds. Without the support of utilitarian considerations, retributivism becomes a circular argument or is reduced to the blind assertion that crimes ought to be punished. Some of von Hirsch's clearest formulations of this point have already been quoted in section 1.1 of this chapter. There are three aspects of the just deserts perspective which are crucial for developing a sentencing rationale:

a) A distinction between the question of the allocation of sanctions – how much sanction? – and the issue of their justification – on what ground can we impose sanctions and for what purposes?

b) The assertion that the principle of proportionality or commensurate deserts must be given priority in deciding the issue of the allocation of a quantum of sanction.

c) The assertion that pure retributivism cannot provide the justification for sanctions and that their legitimacy must rest both on grounds of morality and social utility (crime prevention).

These aspects of just deserts theory have already been discussed. It has been recognized that they should be incorporated in the formulation of a sentencing rationale.

2.7 Summary

This review of justifications and goals has resulted in conclusions which conflict with normal expectations. In principle, we should have found that *retributivism's* strength was providing a *general justification* for sanctions whereas its weakness lay in the fact that its different features did not lend themselves to a precise numerical assessment. In theory, *utilitarianism* is the opposite: it is weak with regard to the provision of a general justification and strong in allowing our *exact appraisal* of its success.

To the contrary, we have found that the only assertion about the current utilitarian goals that was not undermined by the results of research was relative to the existence of some *general effect* of deterrence and incapacitation, the magnitude of which could not be precisely estimated. This finding concurs with a view expressed in *The Criminal Law in Canadian Society*:

> It is now generally agreed that the system cannot realistically be expected to eliminate or *even significantly reduce crime.* (p.28, emphasis added).

With regard to retributivism, we have argued that it *does not* provide a *general justification* for the existence of punishment but that just desert principles, which are akin to retributivism, might provide a rationale for estimating the *quantum* of deprivation to be inflicted on criminal offenders.

Without being bleak, this picture is disquieting because it seems that generality and precision are wrongly allocated. What we need is a general justification of punishment and a precise estimation of the performance of the criminal justice system. According to research, what we have is the exact opposite, namely a limiting just deserts principle for grading the amount of punishment to be visited on offenders and a general belief, grounded in common sense, that the penal system has some preventive effect (through deterrence and incapacitation) on rates of crime.

This predicament entails several things. First of all, it means that uncertainty is not the exception but rather the general rule in attempting to solve penal problems. We are not in a state of ignorance but we lack fundamental certitudes: this is the context in which decision-making will have to occur.

Second, a context of uncertainty grants considerable discretion to decision-makers; decisions may be made without being constrained by a large number of commonly-acknowledged facts. For this same reason, however, decisions should be made in a cautious and principled way. Any tension arising between the freedom enjoyed by the decision-makers, which entails boldness in their resolutions, and between the need for prudence, which may lead them into diffidence, ought to be resolved by stressing the fact that decision-making is an *ongoing process*. This process can be determined by priorities but it should also be flexible and enduring enough to allow for changes. The upshot of these remarks is that all sentencing policy decisions cannot be finalized at the same time. There is a strong need for a permanent body which would build upon the work of this Commission and update its policies.

It also appears that we know much more about what punishment cannot achieve (e.g., rehabilitation of unwilling offenders) than what it can accomplish and what justifies its being. With regard to the actual performance of the penal system and to its legitimacy we must rely on a mixture of knowledge, reasonable beliefs and strong emotions. This situation suggests that the need for restraint repeatedly called for since the early seventies by the Law Reform Commission of Canada is very real. Punishment, which involves pain and deprivation, should be used all the more moderately since we are uncertain of its benefits either to society or to its individual members.

Finally, one might wonder, in view of the limited capability of the sentencing process to prevent crime, why crime-preventive goals like deterrence, incapacitation and rehabilitation play such a prominent part in jurisprudence. In a perceptive article on retributivism, Mackie (1982) writes:

> The paradox is that, on the one hand, a retributive principle of punishment cannot be explained or developed within a reasonable system of moral thought, while, on the other hand, such a principle cannot be eliminated from our moral thinking.

Interestingly, Mackie infers from the existence of this paradox that justifications for punishments are as deeply-rooted in human emotions as in the human mind. Even if punishment cannot ultimately be justified, it apparently satisfies a strong desire, seated both in moral thinking and human emotions, and it cannot be renounced. There is consequently a natural tendency to compensate for the limits of retributivism by attributing to penal sanctions an efficiency in preventing crime which they do not really possess.

3. Goals and Principles of Sentencing

3.1 The Protection of the Public

The most frequently invoked purpose of sentencing is the protection of the public (and/or society). Eighty-eight percent of the judges surveyed by the Commission answered that protecting the public was the overall purpose of sentencing. This is not unexpected in view of the fact that, since 1938, all major commissions reporting on the penal system have followed the lead of the Archambault Commission in asserting that the protection of the public was the over-riding purpose of the criminal law. This Commission has tried to assess to what degree the traditional goals of sentencing have been achieved. It may then appear surprising that it does not present a similar appraisal of the extent to which the sentencing process succeeds in protecting the public. This apparent reluctance can easily be explained.

The notion of protecting the public is fraught with ambiguity. This ambiguity is explicitly acknowledged by Nadin-Davis (1982) in his extensive study of the Canadian Courts of Appeal. After stating that Courts of Appeal do not frequently venture into the "murky waters" of sentencing aims, Nadin-Davis goes on to say (p. 27):

> Where they do venture into these murky waters, their statements are often misleading and confusing...The oft-quoted case of *Morrissette et al.*, despite its many merits, provides a good example of this confusion. Chief Justice Culliton there said:
>
> > As has been stated many times, the factors to be considered are:
> > (1) punishment;
> > (2) deterrence;
> > (3) protection of the public; and
> > (4) the reformation and rehabilitation of the offender.
>
> The problem lies in point (3), "protection of the public". If the phrase is being used in the sense of incapacitation, that is locking the offender away until he is "safe", then the only problem is the terminology. If, however, as seems more likely, the Chief Justice was using the phrase in the sense of the overall aim of sentencing, then factors (2), deterrence, and (4), reformation and rehabilitation of the offender, are not commensurate considerations but *means* of achieving the *end* expressed in the phrase, "protection of the public".

If then, the protection of the public is understood in its current meaning in the sentencing literature, it has already been reviewed under the heading of incapacitation. If this notion is understood in its widest sense, as the overall goal of sentencing, it becomes doubtful whether the success of the criminal justice system in protecting the public can be thoroughly assessed. The notion is too broad for empirical studies. In fact, there is an abundant research literature on deterrence, incapacitation and rehabilitation, but there are very few empirical studies using the notion of protecting the public in its wider implications.

The ambiguity which is illustrated by Nadin-Davis originates with the Archambault Report. After dwelling on the difficulty of formulating principles of penology, this report declares:

> We believe, however, that we are on safe ground in stating that no system can be of any value if it does not contain, as its fundamental basis, *the protection of society*. (p. 8, emphasis in text)

It should be stressed that the protection of society is not said to be the overall goal of sentencing, but of the entire penal system. This introduces an element of great generality to the notion of the protection of society. However, the only sanction which is mentioned by the Archambault Commission's terms of reference is incarceration (in a penitentiary). Excepting three chapters dealing respectively with the prevention of crime, juvenile courts and young offenders, the Archambault Report, which is 32 chapters long, speaks only of incarceration.

Although it recognized that the aim of protecting the public can be furthered by the use of different sanctions, the original association between the protection of society and incapacitation was never broken by the sentencing literature, jurisprudence or by judicial practice.

R. v. Wilmott is one of the strongest assertions that "the fundamental purpose of any sentence of whatever kind is the protection of society".[16] In this

judgment, Mr. Justice McLennan draws a distinction between absolute and relative protection of society; then he asserts that it is custody which provides absolute protection. In a series of experiments involving the determination of a sentence in hypothetical cases, Palys (1982; 127) found that the protection of the public was used by a majority of judges to justify the longest prison sentences.

The ambiguity surrounding the meaning of the protection of society is not a decisive consideration. It is however indicative of further difficulties in using this aim as the overall goal of *sentencing*. It must be emphasized that the difficulties which shall be raised occur in the context of making protection of the public the overall goal of sentencing itself. There are no serious objections to making protection of the public the overall goal of the criminal justice system as a whole.

3.1.1 Victims and the Protection of Society

Professor Irvin Waller has written a study of the role of the victim in sentencing (*Waller, 1986*). In the conclusion of his paper, he declares that "The root of the problem is the concept that crime is committed *only* against the Queen" (p.23). Professor Waller means that as long as it will be believed that offences are committed against abstract entities such as "the State" or "society" or "the general public", the plight of victims will not be fully acknowledged. Making the protection of society the overall goal of sentencing perpetuates a situation where the harm suffered by the victim is not explicitly recognized. Indeed, sentencing takes place only after an offender has been found guilty of an offence. Therefore, save for so-called victimless crimes, victimizing behaviour has *already* occurred when the sentencing stage is reached. Not only has it occurred, but it *must have occurred* for a sanction to be imposed. That only the guilty should be punished is one of the foundations of criminal justice. When it is proclaimed that the protection of the public is the overall goal of sentencing, what is really meant is that *other* members of the public will be protected from a particular offender or that the victim, providing of course that he or she is not dead, will be protected from *further* harm. That the victim has already suffered harm or loss of property and that to this extent he or she has not been afforded protection remains unsaid.

3.1.2 Limited Protection

It has been noted in the preceding chapter that the scope of sentencing is quite limited. Not only is there a large amount of crime that is unreported to the police, but of those offenders who are actually arrested, only a minority are eventually convicted and sentenced. Notwithstanding the success enjoyed by the police in implementing crime prevention programs, the protection that is afforded the public by the courts is quite restricted in its nature.

The John Howard Society of Alberta made this point forcefully in its submission to the Commission

> Prisons do keep the small proportion of those offenders who are actually apprehended and convicted out of circulation for specified periods. However, according to the latest survey by the Department of the Solicitor General of Canada, nearly 60% of serious crimes, ranging from sexual assault and robbery, to burglary, theft and vandalism, are not even reported to the police. In seven selected Canadian cities in 1981 nearly one million out of an estimated 1,600,000 indictable crimes remained unreported. Of those that *are* reported, the "clearance" rate by conviction is unlikely to exceed 20%, and many convictions do not necessarily mean jail. Thus, it can readily be perceived that over 95% of indictable offences are not punished by jail terms at all. In these circumstances the amount of "protection" afforded to the community by our prisons is limited in the extreme.

It would be erroneous to believe that this situation can be drastically modified. Even if we could allocate unlimited budgets to law enforcement, we would have to consider that any crime control strategy which is palatable to a democracy results in leaving a large amount of crime unpunished.

3.1.3 The Need for a Specific Goal

The goal of protecting the public cannot be seen as specific only to the sentencing process. This notion lacks precision in at least two ways. First of all, as understood in its ordinary sense, the notion of protecting the public is so general that several government departments and agencies could claim it as the overall purpose of their activities. Obvious candidates would be the Departments of Agriculture (food inspection), Environment, Health and Welfare, Justice, National Defence, the Ministry of the Solicitor General, the Ministry of State for Small Business, Emergency Planning Canada, the Canadian Coast Guard and several Commissions (e.g., the Privacy Commission). This list could be made much longer just by perusing the list of departments and agencies in the Government of Canada and ascertaining their duties and responsibilities.

Second, while there is no denying that sentences do have protective effects, there are no specific features of the concept of protecting the public which imply that the courts have the prime responsibility of achieving this goal. Due to the general nature of this goal, the protection of the public might conceivably be seen as the overall purpose of the *whole* criminal justice system (police, courts and corrections). This is actually how it has been viewed by all major commissions since the Archambault Commission. There is little about the notion, in its general sense, to suggest that it is especially connected with court sentencing activity. In fact, one associates the goal of protecting the public more readily with police work (i.e. the apprehension and charging of suspected criminals). Intuitively, at least, one would rather resort to a security guard than to a sentencing judge to protect one's home.

According to the Commission's mandate, its recommendations should reflect principles asserted in *The Criminal Law in Canadian Society*. It is said in this policy statement that the overall purpose of the whole criminal law is

two-fold and that it should blend "security" goals, such as the protection of the public, and "justice" goals such as equity. If one formulates a purpose for the whole criminal justice system (criminal law), we argue that it is possible to issue a wide-ranging statement which sets out to reconcile pragmatism with morality. If, however, we wish to focus on sentencing and hence, consider each component of the criminal law worthy of consideration (e.g., the police, the courts and corrections), it becomes clear that justice goals are far more specific to the courts, whereas security objectives are more akin to police work and corrections. Packer (1968) draws a distinction between "crime control" and "due process" models in criminal law, which has now become classic; this distinction reflects the view that the courts' core mandate is to ensure that justice goals prevail. With regard to budgets, personnel and facilities, police and corrections are the main constituents of the criminal justice system. When the criminal justice system is considered in its entirety, it would then seem natural to infer that the balance of goals is tipped towards security goals. However, if one refers specifically to the sentencing process as it is carried out by the courts, then it is justice goals which should be seen as having priority.

3.1.4 Realistic Expectations

It is sometimes argued that sentencing is the climax or the hub of the criminal law and that consequently its overall purpose should be the same as that of the entire criminal justice system. The Commission believes that combining the purpose of the whole system with the overall goal of one of its components can lead to serious misunderstandings.

It generates unrealistic expectations about the effects of sentencing which are mistakenly identified with the total output of the criminal justice system. Being thus singled out, the sentencing process is made accountable for the entire criminal law, over which it has a very limited control.

The Commission's recommendation to distinguish between the overall goal of the criminal justice system and the specific goal of sentencing would prevent such misunderstandings from arising. By making protection of society the overall goal of the criminal law, this recommendation increases the possibility of achieving it to a significant extent. Not only is the whole system more powerful than any of its components, but the criminal justice system is now reaching out to the public to have it participate in its own protection. It is only through a partnership between criminal justice and the public that the latter will be effectively protected.

3.2 Respect for the Law

If criminal sanctions serve no useful social purpose at all then we may as well dispense with them. Unfortunately, we do not seem as yet able to assess with any significant degree of accuracy the effects of sentencing.

On close examination, the nature of the criminal law itself might offer clues as to how we should escape from the above predicament. Contrary to what the general public and a large number of experts believe, the *substantive* part of the criminal law, as *it is actually spelled out*, does not expressly enumerate any "prohibitions" or any "obligations". One does not find the phrases "Thou shalt" or "Thou shalt not" nor any of their modern equivalents in the *Criminal Code*.

Our written criminal law simply sets out a description of criminal offences, followed by their corresponding penalties. Needless to say, prohibitions are a by-product of criminal law – but that is quite different from asserting that the criminal law establishes "a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct" (Canada, 1982; 57). It is crucial to realize that sentencing is not an extension of the criminal law, nor even its "other side" (enforcement). It is exactly the other way around: in its formulation, the criminal law is nothing more or less than a blueprint for sentencing. Hence, the actual imposition of sentences determines which part of the law is living and which part is not.

The same point can be made in a more concrete and revealing way. The criminal law defines criminal offences. Let us suppose that someone would ask: "What if I commit what you say are crimes?". Let us further imagine that the State answers: "Nothing happens, insofar as criminal justice is concerned". Although the sequence of events following this answer is not difficult to forecast, attention must be paid to details:

a) Those people who refrain from committing serious crimes only because of their fear of punishment, would engage in criminal activity once the threat of sanctions is removed.

b) However, research has shown that the majority of the members of the community do not adopt criminal careers for reasons that are on a different level than the simple fear of punishment. (For most people the social environment has built up in them a sense that they should not get involved in serious crime because it is wrong to do so). For these law-abiding individuals, the spectacle of the impunity enjoyed by wilful offenders would have one of two consequences. They would become demoralized, and this demoralization would lead them to deviancy. Or, the alternate and more predictable scenario is that the majority of law-abiding people would become outraged and vengeful. They would sound a return to private justice and vigilantism, thus signifying a breakdown of law and order as it is known in our society.

The important point made by this description is the following: the majority of people do not need to be deterred from serious criminal behaviour (nor do they need to be rehabilitated or incapacitated). *What is imperative is that they should not be demoralized by their perception that there is no accountability for seriously blameworthy behaviour.* To publicly allow a known offender to get away with impunity would undermine the point of

having rules in the first place. The over-riding concern should be that members of a community are accountable for behaviour which is victimizing and which flouts the basic values held by society. The notions of potential sanctions and accountability are essentially the same. Hence, the outline of the overall purpose of sentencing: the assertion that people are held accountable by sanctions for behaviour which betrays core values of their community.

6.1 The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

The proposed purpose is not to be confused with deterrence. It rests on the premise that the majority of the population need to be spared more from the outrage and demoralizing effect of witnessing impunity for criminal acts than to be deterred from indulging in them. It would, however, be a mistake to infer that deterrence *would not* result from the imposition of sanctions as a consequence of holding the members of the community accountable for their wrongdoing. The Commission's formulation implies that the fundamental purpose of sentencing is to impose just sanctions to impede behaviour denounced by the criminal law. Promoting respect for the values embodied in the law would then strengthen the conviction in citizens that they can be made to account for unlawful behaviour, and that the costs of such behaviour outweigh the anticipated benefits.

The Commission's recommendation reflects in part a theory of sanctions proposed by Hyman Gross (1979; 400-401):

> According to this theory, punishment for violating the rules of conduct laid down by the law is necessary if the law is to remain a sufficiently strong influence *to keep the community on the whole law-abiding*...Without punishment...the law becomes merely a guide and an exhortation to right conduct...Only saints and martyrs could be constantly law-abiding in a community that had no system of criminal liability...The threats of the criminal law are necessary, then, only as part of a system of liability ensuring that those who commit crimes do not get away with them. The threats are not laid down to deter those tempted to break the rules but rather to maintain the rules as a set of standards that compel allegiance in spite of violations...(emphasis added).

The important point made by Gross is that sentencing should not claim anymore to intimidate all offenders but more modestly, and also much more importantly, to keep the community *as a whole* law-abiding. In other words, it aims at preventing any serious undermining of our system of criminal laws.

The fundamental purpose that we have just outlined would overcome to a significant degree the difficulties of formulating a sentencing rationale as they have been identified in the course of this chapter.

First of all, the goal that we have provided satisfies the principle that sentencing is only justified if it serves a useful social purpose. Preventing criminal behaviour from systematically occurring is clearly beneficial to society. However, inhibiting criminal behaviour is here seen more as a general effect of the operation of the sentencing process than as the specific outcome of a particular sentencing strategy such as deterrence, incapacitation or reformation. This is in line with the results of research on the degree to which utilitarian goals are achieved. As we have said at length, evaluation research shows that criminal sanctions produce their results in a way which does not yield itself to precise measurement.

Second, the fundamental goal proposed by the Commission can actually be achieved by the sentencing process. Sentencing is not committed to eradicate crime but to prevent it increasing beyond a threshold where freedom, peace and security can no more be enjoyed on the whole by a community.

In contrast with the Declaration of Purpose and Principles of Sentencing contained in the Criminal Law Reform Act, 1984 (Bill C-19) (see Appendix E), the fundamental goal recommended by this Commission has a built-in relationship with the principles of sentencing. If the fundamental purpose of sentencing is to preserve the authority of the law and to promote respect for it through the imposition of *just sanctions*, it follows that the principle of proportionality is given highest priority. The recommended goal also being realistic, it can be achieved in accordance with the principle of restraint, without being dependent upon the use of the more drastic alternatives. Finally, in recognizing that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice, the Commission's formulation of the overall goal of sentencing provides a secure foundation for such principles as equity, predictability and totality.

Finally, in stating that protection of society is the overall goal of the entire criminal law, the Commission dispels a long-standing equivocation and strengthens the requirement of protecting the public by putting it at the level where it belongs.

4. The Declaration of Purpose and Principles of Sentencing

The results of all the previous analyses are embodied in a Declaration of Purpose and Principles of Sentencing. There is no need to comment at length on the Declaration, since it is the outcome of what has been previously said in this chapter. It is, however, important to realize that the Declaration formulated by this Commission is different in one important respect from a similar Declaration embodied in the former Bill C-19. The Declaration recommended by the Commission establishes a clear order of priority with regard to its sentencing policy. The fundamental goal of sentencing takes precedence over the content of all other sections of the Declaration, with

regard to sentencing. As it is explicitly stated in sub-section 4(a), proportionality is the paramount consideration governing the determination of the sentence. There is no order of priority between the considerations listed in sub-section 4(d). However all these considerations are subject to the application of the sentencing principles formulated in sub-sections 4(a), (b) and (c). They must also be invoked in strict conformity with the fundamental goal of sentencing.

6.2 The Commission recommends the following Declaration of Purpose and Principles of Sentencing be adopted by Parliament for inclusion in the *Criminal Code*:

Declaration of Purpose and Principles of Sentencing

1. Definitions

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

"Sanction" includes an order or direction made under subsection 662.1(1) (absolute or conditional discharge); subsection 663(1)(a) (suspended sentence and probation); subsection 663(1)(b) (probation with imprisonment or fine); sections 653 and 654 (restitution); subsections 646(1) and (2), section 647 and subsection 722(1) (fine); subsections 160(4), 281.2(4), 352(2) and 359(2) (forfeiture); subsections 98(2) and 242(1) and (2) (prohibition); subsection 663(1)(c) (intermittent term of imprisonment); and a term of imprisonment.

(Note: The definition of sanction is intended to include all sentencing alternatives provided for in the *Criminal Code*. Section numbers refer to *Code* provisions as they currently exist).

2. Overall Purpose of the Criminal Law

It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

3. Fundamental Purpose of Sentencing

It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

4. Principles of Sentencing

Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical contraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:

- **a) 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.**
- **b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.**
- **c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:**
  - **i) any relevant aggravating and mitigating circumstances;**
  - **ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;**
  - **iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;**
  - **iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;**
  - **v) a term of imprisonment should be imposed only:**
    - **aa) to protect the public from crimes of violence,**
    - **bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,**
    - **cc) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.**
- **d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:**
  - **i) denouncing blameworthy behaviour;**
  - **ii) deterring the offender and other persons from committing offences;**

iii) separating offenders from society, where necessary;
iv) providing for redress for the harm done to individual victims or to the community;
v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

5. List of Recommendations

6.1 **The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.**

6.2 **The Commission recommends the following Declaration of Purpose and Principles of Sentencing be adopted by Parliament for inclusion in the *Criminal Code* (see full text pp. 153-155).**

Endnotes

[1] See von Hirsch (1983a; 211).

[2] This quotation of Kant is taken from The Metaphysical Elements of Justice, which forms Part I of the *Metaphysics of Morals*. The exercise of retribution is called a "categorical imperative" by Kant. These are ultimate principles, which cannot be justified further.

[3] Von Hirsch has subsequently abandoned Kantian justifications for retributivism. It was already quite clear in *Doing Justice* (von Hirsch, 1976) that the imposition of sanctions had to result in *some* tangible social benefits. In the quotations given in the text, von Hirsch uses the expression "crime prevention" in the widest sense – decreasing the occurrence of crime; he does not specifically refer to proactive police work or to community involvement in crime control, which are narrower forms of "crime prevention".

[4] This fact was clearly established by a review of the literature on sentencing disparity which was undertaken by Dr. Julian Roberts (see *Roberts, 1985*). It is frequently alleged to explain the disparate results of sentencing exercises on fictional cases, as they were conducted, for example, by Palys and Divorski. The result of these exercises is discussed in the report entitled *Beyond the Black Box* (Palys, 1982).

[5] See Blumstein, Cohen and Nagin (1978; 7).

[6] The two quotes from Nagin are taken from Blumstein, Cohen and Nagin (1978; 135 and 136).

[7] See *Cousineau (1986)*; (viii).

[8] See Walker, (1985; 100).

[9] See Sechrest, White and Brown (1979; 5).

[10] See Sechrest, White and Brown (1979; 34).

[11] See Blumstein, Cohen and Nagin (1978; 9).

[12] "Models exist for estimating the incapacitative effect, but they rest on a number of important, and as yet untested, assumptions. Using the models requires adequate estimates of critical, but largely unknown, parameters that characterize individual criminal careers. The most basic parameters include estimates of individual crime rates and of the length of individual criminal careers as well as of the distribution of both of these parameters across the population of criminals. Because the crimes an individual commits are not directly observable, these parameters are extremely difficult to estimate." (Blumstein, Cohen and Nagin, 1978; 9-10).

[13] "The reader should recognize that our analysis of selective incapacitation was subject to several limitations. We relied on self-reported retrospective information from incarcerated offenders in only three states. Among these states, the pattern of offence rate varied considerably. At the very least, our work should be replicated in different sites, using prospective data obtained from both surveys and arrest histories. Additionally, the critical assumptions of the model should be tested. Specifically, are there any replacement or career extension effects of incarceration that would tend to reduce the estimated crime reduction effects? Are offence rates stable over time? Moreover, the incapacitation model presented here should be improvised to handle multiple offence types and more complicated sentencing policies." (Greenwood and Abrahamse, 1982; xx-xxi).

[14] "Thus, while strong retributivist theories are the kinds of theories that justification of punishment requires, such theories do not appear to contain a set of moral arguments sufficiently sound, unambiguous, and persuasive upon which to rest the general justifiability of punishment." (Wasserstrom, 1980; 146).

[15] See, for example, Law Reform Commission of Canada (1977), *Guidelines; Dispositions and Sentences in the Criminal Process*; and Law Reform Commission of Canada (1974), *The Principles of Sentencing and Dispositions*.

[16] *R. v. Wilmott* [1967] 1 C.C.C. 171, at 177.

Part II

The Proposed Reform

Chapter 7

General Introduction

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Chapter 7

General Introduction

This introduction to the Commission's specific recommendations attempts to explain the principles which guided our deliberations and upon which we based our approach to the development of a sentencing policy. In other words, it describes what it is that we have sought to accomplish. The sentencing policy formulated by the Commission reflects the following concerns which are listed not in order of priority, but to provide a logical flow of discussion.

1. An Integrative Approach

As has already been pointed out in Chapter 1, of the many groups that have examined criminal law issues, the Canadian Sentencing Commission is the first with the specific mandate to examine the whole sentencing process including the determination of sentences. It is not, however, the first commission to make recommendations in the area of sentencing. Although there have been some important changes over the past 100 years in the criminal law relating to such matters as appeals, early release, electronic surveillance and bail as well as to specific offences such as sexual assault or impaired driving, there have been no fundamental changes to the sentencing structure itself. The enduring character of our penalty structure is illustrated by the fact that the hierarchy of maximum penalties in the *Criminal Code* has remained virtually unchanged for close to a century. The current maxima of two years, five years, seven years, ten years, fourteen years and life, date back to 1892. Other maximum terms of imprisonment provided in the *Code* at that time, such as a three year maximum penalty, have since been deleted.

Part of the reason for the absence, to date, of a comprehensive review of our sentencing policy and penalty structure has been the complexity of the sentencing process and its interaction with other parts of the criminal justice system. Changes to one part of that process imply a need to modify other parts. One might well effect a minor change such as raising the minimum sentence for a particular offence without seriously jeopardizing other components of the system. However, any more ambitious or substantive modification introduced to solve problems in one area of sentencing would impact upon and conse-

quently necessitate a systematic review of all components of the sentencing process.

The scope of the Commission's mandate implies that proposals for reform should encompass a wide range of issues and further, that they should address the structure of the sentencing process. Therefore, it was necessary to adopt an integrative approach in formulating and recommending a sentencing policy for Canada.

The recommendations relating to each of the major tasks assigned to the Commission by its terms of reference are described in detail in the chapters which follow. Although each chapter deals with a specific topic, the Commission's recommendations cannot be read independently of one another. They were formulated as part of a comprehensive sentencing package. Focusing on one set of recommendations to the exclusion of others would lead to an incomplete understanding of the Commission's sentencing policy. In other words, in developing specific recommendations, the Commission was always aware of the degree to which its proposals were interdependent. However, we must stress that an integrated sentencing package does not mean that rejection of one set of recommendations necessarily implies automatic dismissal of all others. Individual elements of our recommended sentencing policy can be modified; however, because the package represents a synthesis of various components, changes to one area may necessitate alterations to others.

In a similar vein, it is important to realize that an assessment of the meaning and anticipated impact of one set of recommendations can only be made in the context of all the other proposals. There is an implicit recognition in the Commission's terms of reference that the sentencing process includes numerous points along the criminal justice continuum. For example, the imposition of a sentence is usually preceded by discussions between Crown and defence counsel and by sentencing representations made to the court. Once pronounced, the sentence is then administered by correctional authorities. The assessment of our sentencing policy would be incomplete if it involved isolating those recommendations which pertained to a particular point along the criminal justice process and evaluating them separately. The recommendations should be evaluated in terms of their anticipated impact upon every aspect of the sentencing process.

2. The Need for Clarity and Predictability

Chapters 3 and 4 documented a very serious problem in the area of sentencing: the sentencing process, for the most part, is not understood by the public nor even by many criminal justice professionals. Since most people obtain information about crime and punishment from the news media, one could easily infer that the media do not adequately explain sentences or, more generally speaking, inform people about the sentencing process.

However, although the news media might be the immediate source of public misinformation, attributing public misunderstanding of sentencing to the media only raises a further question: why is it that the information given by the media is said to be inaccurate? We believe that the answer to this question relates not only to the reporting policies of the various media but also, in part, to the complexity of sentencing provisions and to the absence of clarity and predictability in the sentencing process itself.

Sentencing in Canada is not easy to understand. A few examples will illustrate this point. For instance, a person whose home is broken into may want to know the maximum penalty provided by law for this offence. Section 306 of the *Criminal Code* will tell him or her that breaking and entering a dwelling house carries a maximum penalty of life imprisonment. However, the meaning of this penalty will not be readily apparent from the *Code*. The victim may not realize that the one thing a sentence of life imprisonment does not mean is that the offender will necessarily spend the remainder of his or her natural life in prison. He or she will probably not know that a sentence of life imprisonment may actually mean one of three things. First, if it is a mandatory life sentence provided for first degree murder or high treason, it will mean that the offender must serve 25 years in prison before eligibility for parole. Second, if it is a mandatory sentence for second degree murder, the offender must serve a specific number of years between 10 and 25, as set by the sentencing judge, prior to eligibility for release on parole. Finally, if the sentence is a non-mandatory life sentence, such as that provided for manslaughter, the offender is eligible for parole after serving seven years. Therefore, some knowledge of the parole process and of mandatory life sentences is necessary to be able to comprehend any of the three meanings of life imprisonment. In conclusion, it may be seen that even if the most direct source of information on the criminal law – the *Criminal Code* of Canada – is consulted, the layperson will still be faced with a dilemma. The words will be given their literal meaning, in which case the layperson's interpretation of a life sentence will be wrong, or additional legal knowlege will be needed to be able to understand what the maximum penalty for break and enter actually means.

Let us take this example even further. If the offender who had committed the break and enter were tried and convicted for the offence, the sentencing judge could impose any custodial sentence up to life imprisonment. In view of this maximum penalty, the victim might well expect that the offender would be sentenced to a substantial custodial term. He or she no doubt would be surprised if the judge, after a well-reasoned decision, imposed a large fine and one day of imprisonment. The victim might be bewildered by the discrepancy between the maximum penalty provided for the offence and the sentence actually given. He or she might also question the utility of imposing one day of imprisonment. He or she probably would not realize that, to satisfy the requirements of subsection 646(2) of the *Criminal Code*, the imposition of a fine for an offence punishable by more than five years imprisonment must be accompanied by another punishment, which often is a nominal term of imprisonment. One mechanism for satisfying this statutory provision in a

purely formal way, is to impose one day of imprisonment along with the fine even though the offender will not actually serve the day in prison.

Furthermore, the victim in our example might be surprised to learn that the offender was eventually imprisoned for being unable, rather than unwilling, to pay the fine. On the other hand, if the judge had imposed a sentence of three years in a penitentiary instead of a fine, the victim might be surprised to find the same offender on day parole after six months, or released on full parole after 12 months. The victim might also be surprised to find that if the offender were not released earlier on parole, he or she would be released "automatically" after 24 months on mandatory supervision for which resources for proper "supervision" were not available.

These examples give some indication of the degree to which the sentencing process lacks clarity, certainty and predictability despite its nature as the most serious state intrusion into the lives of citizens. There may be clarity for those who understand the system. Further, those involved in or subjected to the control of the criminal justice system may be able, in particular circumstances, to predict certain outcomes. However, for most people, the system is neither clear nor certain. In view of these considerations, it is not surprising to find that the public misunderstand sentencing. Since misunderstanding a process can lead to dissatisfaction with it, one can appreciate why the general public is critical of sentencing.

As these examples have shown, lack of clarity in the sentencing process arises from at least two sources. First, the substantive complexity of some sentencing provisions (for example, the three meanings of life sentences noted earlier) obscures the layperson's understanding of the sentencing process. Second, judges have developed various conventions to bring about sentences which otherwise would be precluded by legal formalism. For example, to circumvent the statutory requirement that a fine may not be given for an offence which is punishable by more than five years without also ordering another punishment, sentencing courts often resort to the imposition of a fine plus one day in prison. The purpose of sentences of this nature is not readily apparent to the general public.

One basic aim of the Commission's sentencing policy is to introduce more clarity into the sentencing process. To the greatest extent possible, this involves bridging the gap between the meaning of a sentence, as written in the law and as pronounced by the court, and its subsequent translation into practice. The Commission has also tried to rid sentencing provisions of those requirements which hinder rather than facilitate the imposition of appropriate dispositions.

3. The Principle of Restraint

We have just referred to the necessity of bridging the gap between the written law and its concrete application; there is also a discrepancy between the

perceived and the actual ability of the sentencing process to provide the ultimate solution to crime control.

The sentencing process is only one part of the criminal justice system and this system is itself only one of several mechanisms by which society tries to maintain order. It is, however, the most coercive of these mechanisms. What is certain about punishment is that it is aversive; what is more contentious is the extent of social benefit actually derived from it. In Chapter 6, we examined the evidence relating to the criminal courts' success in increasing peace and order in society by pursuing such goals as deterrence, incapacitation and rehabilitation of offenders. There is little evidence to support the view that sentencing decisions can have a large impact on reducing the extent of criminal activity in society. This conclusion is based primarily upon an examination of the most severe sanction; namely, custodial sentences.

Humanitarian concerns dictate that punishment should be inflicted with restraint. If one adds to this consideration the fact that the imposition of the harshest form of sanction appears to contribute only modestly to the maintenance of a harmonious society, a commitment to restraint is the inevitable result.

The Commission's endorsement of a policy of restraint is consistent not only with the recommendations of almost every group that has examined the criminal justice system, from the Brown Commission in 1848 to the Nielsen Task Force in 1986, but also with those members of the Canadian public whose views on the matter have been canvassed by the Commission. Although, on first questioning, a substantial portion of the Canadian public indicates that sentences should be more severe, further inquiries clearly show that they are most concerned about offences involving violence and tend to over-estimate the amount of this kind of crime in society. Statistics show that over 90% of criminal offences do not involve violence or the threat of violence (Solicitor General of Canada, 1984). For non-violent offences, which constitute the majority of offences, the public appears to favour limitations on the use of imprisonment. In short, the Canadian Sentencing Commission's support for a policy of restraint is thus consistent both with public opinion and with the recommendations of previous commissions and committees.

In view of the above discussion on restraint and the fact that sentences of imprisonment are imposed substantially less often than community-based sentences, it may seem peculiar that the Commission's recommended sentencing policy appears to focus more on imprisonment than on community sanctions. However, the Commission is of the view that imprisonment is the most intrusive sanction and consumes the greatest amount of resources. It therefore deserves special consideration.

There are also important historical reasons for this focus. Since the middle of the nineteenth century imprisonment has been pivotal to the sentencing process. A striking illustration of this fact is that, even today, community sanctions are referred to as "non-*carceral* sanctions" or as "alternatives to

imprisonment". As argued in Chapter 5, the emphasis on incarceration must be changed and community sanctions must be recognized as sanctions in their own right.

As pointed out in Chapter 1, paragraph (k) of the terms of reference required the Commission to "take into consideration...existing penal and correctional capacities". This part of the mandate stressed the urgency of addressing the issue of restraint and places it within the context of prison overcrowding. It did not, however, prescribe the manner in which the Commission should approach this issue. The preceding discussion shows that the Commission gives priority to humanitarian and justice considerations, although it is not insensitive to limitations on the financial resources of governments. One cannot deny that prison overcrowding is at least partly generated by economic problems, such as the prohibitive cost of building new facilities. More importantly, however, it relates to issues of humanity and justice. The deterioration of conditions in overcrowded prisons might lead some inmates to claim, as they have done in over 40 American jurisdictions, that the punishment has become cruel and unusual because it is disproportionate to the gravity of the offence for which it was imposed.

Prison overcrowding also raises concerns about the administration of justice and clarity in sentencing. There is evidence to suggest that in some jurisdictions where there is prison overcrowding, offenders subject to intermittent sentences or short periods of incarceration are, in fact, exempted from serving their sentence because of lack of space. This practice has disruptive effects upon the administration of sentences.

In an attempt to make the Commission's proposals on the use of imprisonment conform to an interpretation of the principle of restraint, a distinction was made between serious and less serious offences. For very serious instances of some offences the Commission's recommendations imply that the overall amount of time spent in prison may be increased in appropriate cases. For other offences, the actual amount of prison time served or the number of offenders currently imprisoned for these offences should be decreased.

Finally, the implications of the finding that the sentencing process is a limited tool for crime control should be discouraging only to those who look to the courts for comprehensive solutions to social disorder. The Canadian public does not appear to be among those who look primarily to the courts. When asked, in a Commission poll, to state where they thought the primary responsibility for crime control lay, over half responded "with society generally". Only 15% saw the courts as carrying the primary responsibility for reducing crime (see Appendix C).

4. Fairness and Equity

The practice of restraint involves making choices: selecting those offenders who will be incarcerated and those who will not. It also means deciding the

length of custodial sentences. The exercise of restraint thus entails the exercise of judicial discretion and raises the issues of fairness and equity as well as variations in sentencing dispositions.

Chapter 3 concluded that the disparity which currently exists is due largely to structural problems: judges must work within a framework which allows for considerable discretion but which fails to provide systematic information on how that discretion is exercised by other judges. The structure thus fails to provide meaningful guidance about the factors which do and should affect judicial decision-making.

The Commission is more concerned with an assessment of the institutional framework in which judicial discretion is exercised than with an appraisal of the performance of the professionals involved in criminal justice. The Commission believes that sentencing judges in Canada are working as well as can be expected within the present structure. It is the structure itself which is in need of change.

Before discussing the principles which guided the Commission's approach to sentencing guidelines, it is necessary to review one major concern: the formulation of a policy appropriate to the Canadian context.

4.1 The Uniqueness of the Canadian Context

Many common law jurisdictions are currently reviewing or have already studied ways of reforming the sentencing process. Both the approaches to studying the problems and the solutions which have been recommended and/or implemented vary from one jurisdiction to another. However, the criminal justice system in each jurisdiction studied by this Commission is different from the Canadian system in some fundamental aspects. Many jurisdictions, particularly the United States where indeterminate sentencing systems prevail, have a history of minimal judicial involvement in the sentencing process. Further, in many of these jurisdictions there is no tradition of sentence appeals. In other countries which have sentence appeals, such as Great Britain, this procedure is only available to the defendant. Consistency in sentencing is no doubt facilitated in Great Britain by the fact that there is only one Court of Appeal whereas in Canada there are ten provincial Courts of Appeal.

Compared to other countries, the breadth of Canada's geographic and cultural variation and the scope of its criminal law jurisdiction is unparalleled. Unlike Australia or the United States, Canada has one federal *Criminal Code* which applies to all provinces and territories. Although our study of the sentencing systems in other jurisdictions was very informative, the Commission realized from the beginning that the difficulties with sentencing in the Canadian context could not be solved by the importation of foreign solutions. Similarly, although data from other countries were useful in highlighting issues for consideration, the Commission relied on Canadian sentencing data. Our recommended sentencing policy is based on the belief in the uniqueness of the

Canadian criminal justice system and the need to find solutions which address problems of sentencing in this country.

4.2 Working Assumptions

The Commission adopted the position that it was important to consider the strengths of those institutions which are part of the present sentencing system in Canada or which exert a major influence upon it. Although there are some serious shortcomings in the inter-relationships between these components, there appeared to be little value in recommending a lesser role for those parts of the system which function well. There was value, however, in recommending changes which could strengthen their impact.

With regard to the current sentencing process at the trial court level, the following three assumptions were made in consideration of the issue of guidance. First, the sentencing process should reflect basic principles of justice rather than the personal attitudes or views of those who are involved in sentencing decisions. Second, it should also define a common approach to the determination of sentences for sentencing judges since they bear primary responsibility for making the process fair and equitable. A *common* approach should result in introducing more consistency in sentencing and in treating like cases alike. However, a common *approach* does not necessitate a rigid, formal procedure but should be flexible enough to allow different cases to be treated differently. The third assumption made by the Commission was that there is a clear-cut distinction between the concept of guidance and the idea of coercion. Guidance which is effectively mandatory betrays the very notion of guidance.

It is on the basis of these premises that the Commission has proposed sentencing guidelines which are neither purely advisory nor mandatory. As the Commission's sentencing policy respecting guidelines raises a number of additional issues, it is not summarized in this introduction. Suffice it to say here that the Commission has attempted to build upon a recommendation by the Ouimet Committee that all custodial sentences should be justified by the judge either by stating reasons which shall be entered in the record of the proceedings or, where the proceedings are not recorded, by giving written reasons. It should be clarified that the Commission is not actually recommending that all sentences of incarceration should be justified by reasons; this requirement only applies where the sentencing judge has decided that it is appropriate to depart from guidelines issued either by this Commission or by a succeeding sentencing commission. It is proposed that the latter be created to make those refinements on our proposed sentencing policy which, for reasons to be discussed later, could not be accomplished by this Commission.

Appellate review of sentencing decisions should be facilitated by the requirement that reasons must be given to justify departures from the sentencing guidelines. Chapter 3 acknowledged the important role of the Courts of Appeal in supervising sentencing decisions. Concern about the Courts of Appeal relates to the sentencing structure in which they operate. The

current structure of the sentencing appellate process, which is primarily concerned with fitness of sentence, results in two limitations respecting the ability of appellate courts to give guidance. First, without a specific appeal, Courts of Appeal cannot initiate policy-making respecting particular sentencing issues. The second limitation is that the scope of appellate inquiry into sentencing policy is circumscribed by the facts and considerations of a particular case.

Inherent in the Commission's recommendations is a recognition, however, that the appellate structure is well-suited to review not only the fitness of individual sentences but also the merits of policies concerning specific issues (e.g. a range of custodial sentences for a particular offence).

Initiating and formulating general policy is the proper responsibility of Parliament. Submissions received by the Commission suggested that Parliament has played too minor a role in the formulation of sentencing policy for Canada. The Commission agrees that Parliament should play a greater role in developing sentencing policies which will assist the courts in the determination of sentences generally, and custodial sentences in particular.

Accordingly, the Commission proposes that Parliament's involvement in the development of sentencing policy should be increased in the following ways: first, Parliament should through the enactment of legislation establish the purpose and principles of sentencing. Second, the House of Commons upon the recommendations of a broadly representative and permanent Commission, independent of government, should issue directives regarding the general distribution of sanctions. This enhanced participation by Parliament in policy formulation would be balanced by an equally important role for the Courts of Appeal in reviewing the application of directives approved by the House of Commons and in making those adjustments necessary to reflect the particular needs and circumstances of their respective communities. Thus, the Courts of Appeal would also have an amplified role: not only would they continue to interpret the law and review individual sentences, but they would also be empowered in specified circumstances to modify national guidelines for application in their respective jurisdiction.

5. Highlights of the Recommendations

As indicated earlier, the recommendations which follow are designed to provide the sentencing judge with additional structure and guidance for the determination of sentences. They are not intended to restrict the judge's power to impose fair and equitable sentences which are responsive to the unique circumstances of individual cases before the court. Indeed, although we strongly believe that the overall impact of these recommendations would be to make sentences in Canada more fair, predictable, understandable and acceptable to both the offender and the public, the net effect on actual sentences would be less dramatic than might otherwise be anticipated from an

examination of the individual elements of our sentencing policy. This point is most clearly illustrated by a consideration of the following list of the Commission's central recommendations:

a) **Elimination of all mandatory minimum penalties (other than for murder and high treason).**

b) **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, 6 months.**

c) **Elimination of full parole release for all sentences other than mandatory life sentences.**

d) **Provision for a reduction in time served for those inmates who display good behaviour while in prison.**

e) **Elimination of "automatic" imprisonment for fine default to reduce the likelihood that a person who cannot pay a fine will go to jail.**

f) **Establishment of presumptive guidelines that indicate whether a person convicted of a particular offence should normally be given a custodial or a community sanction. In appropriate cases the judge could depart from these guidelines.**

g) **Establishment of a "presumptive range" for each offence normally requiring incarceration. Again the judge could depart from the guidelines in appropriate cases.**

h) **Creation of a permament sentencing commission to develop presumptive ranges for all offences, to collect and distribute information about current sentencing practice, and to review and, in appropriate cases, to recommend to Parliament the modification of the presumptive sentences in light of current practice or appellate decisions.**

As pointed out earlier, this is a bare outline of some of the Commission's recommendations. Nevertheless, it does highlight the importance of viewing each proposal as part of an integrated sentencing policy. For example, a person who learns that the Canadian Sentencing Commission has recommended the reduction of the statutory maximum penalty for robbery from life imprisonment to nine years might think that the Commission was recommending a wholesale reduction in the actual sentences for robbery. This would be ignoring both the discrepancy between current practice and current statutory maxima as well as various other parts of the package (e.g., the elimination of parole and reduction of remission). These recommendations, taken as a whole, do not have the effect of reducing time actually served by persons sent to prison for serious robberies.

Upon learning that the Commission has recommended the abolition of parole one might think that as a result offenders will be imprisoned for longer periods of time. This assumption, however, does not take into account the

recommendations concerning the reduction of maximum penalties, presumptive ranges for particular offences as well as the recommendations governing sentencing for multiple offences.

The rare person in Canada with access to information about current sentencing practices who made a comparison between the proposed presumptive range of imprisonment for an offence, such as break and enter into a dwelling house, and current sentencing practice, would think that the recommended sentences were considerably shorter than sentences given at present. This person would not be taking into account the recommendation relating to parole and the recommendation that prisoners serve 75% of their sentence before being eligible for release from prison on the basis of remission earned for good behaviour. These provisions (and others) have the effect of changing the meaning of a sentence. In terms of clarity, an important impact of these recommendations would be that the sentence described in court will bear a closer resemblance to the actual sentence served by the offender.

The sentencing proposals recommended by the Commission are not a simple set of changes. In the end, however, they should result in a more understandable and fair system than the current provisions which are not only complex but contain both real and apparent contradictions.

Chapter 8

Mandatory Minimum Penalties

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Chapter 8

Mandatory Minimum Penalties

> Mandatory minimum sentences have been criticized on the basis of their rationale, their effectiveness, and their appropriateness, even though there are very few such provisions in the *Criminal Code*. The issue of their continued or increased use is hotly debated (Canada, Sentencing, 1984; 60).

The fundamental elements of the structure of punishment in Canada (i.e. maximum and minimum penalties) have remained in place for close to a century. Piecemeal amendments have been made to the *Criminal Code* over the years within the confines of this framework and so, as recently as 1985 Parliament increased minimum penalties for a first conviction of drinking and driving offences. In formulating these amendments, Parliament was not formulating a global sentencing policy but performing a necessary role in addressing particular problems. In contrast, the mandate of the Canadian Sentencing Commission requires an examination of all aspects of sentencing, including the use of minimum penalties. Although after considering this issue, the Commission concluded that minimum penalties should be abolished, this does not indicate a disagreement with recent legislation enacted by Parliament. The Commission's recommendations respecting minimum penalties do not dispute the policy objectives embodied in recent criminal law amendments but rather question the use of minimum penalties as the desired means for achieving those goals.

Of over 300 offences in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act*, there are only *ten* offences which carry a mandatory minimum penalty of a fine or term of imprisonment. Even though they are few in number, minimum penalties have provoked concern and debate. Some say they offend our notions of justice because the imposition of the mandatory penalty results, in some cases, in "cruel and unusual punishment"[1]. Others maintain that mandatory minima are an effective means for Parliament to send a message to the public that certain crimes will carry a mandatory penalty regardless of the circumstances of the offence or the offender.

The questions addressed by this Commission were whether mandatory minimum fines and terms of imprisonment constitute just and effective sanctions and whether there is a real need for their continued existence.

1. Terms of Reference

According to paragraph (d)(ii) of the terms of reference, the Commission is directed,

> **...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: ...mandatory minimum sentences provided for in legislation....**

The issue of mandatory minimum penalties is to be considered within the context of guidelines. Hence, the terms of reference pose two major questions with respect to mandatory minima. First, do they serve a valid purpose in the current sentencing scheme? Second, would they serve a valid purpose within the context of the Commission's proposed sentencing policy?

2. Legislative History

In 1892, when Canada adopted the *Criminal Code* drafted by Stephen, it inherited a legislative framework in which the relative seriousness of offences was to be inferred from the maximum penalty attached to each offence. Then, as today, very few offences carried a minimum penalty.

With only maximum penalties to set the upper limit, the legislative framework provided the judiciary with broad discretion as to the nature or severity of the sanction to impose. Mandatory minimum penalties were the exception to this rule. For a select group of offences, Parliament continued to curtail the discretion of judges by making a term of imprisonment mandatory and by specifying the minimum length of that term.

Theft from the mails was one of the offences that carried a three year mandatory minimum in the original *Code* adopted in 1892 (S.C. 1892, c. 29, ss. 326-27). This minimum survived a number of amendments until it was repealed in 1968-69. In fact, the minimum had been removed earlier in 1944 due to the difficulty of obtaining a conviction for offences carrying a mandatory prison term (Canada, House of Commons Debates, June 15, 1944(a)). Judges and juries were less likely to convict knowing that a three year minimum period of incarceration would follow automatically upon conviction regardless of the circumstances of the offence or the offender (Canada, House of Commons Debates, June 28, 1944(b)). However, in 1948, the minimum was restored; Parliament felt that the sentences imposed by judges were inadequate (Canada, House of Commons Debates, June 14, 1948).

In 1919, Parliament set a one year minimum penalty for theft of a motor car (S.C. 1919, c.46, s.9). In order to avoid imposing the minimum jail term, judges began employing suspended sentences. Parliament responded two years later with an amendment stating that no suspended sentences were to be imposed for this offence without the consent of the Attorney General (S.C. 1921, c.25, s.5). As a result of the recommendations of the Royal Commission

on the Revision of the Criminal Code (1952), this minimum penalty was abolished in 1954 (S.C. 1953-54, c.51, s.281).

Even though they have changed significantly over the years, some mandatory minimum penalties – such as those for murder and high treason – have been in existence for a long period of time. Others, such as the minimum penalty for drinking and driving were recently amended, although they have existed for more than half a century. However, over the past 50 years mandatory minimum penalties have been created for only four other offences: use of a firearm during the commission of an offence (s. 83); gaming and betting (s. 186, s. 187); and importing narcotics (*Narcotic Control Act*, s. 5(2)). As is evident from debates in the House of Commons and Senate, Parliament's objectives underlying the imposition of these mandatory minima were primarily to highlight the seriousness of the offence and achieve greater deterrence.

3. Current Mandatory Minima: Fines and Terms of Imprisonment

As stated in Chapter 1, only the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV) were examined by this Commission. All offences currently carrying a mandatory minimum penalty are presented in Table 8.1. With the exception of high treason, murder and importing/exporting narcotics, the minimum penalty for each offence depends on whether it is a first, second, or subsequent conviction.

Table 8.1

Current Mandatory, Minimum Penalties

			Conviction	Minimum	Maximum
a)	Mandatory Life Sentences (*Criminal Code* only)				
s.	47(1)	High Treason	All	Life	Life
s.	212/213	First Degree Murder	All	Life	Life
s.	212/213	Second Degree Murder	All	Life	Life
b)	Mandatory Minimum Sentences				
i)	*Criminal Code*				
s.	83	Use of firearm during commission of offence	first second	1 year 3 years	14 years
s.	237(a)/239(1)	Impaired driving	first second (subsequent)	$300 14 days 90 days	5 years*
s.	237(b)/239(1)	Exceeding .08	first second (subsequent)	$300 14 days 90 days	5 years*

			Conviction	Minimum	Maximum
s.	238/239(l)	Refusal to provide sample (impaired driving)	first second (subsequent)	$300 14 days 90days	5 years*
s.	186	Betting, pool-selling, book-making	second (subsequent)	14 days 3 months	2 years
s.	187	Placing bets on behalf of others	second (subsequent)	14 days 3months	2 years
ii)	*Narcotic Control Act*				
s.	5(2)	Import/export narcotics	All	7 years	Life

iii) *Food and Drugs Act* (Parts III, IV) (No mandatory minima)

* Hybrid offence: more serious charges are proceeded with by way of indictment (5 year maximum); less serious charges by summary conviction (6 month maximum).

In Table 8.1, the Commission has identified two basic types of minimum penalties. The seven offences under the heading "mandatory minimum sentences" carry what we consider to be standard *minimum* penalties. These minima are indicated in criminal legislation by use of the words "not less than...", which refer to the quantum of punishment. Sub-section 5(2) of the *Narcotic Control Act* is one example of legislation which carries a standard minimum penalty of "not less than seven years".

The remaining three offences, first degree murder, second degree murder and high treason are listed in the Table as "mandatory life sentences". The only possible sentence for these offences is life imprisonment since the minimum and maximum penalty is the same. Hence it is the *mandatory* nature of these single penalty offences that sets them apart from the other standard mandatory *minimum* sentences. In this chapter, the Commission will focus exclusively on the seven standard *minimum* penalties prescribed in the *Criminal Code* and *Narcotic Control Act*.

There is one final note with respect to *mandatory* sentences. Although the sentence of life imprisonment is mandatory for all three offences, there is a difference in the minimum term of imprisonment to be served in custody before eligibility for parole. Since this issue relates primarily to early release, minimum parole ineligibility periods will be discussed in Chapter 10 (*The Meaning of a Sentence of Imprisonment*).

4. Problems

4.1 Past Commissions

In the past 35 years, all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished.

The Royal Commission on the Revision of the Criminal Code (1952), established to advise the government on required amendments to the *Criminal*

Code, concluded that all minimum punishments should be abolished. The report quotes an introduction to the original Draft Code in which the Attorney General of England referred to minimum penalties as "a great evil" that would, to a considerable extent, be set aside by the new legislation (p. 234). The report further refers to an article by Chief Justice McRuer in which he claims that, except in the case of murder, a minimum sentence "tends to corrupt the administration of justice by creating a will to circumvent it" (p. 234). This argument was to recur frequently in later debates on minimum penalties.

In spite of the recommendations that no minima should survive the 1953-54 Code revision, a few were retained on the grounds that, "...while there may be some merit in the recommendation of the Commission, we think that because of their deterrent effect minimum penalties should not be entirely abolished". (Senate of Canada, 1952; 210).

In 1969, the Ouimet Committee recommended that "existing statutory provisions which require the imposition of minimum mandatory sentences of imprisonment upon conviction for certain offences other than murder be repealed" on the grounds that these constituted an unwarranted restriction on the sentencing discretion of the court (p. 210).

Finally, the Law Reform Commission of Canada (1975b; 24) called for the abolition of mandatory minima and summarized some of the major problems that these penalties generate:

> While there are no available objective measurements on the effectiveness of such sanctions, experience does not show that they have any obvious special deterrent or educative effect. Generally, the reported research does not show that harsh sanctions are more effective than less severe sanctions in preventing crime. Other problems arise in denying judges discretion to select the appropriate sanction or the length of a prison term in individual cases. For one thing circumstances vary so greatly from case to case that an arbitrary minimum may be seen as excessive denunciation or an excessively long period of separation in the light of the risk and all the circumstances. Indeed, not every case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and a non-custodial sentence.

4.2 Submissions

The vast majority of the submissions received by the Commission argued for the abolition of mandatory minimum penalties[2]. As well as the major problems outlined by the Law Reform Commission of Canada, a number of other arguments against mandatory minima were advanced. Some felt that minima represent an over-reaction to excessive discretion and individualization of sentences and, in forbidding consideration of the circumstances of each offence, mandatory minima can lead to sentences which are unduly harsh.

It was also argued that as well as encouraging distortion in fact-finding (juries avoiding a finding of guilt) and an inconsistency in charging practices, mandatory minima encourage technical defences. An accused person facing a mandatory term of incarceration has nothing to gain by pleading guilty and may take full advantage of procedural tactics and appeal mechanisms that he or she may otherwise have eschewed.

Concern was also expressed regarding the disparity that results from the imposition of mandatory minima, particularly the disparate sentences that result from plea negotiations. What must the public think when they read of a seven year term for importing "soft drugs" when a much briefer term is imposed for bringing into the country large quantities of narcotics? What the public seldom knows is that in the latter case, the accused pleaded guilty to a possession or trafficking charge as a result of a plea negotiation in order to avoid the obligatory seven year penalty for importing. The reason for such perceived unfairness remains invisible and consequently justice is neither done nor seen to be done.

4.3 Surveys

Sentencing judges were divided upon the issue of mandatory minimum penalties (Research #6). When asked if minimum penalties restricted their ability to give a just sentence, slightly over half (57%) responded affirmatively. Only 9% stated that mandatory minima never restricted their ability to impose a just sentence. In addition, slightly over half believed that the current mandatory minima contribute to inappropriate agreements between Crown and defense counsel. Only 5% felt that the presence of a mandatory minimum penalty never resulted in inappropriate agreements.

On the other hand, judges expressed some faith in the deterrent effect of these penalties. Almost three-quarters of the sample endorsed the view that these sentences convey a message to the public about the seriousness of certain offences.

Although on many other issues Crown and defense counsel held divergent views, they agreed that plea bargaining was more likely to occur in cases involving an offence carrying a mandatory minimum penalty (Research #5). However, disagreement emerged when this question was pushed further. Over 75% of defense counsel felt that mandatory minimum penalties caused Crown and defense to enter into agreements they would otherwise avoid, while only 38% of Crown counsel agreed. Responses to both questions varied significantly from province to province. For example, in British Columbia, 88% of defense counsel felt that Crown and defense entered into agreements they otherwise would avoid, whereas in New Brunswick only 33% of defense counsel felt that occasionally mandatory minima resulted in such agreements. These results suggest that the perception of the impact of mandatory minima on plea bargaining varies significantly across the country. However, it is not the variation itself that is most telling, but rather the fact that whatever the

province and regardless of whether a lawyer acts for the defense or the Crown, there is *always* a significant percentage of respondents who endorsed the view that mandatory minima lead to agreements that they would otherwise avoid.

Other professionals involved in the criminal justice system (i.e. probation and parole officers) expressed negative views of the mandatory seven year minimum for importing narcotics (*Rizkalla, 1986*). In their view, this penalty was ineffective in accomplishing its aim (deterrence), unjust in its application, and conferred too much power upon police and Crown counsel.

A survey of the opinions of prison inmates in Quebec on various issues pertaining to the Commission's mandate revealed that inmates in both prisons (three groups were surveyed) and penitentiaries[3] (13 groups were surveyed) had misconceptions about the nature of minimum penalties (*Landreville, 1985*). They usually confused minimum penalties with mandatory parole ineligibility periods. The most frequently-cited example of the latter was the mandatory parole ineligibility period of 25 years for offenders convicted of first degree murder. The notions of mandatory minimum penalties and mandatory minimum parole ineligibility periods are, in fact, quite distinct: an offender convicted of importing drugs will receive at least a seven year sentence, which is the minimum penalty provided by law for that offence; this offender will nevertheless be eligible for full parole after serving one-third of his sentence (28 months). The fact that only two of the 16 inmate groups surveyed were able to give examples of offences carrying minimum penalties (importing drugs and use of a firearm in the commission of an indictable offence) illustrates a lack of familiarity with minimum penalties.

Research addressing public knowledge of statutory penalties was discussed in Chapter 4. However, it may be useful to summarize here some of that research dealing with minimum penalties. Members of the public were asked several questions and the results showed the majority had little idea of the existence of minimum penalties. When asked to name an offence carrying a minimum penalty, very few correctly identified any. They were provided with a list of five offences and asked to identify the one carrying a minimum. Only 28% correctly identified impaired driving. In fact, a comparable number thought manslaughter carried a minimum penalty. They were then asked specifically what the minimum was for importing a narcotic. Sixty-two percent chose "don't know". Thus few members of the public are aware which offences carry minimum penalties. Fewer still know the severity of those minima.

5. Commission Proposals

5.1 Issues

The recommendations of the Commission are preceded by a discussion of the various issues raised by mandatory minima. These include those issues which have been addressed by the courts since the proclamation of the *Canadian Bill of Rights* in 1960 and the *Canadian Charter of Rights and*

Freedoms in 1982. All remaining issues in the context of the sentencing theory proposed in the previous chapters will then be discussed.

5.1.1 Recent Jurisprudence

Mandatory minima raise two related questions that have been addressed by recent jurisprudence[4]. First, does the imposition of minimum sentences, such as seven years for importing, constitute "cruel and unusual punishment"? Second, does the removal of judicial discretion implicit in a minimum sentence authorize the imposition of "arbitrary imprisonment"?

Not surprisingly, courts have been faced with these issues primarily in the context of the seven year minimum for importing narcotics. It is the most severe standard minimum currently existing.

a) Cruel and Unusual Punishment

The concern that the imposition of a mandatory sentence of imprisonment may constitute "cruel and unusual punishment" is not new. In *R. v. Shand* (1976), 29 C.C.C. (2d) 199 (Ont. Co. Ct.) the trial court judge wrote a lengthy judgment examining the issue of whether s. 5(2) of the *Narcotic Control Act* was "cruel and unusual punishment" within the meaning of s.2(b) of the *Canadian Bill of Rights* (R.S.C. 1970, App. II). The judgment held that the seven year minimum was cruel and unusual punishment in that it could be "unusually excessive" given "...the crime committed, the person who committed it, the nature, quantity and value of the drug involved, the current range of sentences for closely related offences, the sentences provided for closely related offences in the *Food and Drugs Act* and sentences for comparable crimes in other jurisdictions..." (p. 234).

Although the decision of the trial court (to set aside the mandatory minimum sentence of seven years) was overturned by the Court of Appeal, concern with the severity of this penalty remains. Indeed, the Court of Appeal recognized that "in a marijuana case particularly, the seven year minimum may in some circumstances be inequitable", although "it is not cruel" (*Shand* (1976), 30 C.C.C. (2d) 23 at p. 36). In defence of a seven year term, the following argument was advanced. Parliament endorsed a minimum penalty knowing in some cases the effect on an individual may be unduly harsh, but acknowledging that a greater goal – the containment of the drug trade – was thereby achieved. Since these narcotics cannot easily be grown in Canada, illicit commerce is highly dependent upon importation. It was the aim of Parliament to cut off the source, using the power of the criminal law. The intention, then, was to deter potential traffickers by the magnitude and certainty of the minimum penalty. In fact, general deterrence is the most frequent justification raised for minimum penalties. It was this putative deterrent effect that prevented Parliament from adopting the 1954 recommendations to abolish all minima (Senate of Canada, 1952; 210).

If indeed there existed unequivocal evidence that minimum penalties were an effective deterrent then one might argue that minima should not only be retained, but extended to other offences. Surely society, through the criminal law, is more interested in deterring robbers and rapists than people who place bets on behalf of others.

Earlier chapters noted that the results of research on the existence of a deterrent effect of punishment were too inconclusive to warrant a policy of increasing either the scope or the severity of punishment in order to deter potential offenders. To this general point must be added the following considerations. No punishment can deter if its very existence is unknown. In this regard research upon the views of inmates showed that their perception of the existence of mandatory minimum penalties was confused, thus adding to the difficulty of attributing a particular deterrent effect to mandatory minima. Furthermore, research conducted on mandatory minima in the area of gun control legislation or impaired driving was no more conclusive than the general studies on the deterrent effect of punishment[5]. Of course, one cannot disclaim any deterrent effect of mandatory minima, but when the uncertain benefits of such punishment are weighed against their acknowledged disadvantages, their retention seems unjustified.

The second objection is that mandatory minimum terms of imprisonment, such as the seven year term for importing narcotics, have little impact upon the very individuals whom the original legislation sought to affect. Judges in this country can, and do, give severe sentences to individuals convicted of this offence. Thus in *R. v. Wai Fun Fung* (1979), 3 W.C.B. 397 the Court of Appeal affirmed a 17 year sentence for a first-time courier of heroin. The seven year minimum, although it may impel judges to impose higher sentences in serious cases, provides no additional weapon to the judicial arsenal: it merely ensures that the least serious cases receive a sentence that is both uniform and severe. Consequently, the punitiveness of the mandatory term is directed at the least serious cases. The substantial sentences in excess of the minimum seven years imposed in the more serious cases are more a reflection of the high maximum penalty (e.g., life imprisonment for importing) than of the mandatory minimum.

This point was forcefully made in *R. v. Smith* (1984), 11 C.C.C. (3d) 411, (B.C.C.A.) a case in which it was alleged that the minimum sentence of seven years imprisonment for the importation of drugs violated sections 9 and 12 of the *Charter*. The British Columbia Court of Appeal ruled that it did not. However, in a dissenting opinion, which offers a very comprehensive treatment of the issues involved, Mr. Justice Lambert noted:

> The only gain is the general deterrent effect of sentencing minor drug importers to terms of seven years instead of lesser terms, in those cases where a sentencing judge might regard as a fit sentence, a sentence of less than seven years. It is not the serious importers who are affected by s. 5(2). (p. 431)

Sentencing data sustain this view. An examination of all sentences for importing from a recent two year period (1983-84) reveals that fully 2/3 of the

cases received exactly the minimum seven years. It is clear that in practice the original intention of Parliament – to provide a high (seven year) *starting* point for sentences – has not been achieved. For over 67% of cases the starting point is also the ending point.[6] To know exactly why this is the case would require additional information about the particular circumstances of each case (e.g. the type and amount of narcotic involved). However, data certainly support the view that the minimum sentence affects primarily the least serious cases.

Data provided in *Sentences Drogues*, a sentencing digest on drug offences prepared by the Québec Service de recherche de la Commission des services juridiques (1984), show that when they are dealing with serious cases, judges are quite willing to impose sentences which are much harsher than the minimum. This digest reviews in detail 25 recent sentences imposed for the importation of narcotics. Eighteen of the 25 exceeded seven years, the longer sentences ranging from 12 to 20 years. Seven of the 25 sentences did not exceed the seven year statutory minimum penalty. The primary determinants of sentence length were the nature and the quantity of the narcotics imported: longer sentences were generally imposed for cases involving hard drugs (heroin, cocaine) or large quantities of soft drugs (hashish and marijuana); the minimum penalty was imposed in all cases involving smaller quantities of soft drugs.

The proliferation of drug use and trafficking in recent years bears witness to the fact that the aim of general deterrence has not been realized. Not only has the minimum penalty failed to provide any additional protection against the "big-time" importers that pose such a threat to society, but the legislation has dealt a considerable blow to the concept of individualized justice.

b) Arbitrary Imprisonment

The second ground for objecting to mandatory minima is that they authorize arbitrary imprisonment, in violation of s. 9 of the *Charter* which states, "everyone has the right not to be arbitrarily detained or imprisoned". This argument applies to all minimum penalties from the least to the most onerous. In many cases, mandatory minimum punishments require a judge to impose a sentence without regard to the circumstances of the offence or the offender. For offenders convicted of an offence carrying a mandatory minimum period of imprisonment, incarceration simply accompanies conviction – the sentencing judge is bound to disregard any other considerations which in the case of other offences might have mitigated against incarceration.

In rejecting the view that the minimum seven year term for importing constitutes arbitrary punishment, the majority in *Smith* (1984), 11 C.C.C. (3d) 411, (B.C.C.A.) at p. 418, held that "a court should not categorize such legislation as 'arbitrary' or 'cruel and unusual' unless it is clearly satisfied that this conclusion is beyond doubt". The majority judgment further states that "an important factor, I think, in the determination of the issue is to ask - What is the legislation seeking to achieve?". The judgment then proceeds to defend the minimum for large-scale importing upon grounds which we have already

outlined – deterring big drug smugglers – and which have been questioned. For the court in *R. v. Newall et al.* (No. 4) (1982), 70 C.C.C. (2d) 10, the fact that the legislation was enacted by Parliament meant it was not arbitrary.

However, in the dissenting judgment in *Smith*, Mr. Justice Lambert argues that in evaluating whether the seven year minimum constitutes cruel and unusual punishment the court should look not only to what Parliament *intended* to achieve, but also to the *effect* of the legislation:

> In short, the effect of s. 5(2) is that guilt or innocence on a charge of importing or exporting a narcotic is determined judicially by a judge or jury, but the sentence is not determined by a judge or a jury, but is predetermined by Parliament. That predetermination by Parliament pays no attention to the individual offender or the circumstances of his offence. In that respect the determination is arbitrary, and the resulting imprisonment is arbitrary imprisonment.
>
> I emphasize that I am considering only the arbitrary *effect* of s. 5(2) on an offender. The *effect* is that it imposes imprisonment arbitrarily. And it is that *effect* that is contrary to s. 9 of the Charter. (p. 425)

Whether it is the role of the court to consider the "effect" of certain legislation is not for us to decide. It is, however, clearly the role of this Commission to consider and weigh what Parliament intended in enacting this legislation *and* its actual effects. In order to fulfill its mandate, this Commission must address the issue of whether the unintended negative effects of mandatory minima nullify the benefits that were expected to ensue from their enactment.

It also seems clear that in the case of the seven year minimum for importing, it is those convicted of the *least serious* instances of the offence who are denied the right to sentencing consideration unconstrained by a minimum. An individualized sentence is still possible for the more serious cases of importation. And, as is apparent from the diversity of sentences above the seven year minimum, current practice suggests that individualized justice still operates there. However, concern is raised by less serious cases such as the frequently-quoted example of the offender who would receive seven years for bringing a cigarette of marijuana into the country. If such a person were to succeed in passing it to another person, the latter might receive a suspended sentence for possession. Such disparate sentences would clearly violate the principle of proportionality and should be avoided.

Those who argue in favour of mandatory minima will suggest such a turn of events is never likely to come to pass owing to the sage exercise of prosecutorial discretion. As was pointed out in Mr. Justice Lambert's dissent in *Smith* (1983), 35 C.R. (3d) 256, this seems a poor solution to the problem:

> I reject the argument that the ameliorating effect of prosecutorial discretion prevents the mandatory prison sentence of seven years required by s. 5(2) of the *Narcotic Control Act* from giving rise to arbitrary imprisonment. The lesson of history is that mandatory minimum sentences put an improper burden on prosecutors, and give rise to perverse verdicts of acquittal. (p. 427).

This view was also shared by the trial court which held that imposing mandatory minimum penalties based on the mere possibility of the "worst case" scenario meant that legislation permitting such possibilities was *ultra vires*.

While the majority decisions in recent cases have held that the minimum sentence of seven years imprisonment is neither "arbitrary" nor "cruel and unusual", it is clear that the matter is far from closed. In fact, at the time of writing, the matter is under consideration by the Supreme Court of Canada which, after hearing the appeal of *R. v. Smith*, has reserved judgment.

c) Conclusion

This Commission is committed to the principles of proportionality and equity. These principles operate at two levels. First, when Parliament prescribes or amends a maximum penalty, it should ensure that the penalty is commensurate with the seriousness of the offence as defined in the *Code*. Since the legal definition of criminal offences is generally broad, the maximum penalty is no more than a general indication of the sentencing range within which the judge may exercise a great deal of discretion. Second, however, the principles of proportionality and equity should further guide the judge in determining a just disposition in the particular case before the court. At this level, each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined. Although the offence should be the focus in determining the appropriate penalty, the circumstances of the offender must also have some weight.

Furthermore, it is not merely uniformity of approach that sentencing must concern itself with, but also uniformity of impact. Clearly, a $300 fine is a far greater penalty for a person with no income than for a wealthy executive. Absolute uniformity of impact may never be perfectly attained – the punishment may never be truly commensurate with the seriousness of the offence and blameworthiness of the offender. There are too many variables for that to happen, but it is a goal to which this Commission is committed and which mandatory minima militate against.

It is unclear whether mandatory minimum penalties violate section 9 or section 12 of the *Charter of Rights*. This Commission is not a tribunal and therefore should not issue judgments. Its mandate is to make recommendations on sentencing policy. In this context of sentencing policy, the ongoing debate in the jurisprudence on minimum penalties can be viewed as a strong indication that there are persistent problems surrounding the use of such sanctions. The existence of mandatory minima appears to be justified by a belief in their deterrent value which is dubious at best. It is at least clear that mandatory minima are opposed to the principle of proportionality.

5.1.2 Legislative Guidance

The maximum penalty attached to each offence is, for all but the few offences carrying a mandatory minimum, the only existing legislative guidance as to the relative seriousness of criminal offences. An argument sometimes raised as a justification for mandatory minima is that they reflect with greater precision the seriousness with which Parliament views a particular offence. This argument over-simplifies the real significance of mandatory minima, but it has been used so often as a justification for their existence that it is necessary to refute it.

Certainly with respect to the mandatory life sentences for murder and high treason one can take no issue with this argument. The other offences carrying minima, however, are clearly not the most serious offences, but rather a cross-section of those offences that have caused some public and political controversy. For example, the gaming and betting offences carry a maximum of two years, and a mandatory minimum of 14 days in jail for a second offence. If an impaired driving case is proceeded with by way of summary conviction, it carries a *maximum term* of 6 months imprisonment and a mandatory minimum fine of $300. If maximum penalties provide a general guide to the seriousness with which Parliament views the offence, then the existing mandatory minima were prescribed not for the most serious offences, but for offences ranging from most to least serious. It is the past practice of piecemeal creation of mandatory minima for offences of varying degrees of seriousness that has generated confusion and obscured their intended purpose. Where an offence carries both a low maximum and a mandatory minimum penalty, the law reflects with ambiguity if not inconsistency the seriousness of the offence. The low maximum implies low seriousness whereas the mandatory minimum is a reflection of greater seriousness.

5.1.3 Accountability

The need for explicit mechanisms to ensure accountability in the use of discretion has been recognized by the Government of Canada in its publication, *The Criminal Law in Canadian Society*:

> The criminal justice system must be accountable for its decisions and the effects of those decisions, as is any public agency. Indeed, it must be more accountable than most, because of the direct or potential impact of the criminal justice system on the rights and liberties of individuals. Accountability in all its dimensions – legal, financial, public and political – must therefore be a question specifically addressed in the criminal law. (Canada, 1982; 33)

For offences carrying a mandatory minimum, the exercise of discretion becomes less visible as the discretion shifts from the judge to Crown counsel and police. Accountability is then jeopardized. In other words, the focus of the discretion is no longer on the judge in deciding in open court which sanction to impose, but shifts to the police in deciding which charge to lay (e.g., importing, carrying a seven year minimum or trafficking with no minimum). The Crown's

discretion as to which charge to proceed with is exercised not in open court, but unilaterally or through plea negotiations, the nature of which are seldom known to the judge and almost never known to the public. The exercise of this discretion is not subject to public scrutiny or judicial review. The Crown's bargaining position is enhanced by the certainty of the penalty the offender faces upon conviction and a guilty plea to a lesser included offence may be the only option open to an accused. Accountability in the use of discretion dictates that, wherever possible, discretion should be exercised in an open forum.

5.1.4 Restraint

Finally, and perhaps most importantly, mandatory minimum terms of imprisonment contradict the principle of restraint. Restraint calls for imprisonment as a last resort, and although in a second impaired driving case a term of imprisonment may indeed be justified, the same will likely not be true for a second conviction for betting. This is not to argue that those persons convicted of offences carrying a mandatory minimum penalty should never receive a term of incarceration, but rather that in order to be true to the principle of restraint, judges must have discretion to consider community sanctions before imposing sentences of incarceration.

Mandatory fines also have the effect of undermining restraint. Although in theory a fine is a community sanction, in current practice it results in imprisonment for many offenders who default in their payment. If the mandatory fine is imposed on an indigent offender who otherwise would have received an alternate community sanction, including the possibility of a discharge, then it no longer represents the least onerous acceptable sanction.

5.2 Recommendations

The answer to the initial question posed – whether mandatory minima serve a valid purpose in the current sentencing scheme – has been answered with notable unanimity given the variety of sources. Calls for the abolition of mandatory minima within the current framework of the criminal justice system have been made by commissions, academics, and criminal justice professionals alike.

This Commission is of the view that existing mandatory minimum penalties, with the exception of those prescribed for murder and high treason, serve no purpose that can compensate for the disadvantages resulting from their continued existence.

In the context of the Commission's sentencing package, the rationale for mandatory minima is even less justifiable. Mandatory minima cannot serve as an indication of Parliament's view of the relative seriousness of offences given that they now apply to some offences carrying the lowest maximum penalty. If Parliament is to convey in a systematic manner its view of the relative

seriousness of offences, it must do so through the maximum penalty for each offence and not just through the minimum penalty currently attached to a limited number of offences. Minima have historically been applied to "topical" crimes (once it was theft of mail; today it is illegal use of firearms) rather than to crimes judged to be most serious relative to all other offences set out in the *Criminal Code*. The recommendations of The Canadian Sentencing Commission address the issue of relative seriousness in Chapter 9 which deals with the revision of maximum penalties.

The answer to the second question posed – whether mandatory minima serve a valid purpose in the proposed sentencing scheme – is also no. This answer reflects not only the concerns raised earlier, but anticipates recommendations with respect to maximum penalties, plea bargaining and guidelines. The sentencing package advocated by this Commission strives to obtain greater certainty and simplicity. In this respect at least, it could be said that minimum penalties are consistent with these aims: they are both certain and simple. The difficulty arises when one considers the cost at which this is achieved. In the view of this Commission, these aims can be realized far more efficiently by the proposals regarding sentencing guidance which are described in later chapters.

The recommendation regarding sentencing guidelines explicitly rejects any form of mandatory guidance. *Mandatory* guidelines compel the judge to impose a pre-determined penalty for each offence. These constitute the least desirable form of guidance to the courts. Mandatory minimum penalties, although currently used for only a few offences, have no place in a sentencing framework designed to provide guidance in the determination of individual sentences. One of the objectives of these proposals is to strive for a uniform approach and greater consistency in sentencing but not absolute uniformity.

As will be stressed in the following chapters, each of the Commission's recommendations must be considered within the context of the entire sentencing scheme proposed in this report. Any decision or recommendation made with respect to one aspect of the criminal justice system in fact affects many other aspects of the process. Decisions regarding mandatory minima are closely linked to other elements of our mandate, including maximum penalties, guidelines and plea negotiations.

8.1 The Commission recommends the abolition of mandatory minimum penalties (fines and periods of incarceration), for all offences except murder and high treason.

Parliament has recently enacted amendments to the drinking and driving provisions in the *Criminal Code* increasing the amount of the minimum fine for these offences. Within the current sentencing structure, the enactment of mandatory minimum penalties is one of the only means available to Parliament to show its growing concern about certain crimes. Hence, this Commission does not feel that the recommendation to abolish mandatory minimum penalties runs contrary to current wisdom.

The Commission is of the view that within the framework of the proposed sentencing policy there will be no necessity for the continued use of mandatory fines and terms of imprisonment. Recommendations regarding maximum penalties, guidelines, and plea bargaining will set the basic structure for that framework. It is felt that a system of guidelines can accomplish the objectives that Parliament sought to achieve through the enactment of mandatory minima, but without unduly constraining the courts.

In the preceding discussion of mandatory minimum penalties, mandatory fines and terms of imprisonment were addressed. The issue of mandatory orders, such as the recently-enacted order prohibiting driving for a certain period after a conviction for impaired driving, was not discussed, not because they are of little importance, but rather because it was felt that further study of orders should be undertaken.

Although the nature of an order of prohibition is quite different from a penalty, its impact can be severe. A mandatory order that prevents an offender from driving may be a minor inconvenience for one person but may result in the loss of livelihood for another. It is primarily on the basis of proportionality that it seems appropriate to recommend that mandatory orders be reviewed. The necessity for review will become particularly important if mandatory minimum fines and terms of imprisonment are abolished, since mandatory orders will then represent the most frequently imposed mandatory disposition.

8.2 The Commission recommends that mandatory prohibition orders be further studied in light of the proposed sentencing framework.

6. List of Recommendations

8.1 The Commission recommends the abolition of mandatory minimum penalties (fines and periods of incarceration), for all offences except murder and high treason.

8.2 The Commission recommends that mandatory prohibition orders be further studied in light of the proposed sentencing framework.

Endnotes

[1] See *R. v. Shand* (1976), 29 C.C.C. (2d) 199 at p. 234 as per Borins, J. (Ont. Co. Ct.).

[2] Of the few individuals and organizations who argued for the retention of mandatory minima, most expressed the belief that the deterrent value of mandatory minima outweighed their disadvantages.

[3] Prisons are provincial institutions for inmates serving less than two years; penitentiaries are federal institutions for inmates serving two years or more.

[4] See *R. v. Shand* (1976), 30 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10 (B.C.C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233; *R. v. Smith* (1984), 11 C.C.C. (3d) 411 (B.C.C.A.); *R. v. Slaney* (1985), 22 C.C.C. (3d) 240; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49.

[5] See, for example, the evaluation of Michigan's mandatory two year add-on sentence for possession of a firearm in the commission of an offence (Loftin, Heumann and McDowall, 1983).

[6] For some offences carrying a mandatory minimum term of imprisonment, the minimum penalty is rarely exceeded. For example, data reveal that of 1307 convictions for use of a firearm (s.83) in 1983-84, all but five received the minimum one year term of imprisonment. (FPS-CPIC data base – see Chapter 9). Although this pattern is not true for all offences carrying a minimum penalty, it is clear that in the case of use of a firearm, the minimum is used more as a mandatory determinate sentence (of one year in prison) than as a "starting point".

Chapter 9

A New Structure for Sentences of Imprisonment

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Chapter 9

A New Structure for Sentences of Imprisonment

In imposing a sentence of imprisonment, a judge must exercise his or her discretion within the legal framework provided in the legislation. After the judge imposes the sentence, different laws and statutes provide the framework for the way in which the sentence of the court will be carried out.

To achieve a uniformity of approach to sentencing, the laws, practices and principles which govern the imposition of the sentence must be consistent with those governing its administration. In this chapter, the legal framework governing the imposition of sentences of imprisonment will be discussed and, throughout, the implications of this framework for the ways in which the sentence of the court is actually carried out, will be stressed.

The recommendations in this chapter can only lead to a more uniform approach to sentencing if they are implemented as part of the integrated package of proposals. If these proposals are to reflect the importance of understanding sentencing as a process, then they cannot be divided into distinct parts without losing the meaning of the whole.

Maximum penalties set the upper limit of the sentence that may be imposed for all offences. Upon application by the Crown in specified circumstances, judges may exceed that maximum and impose an indeterminate sentence when they find the convicted person to be a "dangerous offender". In respect of multiple offences, other provisions govern the order in which sentences of imprisonment imposed may be served. In this chapter the proposals for a new structure for sentences of imprisonment will be presented in the following order: first, a review of the maximum penalty structure; second, a re-evaluation of exceptional sentences; and third, a consideration of sentences for multiple offences.

1. Maximum Penalties

> The numerous anomalies and inconsistencies with respect to current maximum sentences prescribed for each offence ... require further intensive consideration. Many offences carry the same maxima but are of substantially differing

degrees of seriousness. Other offences with different maxima are perceived to be similar in all other respects.

Sentencing (Canada, 1984; 59)

1.1 The Current Structure: Past and Present

The primary source of guidance for judges, criminal justice professionals and the public as to the relative seriousness of criminal offences and the upper limit on the sentence of imprisonment that may be imposed, is the maximum penalty prescribed for each offence. Few offences carry a mandatory minimum penalty, so for the majority only an upper limit is prescribed. Whether this existing upper limit does in fact provide any guidance (or even reflects current notions of offence seriousness) is a question that had to be addressed by this Commission.

There has never been a comprehensive examination of the maximum penalty structure in the Canadian *Criminal Code*. While some penalties have changed since 1892, the overall structure has remained virtually the same.

As was discussed in Chapter 2, a frequently imposed penalty in the 18th century was the transportation of offenders from England to the colonies (*Friedland, 1985*). According to an English Act of 1717, transportation could be imposed for seven years in almost all cases. In 1842, a statute was enacted which provided that an offender could receive a penitentiary term equal to "any term for which he might have been transported beyond the seas". It was upon these multiples of seven that James Fitzjames Stephen, the original drafter of what became our *Criminal Code*, based his structure of maximum penalties – a structure that remains in the *Code* today.

Over the past 90 years, a great number of piecemeal amendments have been made to maximum penalties in response to, among other things, shifts in public attitudes regarding the relative seriousness of certain offences. These amendments were not made within the context of a review of the relative seriousness of all offences in the *Criminal Code*, but rather on an offence-by-offence basis ostensibly in recognition of society's changed notions as to the relative seriousness of crimes.

Part of the impetus for the creation of this Commission came from the recognition that a sentencing structure should not remain static: it should evolve to reflect a changing society. To this end the Commission was enjoined to review the overall framework of sentencing, and to assess the extent to which current penalties reflect contemporary views of Canadians regarding the seriousness of offences. As was stressed in *Sentencing* (Canada, 1984) "one of the questions that must be considered in the fundamental review of criminal sentencing is whether the basic assumptions which led to our current law are still valid today, or whether the enormous change which has taken place in society over the past ninety years requires those assumptions to be reassessed" (p.4).

1.1.1 Terms of Reference

Since a fundamental review of the structure of maximum penalties cannot be achieved through the usual process of amendments to the *Code*, the Government of Canada directed this Commission to undertake the required "intensive consideration". In the first paragraph of the terms of reference, the Commission was asked, "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".

As we mentioned earlier in the report, the "related statutes" considered by this Commission are the *Narcotic Control Act* and the *Food and Drugs Act* (Parts III, IV). Although these represent only a fraction of existing maximum penalties, the procedure undertaken by this Commission in relation to these statutes and to the *Criminal Code* could ultimately be applied to all other statutes.

1.2 Concerns

In the legislation, each offence carries a maximum penalty. The current legislative scheme provides the following maximum penalties:

a) *Criminal Code*
6 months, 2 years, 5 years, 10 years, 14 years, life imprisonment;

b) *Narcotic Control Act*
6 months, 1 year, 7 years, life imprisonment;

c) *Food and Drugs Act*
(Parts III, IV) 6 months, 1 year, 18 months, 3 years, 10 years.

According to the current structure the sanction attached to a particular offence is expressed in terms of a certain length of imprisonment. The answer to the question of whether this structure provides any guidance to the public or whether it only serves to further confuse an already complex process seems clear:

> This may prove more confusing for the public than for the courts, who at least have the case law principle that the maximum is to be reserved for the worst imaginable case for that particular offence. If the public were to read the *Criminal Code*, or even press reports of sentencing decisions, they could easily be puzzled by the fact that the penalty for a given offence is set out only as a particular length of time in prison. In the words of the *Code*, every one who breaks and enters a dwelling house "is liable to imprisonment for life", "every one who commits theft involving a sum of property worth over $200 is liable to imprisonment for ten years" and so on.
>
> *Sentencing* (Canada, 1984; 24)

Although judges have the benefit of both greater familiarity with the laws and the jurisprudence, existing maximum penalties provide little real guidance

in the most difficult task of determining the appropriate sentence to impose.[1] As stated above, maximum penalties prescribe the length of a sentence of imprisonment to be imposed in the worst imaginable case of that offence. For a number of offences, such as break and enter (private dwelling), a judge may impose any sentence from a suspended sentence and probation to life imprisonment. In the words of the Law Reform Commission of Canada, the high maximum penalties currently in the *Code* place an "unreasonable burden on judges in requiring them to exercise an unnecessarily wide discretion" and in fact current maxima "appear to be disproportionately high, even anachronistic" (Law Reform Commission of Canada, 1975b; 21). It concluded that the maximum penalties in the *Code* could be reduced without unduly limiting the discretionary power of the court, since "in principle discretion should be no greater than necessary and be subject to reasonable guidelines" (Law Reform Commission of Canada, 1975b; 22).

1.2.1 Penalties: A Guide to Practice?

The current maximum penalty structure when viewed in the context of sentencing practice is an even greater source of confusion to the public. Upon this there was great uniformity of opinion across diverse groups. Over two-thirds of sentencing judges, defence and Crown counsel in Canada who responded to the Commission surveys felt that the current system, where the maximum penalty is rarely imposed, gives a false impression of sentencing practice to the public. The same point has also been made by organizations and individuals in submissions to the Commission. The reasons for this will become clear.

The major source of this confusion – and perhaps public dissatisfaction – is the discrepancy between the maximum penalties prescribed by the *Criminal Code* and the sentences actually handed down. Statutory maxima should bear some relation to actual sentencing practice by setting the ceiling for the most serious cases. This does not appear to be true.

How do the current maxima relate to actual practice? Table 9.1 presents a comparison between statutory maxima and sentencing practice[2], for a select group of offences. This table contains two indices of current practice: the median custodial sentence, and what is known as the 90th percentile of custodial sentences. The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.[3] The 90th percentile, on the other hand, is that sentence below which 90% of cases can be found.[4] To illustrate, the 90th percentile for robbery during this period was seven years. This means that of all offenders who were convicted of robbery *and* who were sent to prison, 90% received terms of imprisonment that were seven years or less. The maximum penalty for robbery is life imprisonment. Only 10% of all those sent to prison for robbery received a sentence in excess of seven years.

Table 9.1

Comparison Between Current Maximum Penalties and Actual Practice[a]

(y = years; m = months)

Offence	Maximum Penalty	Median[b] Custodial Sentence	90th Percentile[c] Custodial Sentence
Manslaughter	Life	5y	12y
Attempted Murder	Life	5y	14y[e]
Robbery	Life	2y	7y
Break and enter	Life/14y[d]	6m	2y
Forgery	14y	6m	1y
Theft over $200	10y	4m	18m
Possession over $200	10y	4m	2y
Fraud over $200	10y	6m	2y
Assault with weapon	10y	3m	1y
Theft of credit card	10y	3m	18m
Assault	5y	1m	6m

[a] Source: FPS-CPIC data-base (1983-84) (Source: Canadian Centre for Justice Statistics). These data have been cross-checked with more recent data (Hann and Kopelman, 1986). The similarities between the data sets proved to be greater than the differences.

[b] Median = middle sentence, half are above, half below

[c] 90th percentile = includes 90% of all custodial sentences

[d] Private dwelling = Life; Other premises = 14 years

[e] While the 90th percentile for attempted murder exceeded that for manslaughter, the medians were similar.

Even a cursory examination of this table reveals a substantial discrepancy between the statutory maxima and either the median or the 90th percentile custodial sentences. One might not expect the maximum penalties to be close to the medians: the maximum has been reserved for the most serious instance committed by the worst possible offender in the worst circumstances. It is revealing however that the maxima also bear little relation to the 90th percentiles. Thus, while the maximum penalty for breaking and entering a private dwelling is life imprisonment, 90% of those offenders who were imprisoned for this offence received sentences of under two years. In fact, less than half of one percent of cases received custodial terms of over nine years. This pattern of results is not unique to Canada. A similar dissociation between maximum penalties and actual practice has been noted in the United Kingdom (Advisory Council on the Penal System, 1978).

It seems fair to say that the maximum penalties as they currently stand have little impact upon the sentences handed down by judges and only serve to

confuse the public. The worst cases are receiving terms of imprisonment substantially below the most severe penalties prescribed by the *Code*. It is worth noting in this context that fewer than one-quarter of the judges surveyed by the Commission (Research #6) stated that the current maximum penalties guided their sentencing.

1.2.2 Penalties: A Guide to Offence Seriousness?

Besides bearing little relation to sentences assigned to the vast majority of even the most serious cases (those resulting in custody), the current maxima provide little guidance as to the relative seriousness of offences. The principle of proportionality, central to the recommendations of this Commission, requires the severity of penalties (both actual and statutory) to reflect the relative seriousness of offences. No two offences of comparable seriousness should be punishable by maximum penalties of substantially different severity. Likewise, offences of manifestly disparate seriousness should not attract the same maximum or average penalty.

The well-known penal theorist Andrew von Hirsch has brought attention to the role of proportionality in the context of a penalty structure. He notes the importance of two requirements: "the first is the requirement of *parity*. Persons whose criminal conduct is equally serious should be punished equally. The second is the requirement of *rank ordering*. Penalties should be graded in severity so as to reflect gradations in relative seriousness of the conduct" (von Hirsch, 1985; 40). We shall now address the requirement of rank ordering; parity will be discussed in the chapter on sentencing guidelines.

If penalties should be graded in severity so as to reflect gradations in relative seriousness of the conduct, offences carrying the same maximum penalty should reflect a similar level of seriousness. Instead, for example, one finds in the *Criminal Code* that sexual assault with a weapon (s.246.2) carries the same maximum penalty of 14 years as do the offences of possession of housebreaking instruments (s.309(1)) and a public servant refusing to deliver up property (s.297). Numerous examples of the anomalies in the current rank ordering of the offences can be provided. Clipping and uttering clipped coins carries a maximum penalty of 14 years, whereas the setting of traps likely to cause death (s. 231) carries a maximum of five years. Finally, few would wish to argue that the offence of break and enter a private dwelling is on the same level of seriousness as manslaughter, although they carry the same maximum penalty of life imprisonment.[5] Furthermore, the maximum penalty for break and enter a private dwelling (s. 306(1)(a)) is life imprisonment, whereas assault with a weapon carries ten years (s.245.1).

Certainly the public do not regard break and enter as one of the most serious offences: when asked to "sentence" an offender convicted of break and enter, only 29% chose to incarcerate him.[6] Nor in fact does it appear to be the case that sentencing judges in this country regard break and enter as an offence deserving of the highest maximum penalty. In fact, in 1983-84,

approximately 40% of convictions for this offence resulted in a fine or other community sanction. Of those more serious cases that resulted in sentences of imprisonment, fully 95% received terms of less than three years.

In order to address these concerns about rank ordering the Commission reviewed, in a comprehensive manner, the maximum penalties prescribed for all the offences (over 300) in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV).

This undertaking involved two major elements. One was to review the maximum penalty bands (i.e. 6 months, 2 years, 5 years, 10 years, 14 years, life imprisonment) and to decide on a "ceiling": that is to establish the level of the most severe maximum penalty. Currently, that level is life imprisonment. The offences of murder and high treason were excluded from this exercise. (These offences carry mandatory minimum periods of life imprisonment and will be dealt with in the next chapter.) The other element of this review required the Commission to order all offences in terms of their relative seriousness.

In determining levels of maxima and relative seriousness, this Commission reviewed all offences as they appeared in the relevant statutes as of January 1, 1986. It was beyond the scope of the mandate to recommend changes to either the definition of offences or to their appropriateness for inclusion in criminal statutes. This is not to minimize the importance of those tasks; in fact the *Code* is sorely in need of such revision. However, the fact that all offences in the relevant statutes appear in the proposed scheme is not to lend credence to each individual offence. Some offences, such as witchcraft or duelling, are not easily ranked in terms of their seriousness. To have eliminated certain offences, however, would have required a comprehensive review of the *Criminal Code*. This was clearly beyond the purview of this Sentencing Commission, and furthermore is currently being conducted by the Law Reform Commission of Canada.

For reasons of equity, clarity, and predictability, the Commission has structured maximum penalties according to its policy of "real time sentencing" – an attempt to bridge the gap between the sentence imposed by the judge and the administration of that sentence. As stressed earlier, this has implications for all sentences of imprisonment and early release practices.

1.3 Setting the Maximum "Ceiling"

In setting the maximum penalty ceiling, the Commission sought to make the maximum penalty structure reflect, to a greater degree, current sentencing practice. Although maximum penalties would continue to set the upper limit, it was felt that they should no longer be measured exclusively according to the "worst possible case".

The most severe maximum penalty in Canada today is life imprisonment. The term "life imprisonment" is in most cases, however, a misnomer. Inmates

serving a life sentence rarely remain in custody for life. In fact, for most offences, a life sentence means eligibility for release on parole after serving seven years in custody. (Early release eligibility periods will be discussed in greater detail in Chapter 10 *The Meaning of a Sentence of Imprisonment*). With only a few exceptions, it is the National Parole Board that decides how much of the life sentence will be served in custody.[7] Hence, a life sentence begins to look more like an indeterminate sentence. Only the minimum time to be spent in custody (e.g., for some, seven years) is known at the time of sentencing. The actual time to be served is decided by the National Parole Board. Once released on parole, a person serving a life sentence serves the sentence in the community under "supervision" for the remainder of his or her life.

Since maximum penalties, as defined in the *Criminal Code*, provide neither a reliable indication of the meaning of sentences nor an adequate indication of the nature of current sentencing practices, the Commission sought to uncover the sentences actually imposed on those offenders currently serving the longest terms in federal penitentiaries.

In order to do so, the Commission obtained an aggregate sentence breakdown of all federal offenders serving sentences in excess of 10 years. By aggregate sentence we mean the following: if an offender is admitted to a federal institution with a two year sentence for robbery and an additional one year sentence for possession of a restricted weapon, this would be recorded as a three year term for robbery. This point must be borne in mind when considering these data.

Approximately 9% of the total federal prisoner population, (excluding offenders serving life-terms) are serving aggregate terms in excess of ten years. This means that of those inmates who are serving a sentence of over two years, only 9% are serving over 10 years in custody. The average aggregate sentence of offenders in this category is 16 years, but this is misleading, for it suggests that judges are sentencing offenders to long terms for single offences. The reality is that over three-quarters of offenders in this category received multiple sentences.[8] The sentences of almost all long-term offenders reflect multiple offences.

Examination of the most severe sentence imposed upon these individuals revealed the following: the average single longest sentence was 12 years. The average single sentence accorded the worst offenders in the penitentiary system is still substantially below the most severe maximum penalties prescribed by the *Code*.

The Commission took a closer look at a still smaller group of federal inmates: those who had actually served 12 years in federal penitentiaries, and who were still in custody at the time of the study. It was possible that these individuals were ones whom judges had sentenced to very long terms (e.g., 20 years) and who to this point had been denied parole. This possibility would be consistent with a model of sentencing practice in which judges regularly impose

sentences near the maxima prescribed by the law. Reality showed this model to be wrong. Most of these offenders would have been released by now had they not accumulated additional time prior to release from their institutions. This additional time came about through convictions for offences committed *in the institution*, for attempted escapes and for offences committed while on some form of temporary release. It is the repetitive nature of their records as much as the severity of the particular offence for which they were initially sentenced that is responsible for their protracted detention in prison.

To conclude, in reviewing the records of long-term prisoners three findings emerged which had significance for the task of setting a new maximum ceiling. First, offenders serving more than ten year terms constitute a small percentage of the total federal inmate population. Second, almost all these offenders are serving aggregate sentences. Third, frequently these long-term aggregate sentences represent not only the sentence imposed for the initial offences of conviction, but also sentences for subsequent offences committed in the institution.

1.3.1 Proposals

Having considered the data on the length of time actually served in custody by long-term offenders and in consideration of other aspects of our sentencing proposals, the Commission concluded that 12 years in prison should be the maximum sentence to be imposed for a single offence in all but the most exceptional cases. In recognition that there are particular cases that require exceptional sentences, there is a procedure of "enhancement" of the sentence, to be described later in this chapter.

The 12 year ceiling applies to those offences, other than murder and high treason, ranked as the most serious.

9.1 For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:

12 years
9 years
6 years
3 years
1 year
6 months

Once the "ceiling" was set at 12 years, the Commission decided that intervals of three years would provide the necessary flexibility and differentiation between the levels of maxima in the upper ranges. It was felt necessary to retain the lowest band of six months, as one year was perceived to be excessive for the least serious group of offences which comprise the bulk of the criminal court workload.

1.3.2 The Meaning of the Maximum Penalty Ceiling

According to the Commission's recommendations, the maximum penalty of 12 years may only be exceeded by a judge if there is a finding that, according to strict criteria, this offence warrants an "exceptional sentence", or where the sentence has been imposed in respect of convictions for multiple offences. These two exceptions will be discussed in detail in later sections of this chapter.

Perhaps most importantly, the meaning of the maximum penalty ceiling can only be understood in the context of the overall meaning of a sentence of imprisonment. As will become clear in the next chapter, the meaning of a sentence of imprisonment is determined, to a large extent, by early release practices. The proposals regarding maximum penalties must therefore be considered as only one part of the integrated set of reforms that will be proposed by this Commission. Taken alone, the proposals regarding maximum penalties would be deprived of their meaning.

Finally, it is important to remember that currently available data reflect sentencing trends under the present sentencing structure. This includes discretionary release on full parole. Of those offenders who are denied parole, or refuse to apply, almost all will be released on mandatory supervision after serving two-thirds of their sentences in prison. The sentencing proposals of this Commission include the abolition of discretionary early release on parole, and a reduced period of earned remission. Thus a 12 year sentence under the new schedule will be a more severe penalty than a 12 year sentence at the present time. As well, the 12 year ceiling would capture almost all long-term offenders and as discussed later, those few remaining could be subject to enhanced sentences.

Even though we have proposed a reduced "ceiling" for maximum penalties, long periods of imprisonment would still be available for the most serious offences. For example, a sentence of 12 years for a very serious case of manslaughter would mean that the offender would serve at least nine years in custody before release, if he or she earned all their remission credits. How does this compare to current sentencing practice? The most recent data on sentences for manslaughter show that 90% are 10 years or less (Hann and Kopelman, 1986). In the existing sentencing scheme however, one has to take into account parole and release on mandatory supervision. Of these cases approximately 60% will be released on parole (Solicitor General's Study of Conditional Release, 1981, Table A-21). The remainder (except those serving life sentences) will be released on mandatory supervision after serving an average of six and a half years in prison. The most severe sentences proposed here are then really harsh, both in terms of the proposed scheme and current practice.

1.4 Offence Ranking According to Relative Seriousness

The offence ranking exercise involved the rank ordering, according to their seriousness, of over 300 offences in the *Criminal Code*, *Narcotic Control Act*

and *Food and Drugs Act* (Parts III, IV). Ranking all the criminal offences under consideration by this Commission was a complex and time-consuming exercise. As in determining the scale of maximum penalties, reference had to be made to policy, theory and data on sentencing practice.

The ranking also drew upon the diverse experiences of the Commissioners, the findings of public opinion research, similar exercises by sentencing commissions in other jurisdictions, and research on the penalty structures in other countries. Thus it was a multi-stage process in which the subsequent ranking was refined to reflect these diverse sources of information. The final step involved a comparison between the ultimate ranking by the Commissioners and rankings derived from members of the public. This revealed a high degree of consistency between the two populations[9]. Hence, although one can never say with empirical certainty that a certain crime is worse than another in all circumstances, some consensus exists on the perceived seriousness of different offences[10]. The exercise of creating new levels of maximum penalties required consideration of policy, theory, and empirical evidence as to current sentencing practice. In proposing the 12 year ultimate maximum penalty for all but exceptional cases or multiple offences, the Commission recognizes that it is difficult to conclude with certainty that importing narcotics, for example, deserves a 12 year term of imprisonment and that any particular offence "deserves" any particular punishment. What we can say is that based on our theory of sentencing and given the other reforms proposed by this Commission, 12 years for example, appears to be the most appropriate maximum penalty for importing narcotics.

1.4.1 Proposals

In the final ordering, offences involving violence which result in serious harm to persons attracted the most severe maximum penalties. Economic crime (e.g., large-scale frauds) and organized crime also attracted severe penalties, although less severe than crimes against the physical well-being and security of individuals. Offences against property, public morals, some sexual offences (e.g., gross indecency), some offences against public order and transactional crime between consenting parties (e.g., gaming and betting) attracted lower maximum penalties. The complete list of all offences and the proposed corresponding maxima is set out in Appendix E. Table 9.2 provides some examples of each category.

Table 9.2

Representative Examples of Offences from Proposed Maximum Penalty Schedule

Proposed Maximum Penalty	Offence Description and Examples
12 years	Most serious offences other than murder: e.g., manslaughter; attempted murder; aggravated sexual assault; kidnapping; importing narcotics;

9 years	Other violent and very serious offences: e.g., robbery; extortion; causing bodily harm with intent; sexual assault with weapon; arson;
6 years	Serious property offences and crimes against the person: e.g., theft over $1000; assault causing bodily harm; break and enter dwelling house; prison breach; sexual assault;
3 years	Crimes against property, other offences: e.g., public mischief; break and enter business premises; theft from mail; pointing firearm; bestiality; advocating genocide;
1 year	Less serious offences: e.g., common nuisance; theft of credit card; falsifying documents; assault; resisting arrest;
6 months	Least serious offences: e.g., gaming and betting; soliciting; theft under $1000; fail to appear; unlawful assembly; indecent acts; possession of stolen property, under $1000.

1.4.2 Proposed Maxima and Current Practice

We have already referred to the relationship (or absence of one) between current practice and current maximum penalties. How do the proposed maxima relate to current practice? For a sample of offences, Table 9.3 compares these proposals with two indices of current practice: the median and the 90th percentile. The proposed maximum penalties are designed to address the majority of cases. As Table 9.3 shows, these proposed maxima include 90% of sentences currently imposed.

Table 9.3

Comparison Between Proposed Maximum Penalties and Current Custodial Sentences Imposed by Courts

(y = years; m = months)

Offence	Proposed Maximum Penalty	Current Median Custodial Sentence Imposed	Current 90th Percentile Custodial Sentence[a] Imposed
Manslaughter	12y	5y	12y
Attempted murder	12y	5y	14y
Kidnapping	12y	4y	12y
Causing bodily harm with intent	9y	1y	5y
Robbery	9y	2y	7y
Extortion	9y	1y	3y
Sexual assault, weapon	9y	3y	8y
Forgery	6y	6m	1y
Theft over $1000	6y	4m	18m
Fraud over $1000	6y	6m	2y
Assault with weapon	6y	3m	1y

Sexual assault	6y	6m	3y
Forcible confinement	6y	2y	6y
Public mischief	3y	1m	4m
Possession of house-breaking instruments	3y	1y	3y
Assault	1y	1m	6m
Assault police officer	1y	2m	6m
Fraudulently obtaining food & lodging	6m	1m	6m
Theft under $1000	6m	3m*	1y*
Fraud under $1000	6m	3m*	1y*

(a) Source: FPS-CPIC data-base (1983-84)

* Based on data for offences proceeded with by indictment

The 90th percentile for the sentences imposed in the case of attempted murder seems to be over the 12 year ceiling (14 years). However, according to the most recent research project on sentencing data (Hann and Kopelman, 1986; 24, Report on Murder and Related Offences), the 90th percentile for attempted murder would be lower, i.e. 10-12 years. Hence the 12 year ceiling really encompasses at least 90% of sentences for all offences, except murder and high treason.

The proposed maxima are still consistently higher than current practice. This is clear from an examination of the two primary sources of sentencing statistics available to the Commission. In the Correctional Sentences Project (Hann and Kopelman, 1986) 90% of custodial terms were less than ten years. In the data-base provided by the Canadian Centre for Justice Statistics (FPS-CPIC) the 90th percentile was slightly higher: 12 years. This general observation also applies to particular offences, such as theft over $1,000. The proposed maxima is six years. Data from the custodial sentences project shows a 90th percentile of one year. The FPS-CPIC data base showed a 90th percentile of 18 months. While the proposed maxima are lower than the maxima which exist today, they still provide the scope to deal with all cases in a way consistent with current practice.

1.4.3 Proposed Maxima and Maxima from Other Jurisdictions

As part of its research activities the Commission compiled comparative penalty data from other jurisdictions. This was not always possible – definitions of criminal acts vary almost as much as the acts themselves. Table 9.4 however, presents some comparisons, which illustrate that (a) there is considerable variation in the maximum penalties prescribed in different countries, and (b) that generally speaking, the Commission's proposals are not out of line with the maxima which exist elsewhere. On this last point the reader is reminded that the maximum penalties proposed by the Commission do not include any provision for discretionary parole release. Accordingly, a six year maximum under the proposed scheme is a more severe penalty than a six year sentence under the old scheme or another derived from a jurisdiction which retains parole.

Table 9.4

Comparison of Current Maxima, Proposed Maxima and Maxima from other Jurisdictions (Selected Offences)*

Offence	Current Maximum	Proposed Maximum	United Kingdom	British Advisory Council[a]	United States[b]	Sweden	France	Netherlands
Manslaughter	Life	12	Life	Life	10	10	15	15
Attempted Murder	Life	12	10	Life	10	Life	Life	10
Kidnapping	Life	12	Life	7	Life	Life	Life	12
Robbery	Life	9	Life	6	Life	10	Life	15
Extortion	Life	9	14	5	5	6	10	9
Arson	14	9	Life	5	10	Life	20	15
Perjury	Life/14	9	5	7	2	8	10	3
Aggravated Assault	14	9	Life	5	10	10	15	6
Assault with a Weapon	10	6	14	5	1	2	4	4
Sexual Assault	10	6	*	7	2	4	5	8
Theft Over $1000	10	6	10	3	5	6	3	6
Forgery	14	6	Life	3	10	6	Life	5
Use of Firearm in Commission of Offence	14	6	14	*	*	2	*	4
Public Mischief	5	3	*	3	1	2	5	6
Assault	5	1	1	1	3m	*	2	6
Fraud Under $1000	2	6m	10	3	5	6	5	4
Current imprisonment rate per 100,000 population	108		97		287	49	72	34

* = either no equivalent or a variation in definition prevents direct comparison

[a] = Proposal of the British Advisory Council on Maximum Penalties (1978)

[b] = U.S. Model Penal Code

1.5 Effects of Maximum Penalties on Public Perceptions

Maximum penalties as well as actual sentences, it is said, guide public views of the seriousness of offences. This *declaratory* function of penalties anticipates that people derive their views of how serious offences are – in part at least – by referring to the penalties prescribed for those offences.

It is this reasoning which has, in the past, provoked opposition to reducing penalties. The argument runs that, by so doing, people will view the crimes in question as either morally less wrong or less serious. If this were the case, one might want to proceed cautiously when lowering penalties. This Commission has recommended lowering the maximum penalty for common assault from five years to one. It was not the intention to convey to the Canadian public a message that assault is now regarded as a less serious offence than was previously the case. If the public do derive perceptions of seriousness from statutory maxima, this might be one undesirable effect of lowering the maximum penalties in the *Code*.

As it happens, there seems to be little evidence that statutory maxima affect public perceptions of crime seriousness. This was apparent from a literature review and the results of original empirical work, both of which were carried out by the Commission research staff.

For one thing, as is apparent from Chapter 4, the public have little accurate idea of existing maximum penalties. It is hard to argue that public perceptions of offences are affected by statutory maxima when most people don't know what those maxima are even when the penalty for an offence is the object of extensive media coverage. In addition to this fact, there is other evidence to support this position. In a nation-wide poll (Research #3) respondents were asked to rate the seriousness of impaired driving relative to other offences in the *Code*. Prior to this rating half the respondents were told about the new, harsher penalties for this offence, for which a convicted offender can now receive five years in jail. The other half of the sample received no such information. If peoples' views of the seriousness of offences are affected by maximum penalties, we would expect the group receiving the information about the new penalties to rate the offence as being more serious. This was not the case. There were no differences between the groups. Of course there remains the possibility that the public would regard an offence as being less serious if they knew that the penalty had decreased in severity. This experiment only tested the other half of the proposition that raising the penalty would inflate seriousness ratings. The evidence seems to indicate however, that public views of the seriousness of offences are not derived from the maximum penalties prescribed for those crimes. It does not seem likely, then, that the Canadian public will regard crimes as being less serious if the maximum penalties prescribed for those crimes are lowered.

1.6 Maximum Penalties as Part of an Integrated Set of Sentencing Reforms

Finally, it is necessary to end this discussion of maximum penalties with a most important caveat. The maximum penalties proposed by this Commission are substantially lower than those currently prescribed by the *Code*. Even if the exact amount by which sentence lengths (as opposed to lengths of time actually served) will be shortened is hard to estimate, one thing has got to be clear: sentences must be reduced to take into account the Commission's proposals regarding early release.

The sentencing reforms advocated by this Commission reflect recognition that changes to one part of the sentencing process will affect all other parts. One of the Commission's recommendations regarding early release calls for the abolition of parole. If this step were taken without some concomitant reduction in sentence lengths, our prisons would be strained beyond capacity. Prison occupancy exceeds 100% in many institutions right now. Thus if discretionary parole release were to be abolished without a reduction in sentence length, the extra demand for cells would quickly stress the system beyond its capacity to function.

1.7 Hybrid Offences

Like the current bands of maximum penalties in the *Code*, the current classification of certain offences as "hybrid" is more the result of historical accident than any systematic design. Hybrid offences carry two maximum penalties: the lower penalty applies if the offence is dealt with by way of summary conviction, the higher one applies if it is proceeded with by indictment. For example, the offence of sexual assault carries a maximum penalty of six months (summary conviction) or ten years (indictable).

Whether a hybrid offence is proceeded with summarily or by way of indictment is a decision typically made by Crown counsel. The classification of an offence as summary or indictable determines a number of procedural incidents such as the mode and place of trial, the mode and routing of appeals and the applicability of the *Identification of Criminals Act* (fingerprinting the accused). In addition, the choice of whether to proceed summarily or by indictment has other consequences (e.g., whether a fine may be imposed in addition to, or in lieu of, other punishment).

According to the principle of proportionality and for reasons of greater equity, clarity and predictability of procedure, this Commission is of the view that the classification of offences as hybrid should be abolished.

9.2 The Commission recommends that hybrid offences be abolished and reclassified as offences carrying a single maximum penalty of 6 months, 1 year, 3 years, 6 years, 9 years or 12 years imprisonment.

The Law Reform Commission of Canada is studying the classification of offences, which will be the subject of a future report. There are a number of procedural incidents which will result from any new structure of offences and which will have to be addressed. For example, the question of whether the option of a jury trial should be available to all those convicted of indictable offences would have to be resolved within the context of any new classification scheme. The lowest maximum level recommended by this Commission for the more serious offences (i.e. three years) may well be an appropriate threshold at which to grant the right to a jury trial.

Finally, the Commission's recommendation regarding the elimination of the current classification system is consistent with the principle of accountability, discussed in greater detail in the chapter on the exercise of prosecutorial discretion (Chapter 13).

2. Exceptional Sentences

The Commission has proposed that a sentence of imprisonment of 12 years should, for all offences except murder and high treason, be the most severe maximum penalty prescribed by the *Code*. This decision was made subject to one important caveat: that the Commission would also propose a special procedure to allow the sentencing judge to impose a custodial term in excess of the highest maximum for exceptionally heinous crimes.

The Commission will also recommend a process by which a judge may impose a penalty in excess of the maximum penalty in cases of sentencing an offender for multiple offences. This proposal will be discussed in the next section, *Sentences for Multiple Offences*.

Although the Commission sought to develop a structure that would allow for a longer term of incarceration to be imposed for those rare heinous crimes, the procedure itself has to be exceptional in order that these exceptional crimes do not dictate the maxima for the more common occurrences of the same crime.

As will become evident in the course of this section, the legislative history of exceptional sentences is a history of indeterminate sentences. Indeed, the history of a special procedure to allow judges to depart from normal sentencing practice reflects a belief in the ability to predict future behaviour and in the ability to "cure" criminals. Not only has this model of sentencing been the cause of much debate, but more importantly, it is a model which has as its basis a theory of sentencing that is antithetical to the sentencing structure proposed by this Commission.

2.1 Indeterminate Sentences

Under the current law, there exists one mechanism which gives judges, on application of the Crown with consent of the Attorney General, the power to

impose an indeterminate term of custody which may exceed the maximum sentence prescribed in the *Code* for the offence of conviction. Part XXI of the *Criminal Code* empowers the court to impose a sentence of indeterminate length once it has found the offender to be "dangerous".

The dangerous offender legislation was enacted in 1977 to replace former provisions for "habitual offenders" and "dangerous sexual offenders". Although some changes have been made over time to the procedure and criteria which must be followed before a judge may impose an indeterminate sentence, the basic thrust of the legislation has remained the same. The dangerous offender legislation gives the court the power to impose an indeterminate sentence of imprisonment on those offenders who commit a "serious personal injury offence" and *who meet other criteria centred around the prediction of future behaviour.* Where the court imposes an indeterminate sentence, the parole board is required to review the inmate's case three years after the sentence is imposed, and every two years thereafter, to determine whether parole should be granted.

There are two elements of the dangerous offender legislation that are an exception to general criminal law principles. First, the indeterminate nature of the custodial sentence, and second, the primary focus on the offender rather than the offence.

The thrust of our proposals regarding sentences of imprisonment has been toward a system of real-time sentencing consistent with the principle of proportionality. Indeterminate sentences offend this concept even more than current mechanisms for discretionary release on parole. To the public, an indeterminate sentence may mean life in custody. To the offender, it may mean the possibility of release after three years.

2.2 Offence-related Criteria

The Commission has already decided that among the principles of sentencing, priority would be assigned to proportionality. Proportionality implies that the focus of sentencing should be the blameworthiness of the conduct rather than the character of the offender, or worse, predictions about his future behaviour. Consequently, no special sanction should be triggered only or primarily by reference to the offender's character and propensities. As stated in *Sentencing* (Canada, 1984; 28):

> Criminal law generally punishes people for what they actually did in the past. The dangerous offender provisions, on the other hand, incarcerate people for what they might do in the future. Many ... critics object to the requirement for psychiatric evidence, stating that the human sciences are simply unable to predict future behaviour at the level of the individual with any degree of confidence. In fact, the evidence indicates a large degree of over-prediction of future violence.

2.3 Sentencing Practice

The current dangerous offender legislation has been criticized extensively (for a review of these criticisms and other relevant issues, see Webster, Dickens

and Addario, 1985). For example, it is unclear why offenders designated as "dangerous" have been singled out. In terms of the extremity of violence displayed in the commission of an offence, there is actually little to set this group apart from many other inmates in the general penitentiary population.

The authors note: "Factors other than the labelled offenders' behaviour appear to be used in the process of designating one offender as more dangerous than another" (p. 143). Also, it appears that the dangerous offender provisions have not been consistently applied across the country. Of the 32 offenders thus designated as of 1982, 18 were sentenced in one province (Ontario). To quote Webster et al., once again: "This suggests that factors such as community sentiment or local sensitivity to a particular offence or offender, or the disposition of the particular Crown Attorney may determine if an application is brought" (p. 144).

2.4 Proposals

The maximum penalties proposed by this Commission were not set exclusively with reference to the sentence to be imposed in the worst possible case. In setting the proposed maximum penalty levels, Commissioners sought to construct policy for the vast majority of cases. It was nonetheless recognized that the most serious occurrences, albeit very few in number, might require a special procedure to allow an enhancement of the sentence. The exceptional sentence proposal was formulated as a determinate sentencing structure to accommodate that very limited number of cases (fewer than 1% of the most serious cases) where the judge feels that in the interests of security, a custodial term longer than the maximum penalty period is necessary. The exceptional sentence was also formulated to replace the current system of indeterminate sentencing with a determinate sentencing structure.

9.3 The Commission recommends that the dangerous offender provisions in the *Criminal Code* be repealed.

9.4 The Commission recommends that, according to explicit criteria, the court be given the power to impose an exceptional sentence exceeding the maximum sentence for specified offences by up to 50%, following the procedure specified in this report.

2.4.1 Meaning of an Exceptional Sentence

The qualifying offences for exceptional sentences will include only offences which, under the new proposals, carry a maximum of 12 or 9 years. The exceptional sentence differs from a normal sentence in two basic ways. First, remission credits do not apply to any part of an exceptional sentence. The offender serves what is referred to as "straight time". Straight time means that the length of the term of imprisonment prescribed by the sentencing judge is the time actually spent in custody: the offender receives no early release or

remission credits. Second, the court may impose a sentence exceeding the maximum penalty by fifty percent. For example, if the offence of conviction carries a maximum penalty of 12 years and if the circumstances of its commission satisfy the criteria for the imposition of an exceptional sentence, the judge may impose such an exceptional sentence of 12 years "straight time" plus an "enhancement" of up to an additional 6 years, to which no remission credits apply. It is important to realize that the sentencing judge does not have to exceed the maximum penalty of 9 or 12 years by more than one day in order to impose a longer term of custody on an offender. Since no remission credits apply to exceptional sentences, imposing the maximum penalty plus one day as an exceptional sentence implies in itself that the offender will be incarcerated for a longer period of time, since he or she cannot earn any remission credits.

2.4.2 Criteria

The qualifying offences must meet the following criteria before being eligible for an enhancement:

The offence of conviction is a "serious personal injury offence" carrying a maximum penalty of 12 or 9 years of imprisonment

- and -

is of such a brutal nature as to compel the conclusion that the offender constitutes a threat to the life or safety or physical well-being of other persons

- or -

forms a pattern of serious repetitive behaviour by the offender showing a failure to restrain his behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others.

A "serious personal injury offence" is an offence involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person.

2.4.3 Procedure

If the threshold criteria are met, the prosecutor may make an application, after conviction, seeking an exceptional sentence.

Such an application may only be made where the prosecutor has served notice to the accused or his or her counsel, before plea, of the intention to make application for an exceptional sentence in the event of conviction. This notice would outline the basis on which this application would be made.

In addition to other requirements, the prosecutor shall obtain and file the consent, in writing, of the Attorney General of the province in which the offender was convicted.

Where the court is considering imposing an exceptional sentence, the court shall require a pre-sentence report.

The Crown shall have the burden of proving beyond a reasonable doubt that all the conditions precedent to the imposition of an exceptional sentence have been met.

Where the Crown proves beyond a reasonable doubt that all the criteria have been met, the judge *may* impose an exceptional sentence.

Where an exceptional sentence is imposed, the judge must provide reasons setting out how the criteria were met and why the exceptional sentence was justified in this case.

In setting the enhanced term the judge shall specify the length of time to be served in custody after the expiry of the "straight" portion of the sentence (e.g., 12 year maximum plus 4 year enhancement = 16 years in custody.)

There shall be no remission on any part of an exceptional sentence (i.e. neither on the "straight time" portion nor the "enhanced" portion).

After serving the mandatory straight time (i.e. the maximum penalty for the offence of conviction) the inmate is entitled to a review of the enhanced portion of the sentence.

A review will take place before a court of the same level as the sentencing court that imposed the enhancement.

Upon review, the burden will rest on the offender to satisfy the court that he or she is fit for release.

At the review hearing, the judge shall set the time and conditions of release.

Where release is refused, the offender shall be entitled to a further review in two years, and so on every two years where custody is maintained.

There shall be a right of appeal by the accused where an exceptional sentence is imposed and by the Crown where the court refuses to do so. Both the accused and Crown may appeal the length of the enhanced term imposed.

2.5 Discussion

In rejecting the indeterminate sentence and in emphasizing the need for certainty, the Commission sought to construct an exceptional sentence provision that was both more determinate and predictable.

The aim of the exceptional sentence is to provide a special procedure to deal with the occurrence of a crime in circumstances that society finds most

abhorrent. Restraint calls for selectivity in choosing those offences that are eligible for enhanced sentences, as well as setting strict criteria and procedural requirements which must be met before an exceptional sentence can be imposed.

The criteria were constructed with reference to criteria set out in the Criminal Law Reform Act, 1984 (Bill C-19). Although the context in which these criteria are proposed is different, the Commission was satisfied that they are broad enough to cover the most heinous crimes but narrow enough to ensure restraint in the use of the provision. The criteria are primarily offence-oriented and although some offender characteristics (such as culpability) are relevant factors in judging the gravity of the offence, the focus is no longer on future behaviour.

The requirements for the written consent of the Attorney General and the notice to the accused that the prosecution is making application for an exceptional sentence should have the effect of further limiting the use of these provisions as well as ensuring that the decision to proceed is given the fullest consideration.

The issue of whether to impose an exceptional sentence should be dealt with by the sentencing judge at the normal sentencing hearing. If all the procedural requirements are met, the judge may impose an exceptional sentence – that is he or she may impose a sentence that exceeds the maximum penalty (of 12 or nine years) by a maximum of 50%.

To illustrate how the exceptional sentence is pronounced by the judge, take for example a heinous case of attempted murder. Attempted murder is a "qualifying" offence; it carries a proposed maximum penalty of 12 years. If the criteria and other procedural requirements are met and the judge feels an exceptional sentence is the only appropriate one, a flat sentence of 12 years may be imposed with an enhancement of up to six years. Under normal circumstances, the longest time anyone would serve in custody for attempted murder pursuant to our proposals would be the maximum of 12 years minus one-quarter if remission is earned – totalling nine years. Since remission cannot be earned on any part of the enhanced sentence, the enhancement allows the judge in rare circumstances to impose a custodial term twice as long as allowed for under the regular sentencing procedure (12 + 6 = 18 years). Given the magnitude of the potential enhancement, the Crown must prove the necessity for an exceptional sentence beyond a reasonable doubt (as is currently the case in dangerous offender proceedings). The criteria will not easily be proved at this threshold, but nor should they be, given the magnitude of the increment achieved. The judge is also required to provide reasons for the imposition of the exceptional sentence.

Following the same example, suppose the person convicted of attempted murder received a sentence of 12 years flat and three years enhancement, for a total sentence of 15 years imprisonment. The warrant of committal would expire at the end of 15 years. However, in recognition of the extremely long

period that must be served in custody, the inmate will be entitled to a review of the enhanced portion of the sentence at the normal maximum penalty date (12 years).

The review will be conducted by a court at the same level as the sentencing court. The judge reviews the enhanced portion of the sentence only (the three year custodial term not yet served) and considers the necessity for continued custody during the period of enhancement (the warrant expiry date remains the same, but early release on conditions or day release may be ordered). If the inmate satisfies the court that he or she is fit for release on conditions, the judge will set those conditions according to specified criteria (see Chapter 10, section 2.3). Where release on conditions is denied, the inmate shall be entitled to a review in two years – after serving 14 years of the 15 year sentence.

2.6 Conclusion

Although these recommendations include a special procedure to allow the court to extend the term of custody beyond the 12 year maximum ceiling, two important factors must be borne in mind.

First, by its very nature any exceptional procedure will add a degree of uncertainty to the sentencing process since it is by definition a way of going outside normal sentencing procedure. The preamble to the Commission's mandate states that "...certainty [is a] desirable goal of sentencing law and practices". In paragraph (c)(i) of its mandate, the Commission is directed "to investigate and develop separate sentencing guidelines for different categories of offences and offenders". The recommendations in this area have attempted to balance the need for certainty and equity with the requirement for an exceptional sentence for the most heinous offences.

Second, the term "exceptional" must be taken literally. This procedure for enhancement should be reserved for only the most heinous crimes which demand a longer period of incapacitation for security reasons. In order to ensure that only exceptional cases will be subject to an enhanced custodial sentence, the number of qualifying offences is limited to those contained in the two most serious levels of maxima.

Finally, in setting the criteria for the imposition of an exceptional sentence, attention is focused on the offence of conviction, not primarily on the anticipated future behaviour of the offender.

3. Sentences for Multiple Offences

3.1 Definitions

The Commission has defined the term "multiple offences" to encompass two situations. The first, it has called the "single transaction" case which

consists of several charges arising out of a single criminal transaction, e.g., an offender who breaks into a residence, assaults the occupant and damages the premises. The second type of multiple offence involves "a string of offences" whereby several offences arising out of separate criminal transactions are disposed of before the same court at the same time. For example, the court may decide to impose consecutive sentences where the offender is being sentenced at one time for breaking and entering a dwelling house, a robbery and an assault, all of which were committed on different days.

As will be discussed in greater detail below, there are two legal mechanisms currently used by the courts to sentence offenders convicted of multiple offences: concurrent sentences and consecutive sentences. Concurrent sentences are separate sentences imposed for two or more offences which are served simultaneously. Thus, where imposed at the same time, the total time served by the offender for all the offences is not more than the longest individual sentence imposed. Consecutive sentences are sentences imposed for separate offences which run in succession. Thus, the combined length of the sentences is the sum of the individual sentences added together.

3.2 Issues Respecting Concurrent/Consecutive Sentences

There are a number of problems which arise in the current use of consecutive and concurrent sentences. They underline the necessity of determining whether the continued use of these sentences is consistent with the sentencing goals of equity, clarity, uniformity and accountability. One problem which has been extensively reviewed by Richard Ericson, concerns the police practice of multiple charging for the purpose of giving greater leverage to Crown counsel in plea negotiations.[11] Although there does not appear to be a conclusive link between the availability of consecutive and concurrent sentences and police over-charging, it is interesting to note that most long-term offenders were subject to aggregate sentences.

Second, the artificial breakdown of a criminal transaction for the purpose of generating numerous charges undermines the principle of proportionality. The absence of national standards respecting police charging practices and the exercise of prosecutorial discretion militates against controls on inappropriate multiple charging. It should be clearly understood that in making this statement the Commission is not implying that all multiple charges are products of unconscionable charging practices.

A third problem concerns the lack of public knowledge respecting concurrent and consecutive sentences. A national survey conducted for the Commission confirms that a substantial portion of the public does not understand the difference between these two sentences (Research #2). This is hardly surprising given both the complexity of this area of law and some of the sentencing dispositions which result from its application. It would seem that clarity in sentencing would be considerably enhanced by giving a total sentence of a particular length, e.g., 12 years for multiple offences rather than by giving

three concurrent sentences of 12 years. Also, the use of consecutive and concurrent sentences, particularly in combination with each other, adds complexity to criminal record-keeping and to the determination of conditional release dates. The interpretation of directions on warrants of committal respecting consecutive and concurrent sentences has created difficulties for sentence administrators. In fact, in some instances, parties have resorted to litigation to resolve the complexities of sentence computation.[12]

Two additional problems relating to consecutive and concurrent sentences for multiple offences are variation in the rules respecting when a consecutive, as opposed to a concurrent sentence, is to be imposed and distortions in the rules relating to concurrent and consecutive sentences resulting from the application of the totality principle. Both of these issues will be examined in the following discussion on the current legal provisions and practice governing multiple offence sentencing.

3.3 The Current Approach

The legal authority to impose consecutive sentences has been the subject of judicial analysis. The Supreme Court of Canada established in the case of *R. v. Paul*[13] that the power to impose a consecutive sentence must be found in some federal enactment, such as the *Criminal Code*. Subsection 645(4) of the *Criminal Code* outlines three instances in which consecutive sentences may be imposed. The first two subsections do not deal with sentencing for multiple offences *per se* and thus will be dealt with at the end of this part. The focus of discussion will be on subsection 645(4)(c) and particularly on paragraph 645(4)(c)(ii) which deals expressly with multiple offence sentencing.

Paragraph 645(4)(c) provides as follows:

(4) Where an accused

(c) is convicted of more offences than one before the same court at the same sitting, and

(i) more than one fine is imposed with a direction in respect of each of them that, in default of payment thereof, the accused shall be imprisoned for a term certain,

(ii) terms of imprisonment for the respective offences are imposed, or

(iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence with a direction that, in default of payment, the accused shall be imprisoned for a term certain,

the court that convicts the accused may direct that the terms of imprisonment shall be served one after the other.

An examination of subsection 645(4)(c) shows that only paragraph 645(4)(c)(ii) deals with the imposition of multiple terms of imprisonment

which are not tied to fine default. The other two paragraphs contemplate prison terms imposed for fine default which are activated subsequent to the initial sentencing hearing. These paragraphs will be dealt with later.

The primary focus of the Commission's recommendations respecting sentencing for multiple offences thus concerns terms of imprisonment imposed for more than one offence pursuant to paragraph 645(4)(c)(ii) of the *Criminal Code* whether those offences constitute a "single transaction" or "a string of offences".

3.3.1 Concurrent Sentences

Concurrent sentences imposed for multiple offences serve two principal functions. First, they permit the court to give proportionate sentences for related offences without disturbing the overall length of the total sentence imposed. Thus, they counter any need to reduce sentencing dispositions for individual offences in order to achieve an overall just result. Second, concurrent sentences also serve a denunciatory function since their use denounces criminal conduct without increasing the overall sentence.

Generally, concurrent sentences are imposed for multiple offences which arise out of one continuous criminal act or single transaction (Nadin-Davis, 1982; 396). Three specific examples respecting the use of concurrent sentences are given below (Nadin-Davis, 1982; 402-406):

a) Where an accused is convicted both of conspiracy to commit an offence and the substantive offence, concurrent sentences should be given.

b) Where goods from one theft are found in the accused's possession at different times, only one transaction is really involved and concurrent sentences should be imposed.

c) While a sentence consecutive to a life term cannot be imposed because it is an absurdity, there is no prohibition against imposing several concurrent life sentences or other sentences concurrent to life.

3.3.2 Consecutive Sentences

The use of consecutive sentences has been justified on the basis of a number of sentencing principles. One such principle is deterrence; that is, consecutive sentences should be used to discourage criminal activity in certain circumstances, e.g., for an offender who commits an offence while on bail. Consecutive sentences have also been justified on the basis of their denunciatory effect and their contribution to the overall protection of the public.

As a general rule, consecutive sentences are imposed for multiple offences which arise out of separate criminal transactions (Nadin-Davis, 1982; 396). Using the Commission's definition of "multiple offences", they thus would be imposed for "string of offence" situations. A number of common examples can be found regarding the use of consecutive sentences (Nadin-Davis, 1982; 401-405):

a) Offences committed during or to facilitate flight from the commission of an earlier offence require consecutive sentences (the policy of the law here is to discourage further offences while an offender is in the process of flight, particularly such acts as shooting or attacking police officers).

b) Section 83 of the *Criminal Code* imposes a mandatory consecutive term of one to 14 years for a first offence and 3 to 14 years for subsequent offences, for using a firearm while committing, attempting to commit or fleeing from the commission or attempted commission of an indictable offence (the section illustrates a policy of imposing double liability on persons for one criminal act, presumably to discourage the use of firearms in the commission of other offences).

c) Section 137(1) of the *Code* provides that sentences for escape from custody shall be served concurrently with time being served or, if the court so orders, consecutively. Consecutive sentences are usually imposed (the policy of the law being specific and general deterrence respecting the commission of these offences).

d) Where an offence is committed while the accused is on bail in respect of another unrelated offence, despite the order of convictions, consecutive sentences should be imposed (the policy of the law is to discourage the commission of offences pending trial).

3.3.3 The Totality Principle

The principle of totality may be described as follows: whenever an offender is convicted and sentenced for more than one offence, at either the same or subsequent sittings, the sentences imposed must not be disproportionate, in their cumulative effect, to the overall culpability of the offender (Nadin-Davis, 1982; 399). This description of the totality principle focuses on proportionality between the offences and the total sentence. Another rationale for the totality principle relates to the principle of rehabilitation whereby the total sentence should not be crushing, given the offender's record and prospects for reform (Thomas, 1979; 57).

The application of the totality principle is not limited to sentences imposed at the same time, but applies to all situations in which an offender may be subject to more than one sentence (Ruby, 1980; 34). Since the totality principle is a matter of policy, there are no definitive rules to guide the courts in its application. Each case will be decided on its own particular facts to determine whether the totality of the sentences reflects punishment which is *excessive* given the offender and the circumstances of the offence.[14]

3.3.4 Two Additional Problems: Disparate Tests and Application of the Totality Principle

The evolution of different tests by different Courts of Appeal for the imposition of concurrent and consecutive sentences is evident from an

examination of appellate jurisprudence on this issue. To determine whether sentences for multiple offences should be consecutive or concurrent, the Nova Scotia Court of Appeal has used the test of a "continuous criminal act".[15] The Court has decided that it is a question of fact whether the criminal acts show a concurrency of intent, time and place (in which case concurrent sentences are to be imposed). The Ontario Court of Appeal has devised a different test for determining whether to impose consecutive or concurrent sentences. It has used a "break in the transaction" test. For example, the Court imposed a consecutive sentence for two offences of rape against the same victim where there was a lapse of a few hours between the offences.[16] The use of different tests to determine the same question potentially results in different conclusions in comparable cases and undermines the goals of equity and uniformity of approach in sentencing. The current situation has been summarized as follows:

> It often seems that the appeal Courts regard the rules of consecutive and concurrent sentencing as containing a great deal of discretion for the sentencing judge, and take the view that *it does not really matter how sentences are calculated, so long as the final result is just and appropriate* (Nadin-Davis, 1982; 398).

The Newfoundland Court of Appeal acknowledged this ambiguity in the law in the following terms:

> I do not subscribe to the submission of counsel for the appellant that it is important in this appeal to enunciate a principle which would clearly state when sentences should run consecutively or concurrently. Indeed, I doubt whether it is possible to lay down any hard and fast rule.[17]

Nadin-Davis notes that "modification of sentence to accord with the totality principle is a commonplace occurrence in both trial and appellate Courts" (1982; 399). There are basically two ways in which the totality principle is applied to modify the overall sentence length, neither of which promote clarity and consistency in sentencing. The first approach is to impose consecutive sentences of reduced lengths to avoid a disproportionate total sentence.[18] This approach illustrates an apparent tension between the totality principle and the sentencing principle of proportionality. While it is acknowledged that the principle of totality modifies proportionality, the reduction of sentence lengths for individual sentences may lead to distortion in the offender's criminal record for subsequent sentencing purposes.

There is a second way in which the principle of totality operates to change (some would say distort) the usual application of the rules governing the imposition of consecutive and concurrent sentences. As illustrated in one case involving a series of unrelated weapons and substantive offences, the Nova Scotia Court of Appeal imposed consecutive sentences for each of the weapons offences and imposed concurrent sentences for each of the other substantive offences even though the latter were unrelated and thus would normally attract consecutive sentences.[19] Another court, in the same fact situation, applied the totality principle in a completely different way. The court held that the weapons offences must be served consecutively to their underlying offences but could be served concurrently with both each other and with the other offences.[20]

3.4 A Proposed Solution

The Commission considered a number of proposals in formulating a solution to some of the problems noted previously. Some briefs submitted to the Commission suggested that consecutive sentences should be subject to an upper legislative limit (The Law Reform Commission of Canada and the John Howard Society of Alberta). Another brief recommended the formulation of principles to govern the imposition of consecutive and concurrent sentences (The Canadian Crime Victims Advocates). The Commission studied variations on these proposals in some detail and ultimately rejected the retention of concurrent and consecutive sentences for multiple offence sentencing.

The Commission has adopted a concept which is new to the North American criminal context but has been used for a number of years in Sweden, the Netherlands, West Germany and Austria. The concept is the global sentence, or what the Commission proposes should be called the "total" sentence. As noted in the earlier discussion respecting complexities which arise in the application of the totality principle, it seems that the courts are more concerned with the final sentence for multiple offences than with the specific means of arriving at that result. The Commission's research confirms this finding and has prompted it to conclude that both the means to achieve a sentence for multiple offences and the final result should promote clarity and consistency in multiple offence sentencing. The Commission was not hopeful that this could be achieved by the use of principles or a numerical capping mechanism in the current context of consecutive and concurrent sentences and is therefore recommending an entirely new mechanism.

9.5 The Commission recommends that the use of consecutive and concurrent sentences for multiple offence sentencing be replaced by the use of the total sentence.

The total sentence would be available for offences for which convictions were registered on the same or different days so long as they were the subject of the same sentencing hearing.

3.4.1 The Total Sentence

The Commission proposes that the total sentence should be determined and imposed in accordance with the following procedure:

The sentencing judge would apply the Commission's statement of the purpose and principles of sentencing to determine and assign an appropriate sentence for each offence as if he or she were considering that offence in isolation from all other offences. The requirement to assign a sentence to each offence serves two purposes: there is a clear indication on the criminal record of the sentence for each offence; and an offender who contests the sentence indicated for a particular offence is able to appeal it.

The next step would be for the sentencing court to apply the principle of totality to arrive at and impose a total sentence. A distinction would thus be made between the ascription of a sentence for each offence and the imposition of the total sentence. The main effect of the application of the totality principle would be to reduce, where necessary, the total length of the sentence imposed to ensure that the total sentence was proportionate to the offender's overall culpability.

The maximum period of incarceration which could be imposed as a total sentence would be circumscribed by the following formula. The available maximum penalty for the total sentence would be the lesser of: the sum of the maxima provided for each offence or the maximum provided for the most serious offence enhanced by one-third. For example, if offence A carried a maximum penalty of 12 years and offence B was punishable by a maximum of 1 year, the potential length of the total sentence for offences A and B would be the lesser of (12 + 1) or (12 + 4). In imposing a total sentence for offences A and B, the court could thus sentence the offender to a maximum term of 13 years. This formula has been adopted for two reasons: to ensure that the offender is not subject to a sentence which exceeds the combined maxima for the individual offences; and to prevent the disproportionate inflation of the total range available by combining a minor offence with a serious one. The Commission is hopeful that use of the total sentence will reduce tendencies to lay multiple charges in inappropriate circumstances.

Offenders sentenced to a total sentence would be eligible for remission-based release.

A total sentence for multiple offences could not be imposed in addition to an enhanced sentence for one offence. The total sentence and the enhanced sentence would be alternative dispositions.

If the above-noted procedure were adopted, the form of warrants of committal would have to be amended to reflect the use of total sentences.

3.5 The Retention of Concurrent and Consecutive Sentences

By proposing the total sentence, the Commission has dealt with multiple offence sentences currently embraced by paragraph 645(4)(c)(ii) of the *Criminal Code*. The Commission proposes the retention of the consecutive and concurrent sentences for a number of limited situations. They are limited either because they are not frequently imposed or because their current use is expected to decline if the Commission's recommended fine default scheme is adopted (discussed in Chapter 12). That scheme would be more restrictive respecting the power to impose a term of imprisonment for fine default and would abolish the "quasi-automatic" imposition of imprisonment for fine default at the time that the fine is ordered.

3.5.1 Concurrent and Consecutive Terms For Default

Subsection 645(4)(b) deals with a sentence where both a fine and a term of imprisonment are imposed for one offence. It thus does not deal with multiple offences *per se*. The subsection permits a term imposed for fine default to be served consecutively to the original custodial term. Paragraphs 645(4)(c)(i) and (iii) deal with multiple offence situations and empower the court to make terms imposed for fine default either consecutive to one another or to other custodial dispositions. The Commission suggests that these provisions should be removed from subsection 645(4) and should be subject to a general power to permit a term of imprisonment imposed for fine default to be served consecutively to any other term of imprisonment that is being served or is to be served by the offender. A provision of this nature was included in subsection 668.17(10) of the proposed Criminal Law Reform Act, 1984 (Bill C-19):[21]

> 668.17(10) Any term of imprisonment imposed under this section shall be served consecutively to any other term of imprisonment that is being or is to be served by the offender unless the court orders otherwise.

Therefore,

9.6 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.17(10) of the Criminal Law Reform Act, 1984 (Bill C-19).

The Commission is also satisfied that this provision in the context of total sentences would address the current legal complexities which arise respecting the imposition of a consecutive sentence for an offence committed while an offender is subject to a term of probation as part of a suspended sentence. Subsection 664(4)(d) of the *Criminal Code* governs this situation and permits the court which made the probation order to revoke the order and impose "any sentence that could have been imposed if the passing of sentence had not been suspended". The issue is whether the sentence imposed for the breach of probation can be made to run consecutively to the sentence which is substituted for the suspended sentence. The controversy revolves around the degree to which subsection 664(4)(d) modifies the application of the rules in subsections 645(4)(a) and 645(4)(c).[22]

3.5.2 Concurrent/Consecutive Terms Imposed on an Offender Who is Subject to Another Sentence

Paragraph 645(4)(a) applies to an offender who commits an offence while under sentence for a previous offence. The court may order that the sentence for the second offence be served consecutively to that given for the first offence.

The Commission is satisfied that a general provision for the imposition of consecutive or concurrent sentences similar to that proposed in section

668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19) would embrace those situations currently covered by subsection 645(a) of the *Criminal Code*. The proposed section 668.24(a) provided as follows:

> 668.24 Subject to subsection 668.17(10) or any other provision of this or any other Act of Parliament, where a court imposes a term of imprisonment on an offender,
>
> (a) in respect of an offender who is serving a term of imprisonment imposed for another offence, or...
>
> the court may direct that the terms of imprisonment shall be served concurrently or consecutively.

9.7 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19).

The specific wording in subsection 668.24(a) could be modified to empower the court to make the total sentence consecutive to an earlier imposed total sentence.

The Commission anticipates that a general provision to impose a consecutive sentence in conjunction with a power to make prison terms imposed for default consecutive to other prison terms, would cover all situations currently addressed in subsection 645(4). Thus, the court would retain the power to impose consecutive sentences in the following situations and could order:

a) That a term of imprisonment imposed for an offence for which the offender was convicted while under sentence for another offence be served consecutively to that first sentence.

b) That terms of imprisonment imposed for wilful default of community sanctions be served consecutively to any other term of imprisonment that is being or is to be served by the offender, unless otherwise ordered by the court.

The total sentence specifically would be used for sentencing multiple offences currently covered by subsection 645(4)(c)(ii).

4. List of Recommendations

9.1 For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:

12 years
9 years
6 years
3 years
1 year
6 months

9.2 The Commission recommends that hybrid offences be abolished and reclassified as offences carrying a single maximum penalty of 6 months, 1 year, 3 years, 6 years, 9 years or 12 years imprisonment.

9.3 The Commission recommends that the dangerous offender provisions in the *Criminal Code* be repealed.

9.4 The Commission recommends that, according to explicit criteria, the court be given the power to impose an exceptional sentence exceeding the maximum sentence for specified offences by up to 50%, following the procedure specified in this report.

9.5 The Commission recommends that the use of consecutive and concurrent sentences for multiple offence sentencing be replaced by the use of the total sentence.

9.6 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.17(10) of the Criminal Law Reform Act, 1984 (Bill C-19).

9.7 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19).

Endnotes

1. This relationship between maximum penalties and actual sentences is not new. Stephen observed in 1883 that "the mere lowering of maximum punishments would, no doubt, prevent the infliction of exceptionally severe punishments in exceptionally bad offences; but in practice, it would make very little difference, for the maximum punishment authorised by law for any given offence is in practice very rarely inflicted" (cited by Thomas, 1979, p. 62).
2. The Canadian Sentencing Commission data on current sentencing practice reflect the two most recent attempts to obtain systematic national sentencing statistics. One was drawn from the FPS-CPIC data base and was made available by the Canadian Centre for Justice Statistics. The second was a study of sentenced admissions to provincial and federal institutions conducted for the Canadian Sentencing Commission and the federal Department of Justice (Hann and Kopelman, 1986). The sentencing trends emerging from both were similar.
3. The median is usually close to the mean (or average) with which most people are more familiar. We have chosen to present the median because the mean is easily affected by a few extreme scores and can accordingly present a distorted view of the distribution of sentences. This is not the case with the median.
4. The reader should bear in mind that those percentiles refer only to those offenders who receive sentences of custody. The 90th percentile therefore includes 90% of cases resulting in custody, which are naturally the more serious ones. For many of these offences, a substantial proportion of offenders receive non-custodial sentences. The 90th percentiles presented in Table 9.1 therefore include 90% of the most serious cases, and a much higher percentage of all offenders convicted of any particular offence.
5. In reality, of course, judges treat the two offences very differently. The median sentence for manslaughter during this period is five years (98% of cases were imprisoned); the median sentence for break and enter is six months (65% were imprisoned).
6. Similar results emerge from research which asked members of the public to rank-order a series of offences on a scale of seriousness. One study (Rossi, Waite, Bose and Berk, 1974) found that break and enter received a rank approximately midway between the most and the least serious offences.
7. First and second degree murder and high treason are exceptions. For these offences, the maximum penalty of life imprisonment is mandatory and the *Criminal Code* sets out a minimum period of time that the offender must serve in custody before release. For first degree murder, that minimum period is 25 years. These offences were excluded from the general review of maximum penalties. Discussion of these offences will be postponed until Chapter 10.
8. The average number of different offences was five. The average number of sentences per offender was six, and the average number of counts per inmate was 12.
9. This outcome of consensus in rankings derived from criminal justice professionals and members of the public is consistent with a great deal of previous work upon the topic of seriousness ranking of offences. (See for example, Levi and Jones (1985); McLeary, O'Neil, Epperlein, Jones and Gray (1981).
10. Over a century ago (1843) the Criminal Law Commissioners in England recognized as much when they noted "There is no real or ascertainable connexion (*sic*) or relation existing between crimes and punishments which can afford any correct test for fixing the nature of the extent of the latter, either as regards particular offences or their relative magnitudes" (cited by Thomas, 1978, p. 24).
11. See Ericson, (1981, 1982) and Ericson & Baranek (1982).
12. See *Re Abbott* (1970), 13 C.R.N.S. 70 (Ont. S.C.); *MacIntyre v. The Queen* (1982), 2 F.C. 310 (F.C.A. A.).
13. *R. v. Paul* (1982), 67 C.C.C. (2d) 97 (S.C.C.).

14. See, for example, *R v. Fait* (1982), 68 C.C.C. (2d) 367 (Alta. C.A.).

15. *R. v. Brush* (1975), 13 N.S.R. (2d) 669 (C.A.), at pp. 670-671.

16. *R. v. White, Dubeau and McCullough* (1974), 27 C.R.N.S. 66 (Ont. C.A.).

17. *Gollop v. R.* (1980), 22 C.R. (3d) 292 (Nfld. C.A.) at p. 297, *per* Chief Justice Mifflin. See also *R. v. Cousins* (1981), 22 C.R. (3d) 298 (Nfld. C.A.).

18. *R. v. Newman* (1977), 22 N.S.R. (2d) 488 (N.S.C.A.).

19. *R. v. MacLean* (1979), 49 C.C.C. (2d) 552 (N.S.C.A.).

20. *R. v. Jensen et al.*, [1983] 1 W.W.R. 717 (Alta. C.A.)

21. The Bill received first reading on February 7, 1984 and subsequently died on the order paper.

22. Subsection 664(4)(d) provides that where an offender commits an offence while on probation as part of a suspended sentence, the court that made the order may revoke it and impose any sentence that could have been imposed if the passing of sentence had not been suspended. The courts have taken different positions on whether the relevant time period in subsection 664(4)(d) is the date of conviction for the offence for which sentence was suspended or the date of imposition of the substitute sentence. This, in turn, has determined whether the courts have considered the offender to have been "under sentence" and thus subject to the imposition of consecutive sentences pursuant to subsection 645(4)(a). The jurisprudence has also taken different positions respecting whether the above fact situation constitutes proceedings "before the same court at the same sittings" as required in subsection 645(4)(c). The Supreme Court of Canada in the case of *Paul v. The Queen* (1982), 67 C.C.C. (2d) 97, settled some of the rules respecting the power to impose consecutive sentences pursuant to subsections 645(4)(a) and (c). The court held (at p. 129):

    a) a judge may order that a sentence be served consecutively to another sentence he has previously or is at the same time imposing (s.645(4)(c)).

    b) the judge cannot order that a sentence be made consecutive to that imposed by another judge in another case unless that sentence had already been imposed by the other judge at the time of the conviction in the case in which he is sentencing (645(4)(a)).

    However, the *Paul* case did not deal with the above-noted fact situation respecting suspended sentences. Mr. Justice Lamer cited the appellant's argument that application of the rules in subsection 645(4) were modified by subsection 664(4)(d). However his Lordship offered no *dicta* on the issue.

Chapter 10

The Meaning of a Sentence of Imprisonment

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The Meaning of a Sentence of Imprisonment

> Apart from death, imprisonment is the most drastic sentence imposed by law. It is the most costly, whether measured from the economic, social or psychological point of view. (Law Reform Commission of Canada, 1976: Part II, p. 10)

1. Imprisonment in Canada

On any given day there are approximately 30,000 people incarcerated in this country (Correctional Service of Canada, 1986). With an imprisonment rate of 108 per 100,000 inhabitants, Canada has one of the highest rates among Western nations (Correctional Service of Canada, 1986).[1] Besides the incalculable human costs to a person removed from society, there are easily calculable economic costs. Incarceration costs between 10 and 15 times as much as do alternative sanctions (Nielsen Task Force Report on the Justice System, 1986). The average annual cost of keeping a prisoner in a maximum security penitentiary is $50,000. In medium or minimum security institutions the cost is $35,000. The cost per bed of building a new institution is now $200,000. One does not have to look far, then, for reasons to support the exercise of restraint in the use of incarceration. As the recent Nielsen Task Force Report on the Justice System (1986) noted: "Our over-reliance on incarceration is a luxury which is quickly becoming difficult to afford" (p. 288).

This chapter will address issues related to sentences of imprisonment. As well, it contains the recommendations of the Commission regarding this, the most invasive penalty imposed by the criminal justice system. Imprisonment is but one sanction however, and before evaluating the impact of the Commission's proposals, it is necessary to read the next chapters which deal with guidelines and community sanctions.

1.1 The Administration of Sentences of Imprisonment

At the present time, three different authorities make largely independent decisions regarding the length of time a person sentenced to a term of

imprisonment must spend in custody. When the judge pronounces the sentence, he or she sets the limit of time that the offender may be held in custody for the offence. Correctional authorities are responsible for calculating the remission credits that most prisoners may earn for good behaviour, which entitles them, where maximum credits are earned, to be released after serving two-thirds of the sentence pronounced by the judge. The parole board has the authority to release most prisoners on full parole after they have served one-third of their sentence.

An example will illustrate how the system works. At trial, a man convicted of armed robbery receives a term of six years. If he is granted full parole at earliest eligibility, he will be released from custody after two years. If he is successively denied full parole but earns all his remission credits, he may be out after four years. Whether the judge takes into consideration either of these possibilities in setting the length of the sentence is unclear. In determining whether to release the inmate after two years the parole board is rarely aware of the reasons given by the judge in setting the term of imprisonment at six years; the decision to release is made according to different criteria. If he was thought to be a poor risk and denied release by the board, correctional authorities may release him at four years if he has earned his credits through good behaviour. He will then likely spend the remaining two years in the community, provided he complies with the conditions of the mandatory supervision program.

What then, is the exact meaning of a six year sentence? Clearly it may have a different connotation for the judge who imposes the sentence, correctional authorities who administer the sentence and the parole authorities who decide whether to grant or withhold release. As well there are other parties to consider. Crime victims may understand a six year sentence to mean six years in prison. No wonder their dismay at seeing the convicted robber on the street after only two. The public, reading that he committed another offence after serving four years in custody must wonder why the prison administration released him on mandatory supervision in the first place. To the convicted offender it may mean six years in custody, if he or she fails to earn any remission or is denied remission-based release.

What happens after the judge pronounces the sentence of imprisonment can be as important as the initial determination of whether to impose a custodial term and if so, for how long. The system is complex. The purpose of the sentence has a different meaning for the judge, the parole board and the correctional authorities. The offender cannot predict with any accuracy how long he will be detained in custody. The public cannot help but be confused by a process which says it is doing one thing but is seen to be doing another.

The confusion surrounding early release was summarized by the Government of Canada in *The Criminal Law in Canadian Society* (1982; 34): "The manner in which such processes as parole, remission, temporary absence and mandatory supervision affect sentence is not well understood by the public, and is periodically subject to criticism in the media and by criminal justice professionals who claim either that these processes operate too leniently, or

that they should not be in use at all, because they needlessly expose the public to harm, usurp the court's sentencing authority and unduly lessen the effectiveness of the sentence."

This then is the first major objection to current laws and practices which affect the meaning of sentences of imprisonment: they introduce a great deal of ambiguity which in turn results in confusion and unpredictability in the sentencing process. All major participants and interested parties in the transaction of a sentence – the judge, the offender, the public, the victims, correctional authorities, and the Parole Board – may have different understandings of the meaning of the sentence of imprisonment imposed by the court.

1.2 Jurisdiction Over Sentences of Imprisonment

Federal and provincial governments share jurisdiction over offenders sentenced to terms of imprisonment for offences under all three federal statutes considered by this Commission (*Criminal Code*, *Narcotic Control Act*, *Food and Drugs Act*, Parts III, IV). Sentences of imprisonment of less than two years are served in provincial prisons and reformatories while terms of two years or more are served in federal penitentiaries.

Statistics cited by the Correctional Law Review (1986) reveal that there are a great number of people in Canada currently serving sentences of imprisonment in both the federal and provincial systems:

> There are approximately 12,000 inmates in 60 federal institutions across the country, run by 10,000 staff. There are a further 7,000 federal offenders on some form of conditional release. There are approximately 20,000 inmates in provincial institutions across the country, with approximately 20% in custody on remand (p. 4).

While the Commission recognizes that laws and practices regarding the administration of a sentence of imprisonment differ in the provincial and federal systems, these differences are not addressed in any detail in this report. They are beyond the scope of the Commission's mandate, and within the purview of the mandate of the on-going Correctional Law Review (Ministry of the Solicitor General).[2] There is a pressing need, however, to coordinate the ways in which the sentence imposed by the judge is carried out at both the provincial and federal levels of government. In constructing these proposals, the Commission sought to construct a framework for the administration of carceral sentences to apply to *all* sentences of imprisonment. Hence, although it is beyond the scope of this report to detail the changes required to rationalize the laws and practices regarding sentences of imprisonment at both levels of government, the Commission is of the view that such a rationalization is a necessary first step towards an integrated and uniform approach to sentencing in Canada.

There can be no justification for differences in the meaning of a sentence of imprisonment at the federal and provincial levels. Equity and justice can

only prevail if there is a uniformity of approach to the administration of a sentence in both systems.

1.3 Terms of Reference

In the terms of reference, the Commission is directed to examine various possible approaches to sentencing guidelines, and in so doing

> **(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:**
>
> > **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.**

Following a brief overview of the complexities of and concerns surrounding current laws and practices, our recommendations regarding the administration of a sentence of imprisonment will be presented in the following order:

i. Early Release
   a) Full-parole release
   b) Remission-based release
   c) Conditions upon release
   d) Withholding Remission Release
   e) Day Release
   f) Special Leave
   g) Clemency

ii. Open Custody

iii. Sentences for First and Second Degree Murder and High Treason

1.4 Summary of Proposals

The real meaning of a sentence of imprisonment lies in the human, social and economic costs incurred. It is those costs to the individual and society and the need for restraint that guided the Commission's decision-making with respect to early release, open custody, and sentences for murder and high treason. This chapter, however, will focus on the meaning of a sentence of imprisonment in structural terms: how the sentence imposed by the judge is carried out.

The Commission has interpreted the terms of reference as requiring a review of sentences of imprisonment only to the extent that the application of our proposed sentencing policy requires. There are many other aspects of early release, for example, that are beyond the scope of the Commission's mandate but it was felt that they are better dealt with in the context of the Correctional Law Review.

Although we have considered all issues relevant to the meaning of a sentence of imprisonment as it may be understood in the context of our proposed sentencing policy, there remain issues which could not be addressed exhaustively. Again, the focus of this Commission was on constructing a framework for decisions made about the administration of the sentence that reflects its recommended sentencing policy.

The principle of proportionality should guide the judge in the determination of a fit sentence; it should also guide the decisions regarding the administration of a sentence. This implies that the process of administering a sentence of imprisonment should be governed by law to a greater degree than is now the case. Another factor that guided the Commission's approach to the meaning of sentences of imprisonment was its desire to enhance the role of the court in determining how the sentence is to be carried out.

The recommendations regarding sentences of imprisonment may be summarized as follows:

- **that full parole release be abolished**
- **that remission-based release be retained at a new rate of one-quarter of the sentence**
- **that mandatory supervision be abolished and release on conditions be reserved for those offenders who require special conditions**
- **that release on remission may be withheld in certain exceptional cases according to well-defined criteria**
- **that a system of day release be retained**
- **that a system of special leave be retained**
- **that a system of executive clemency be retained**
- **that the judge assume a greater role in determining the meaning of custody**
- **that release ineligibility periods for murder and high treason be reduced**

At the present time in Canada, sentences of imprisonment are both unclear and unpredictable. The absence of clarity and predictability can only have deleterious effects upon the administration of justice and perceptions of sentencing by offenders, the public and criminal justice professionals. One of the aims of the Commission's proposals is to eliminate the confusion surrounding terms of imprisonment and to enhance equity, clarity and predictability in the process.

2. Early Release

2.1 Full Parole Release

Uniformity of approach and consistency in the application of the law requires that the different components of the criminal justice system share an

understanding of the meaning of a sentence of imprisonment. Similarly, equity, clarity and predictability require a consistency in purpose from the imposition of the sentence through its administration until warrant expiry. Discretionary release on full parole has attracted more criticism than any other aspect of sentencing (e.g., Mandel, 1975).

2.1.1 History

Some form of early release has been in existence in Canada since Confederation. In 1868 inmates were granted early release through earning remission credits for co-operative behaviour and for industrious work habits in prison (*Penitentiary Act*). In 1899, another form of early release was created to allow the Crown to exercise mercy in certain cases, usually on humanitarian grounds (*Ticket-of-Leave Act*).

It was not until 1956 that the Fauteux Commission (created to review the granting of tickets of leave) came to the conclusion that this system, based on clemency, had very little to do with reform or rehabilitation. It recommended that instead, a new system of early release on parole should be offered to all inmates as "...a logical step in the reformation and rehabilitation of a person". Following these recommendations, in 1959 the Government enacted the *Parole Act* to replace the *Ticket-of-Leave Act*, and created the National Parole Board.

The decision to grant full conditional release is currently made by the National Parole Board[3] for all federal and provincial prisoners except in three provinces where provincial parole boards exist (British Columbia, Ontario and Quebec). As described in the *National Parole Board Handbook* (1983), parole is the authority granted by the National Parole Board to an inmate to be at large during his term of imprisonment. The term "parole" embraces both full parole, which does not require that an inmate return to an institution unless it is suspended or revoked, and day parole which requires the inmate to return to an institution periodically or after a specified period of time (p. 19).[4] Most inmates are eligible for full parole after serving one-third of their sentence or seven years, whichever is the lesser (*Parole Regulations*, s.5). Where life imprisonment is imposed other than as a minimum punishment, an inmate is eligible for full parole release after serving seven years, minus any time in custody after arrest and prior to sentencing (*Parole Regulations*, paragraph s.6(a)). There are other special eligibility periods prescribed for indeterminate sentences, mandatory sentences of life imprisonment and for "violent conduct offences".[5]

2.1.2 Rehabilitation: A Problematic Foundation

The purpose underlying the newly-created system of discretionary parole release was based on a rehabilitation-oriented model of justice. It is within this framework that the release criteria to guide the parole board in the exercise of its discretion were formulated. According to section 10 of the *Parole Act*:

10.(1) The Board may

(a) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that:

i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment

ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and

iii) the release of the inmate on parole would not constitute an undue risk to society.

Although parole was based on a model of rehabilitation, this model has never been implemented in Canada. According to this model, prison serves as a kind of maximum-security hospital and parole provides the necessary period for convalescence. Since treatment and recovery periods are difficult to quantify in advance, a true rehabilitation model can only be realized in the context of a system of indeterminate sentencing. Canada never adopted a system of indeterminate sentencing and hence, in adopting parole, only adopted part of the rehabilitation model. In the U.S., however, indeterminate sentencing and discretionary parole release together formed the package required for a real attempt at a rehabilitative model. It is disenchantment with this rehabilitation model that has led a number of U.S. states, over the past 15 years, to abolish discretionary parole release as well as to create sentencing commissions to move toward a system of determinate sentencing. Some states that have abolished discretionary parole release have retained a parole board to release and supervise those inmates serving life sentences. In addition, parole boards have been retained to fulfill the discretionary release function for those inmates sentenced prior to the abolition of parole. Given the adoption of the Commission's recommendations, similar provisions must be made for Canada's Parole Board. So far 11 states have abolished discretionary parole release: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico and North Carolina. The problems created by adopting only one element of the rehabilitation model are illustrated in the above criteria for parole release. Under our current system of determinate sentencing, it is difficult to understand how one would determine whether an offender has derived "maximum benefit from imprisonment". We have seen in the historical chapter that one of the most frequently recurring themes in official reports on incarceration was that imprisonment had a debilitating rather than a rehabilitative effect on prisoners. Hence, some would argue it is hard to imagine any benefits accruing to someone who spends a number of years in a penitentiary. In addition, since it is impossible to predict accurately who will re-offend (or when, or why), the issues of risk to society and reform of the inmate are tenuous grounds upon which to release, suspend or revoke inmates on full parole.

2.1.3 Effects of Parole on the Meaning of the Sentence

a) Time Served in Custody:

Terms of imprisonment in this country are substantially affected by parole release. While the relative merits of parole remain controversial, some

characteristics and consequences of the system are clear enough. First, approximately one-third of eligible prisoners are granted release on full parole at some point in their sentences. The majority of all prisoners who are released on full parole were granted full parole upon their first application. Paroled prisoners serve an average of 40% of their sentence inside prison before obtaining release. Over three-quarters of those released on full parole serve less than half of their sentences in prison. (These statistics are all drawn from the 1981 Solicitor General's Study of Conditional Release). Tables (data from 1977 to 1981) provided by the Statistical Liaison Office of the National Parole Board corroborate the view that parole intervention in time actually served in prison is substantial. The following trends emerge:

- 95% of offenders convicted of offences against the person (excluding murder, attempted murder and manslaughter) who received sentences of over 10 years serve less than 10 years in prison;
- 70% of offenders convicted of attempted murder, second-degree murder and manslaughter who received sentences of over ten years served less than ten years in prison. This figure would actually be higher if it did not also encompass cases of second degree murder. Those convicted of second degree murder serve a mandatory period of at least 10 years before becoming eligible for parole. Hence, they automatically increase the percentage of offenders who serve ten years or more in prison.
- 98% of offenders convicted of drug offences and who received sentences of over 10 years served less than 10 years in prison.

These statistics make it clear that there is a substantial difference between the sentence a judge hands down and the length of time an offender actually serves in prison. Moreover, there is a great deal of variation in the parole release rates across different parts of the country. In 1978, for example, there was a 26% difference between the regions demonstrating the highest and lowest rates of parole (Solicitor General of Canada, 1986).[6] These variations – as well as the indeterminate nature of parole – may lead offenders and public alike to perceive parole as inequitable.

b) Sentence Equalization:

Another consequence of parole is that known as "sentence equalization": offenders serving longer sentences are more likely to get released on parole than are offenders sentenced to shorter terms. This leads to the result – paradoxical to some quarters such as the public – that the more serious offences (e.g., manslaughter and attempted murder) have higher parole release rates than less serious offences such as theft and fraud. This pattern is noted in a recent report (Hann and Harman, 1986) for the Ministry of the Solicitor General. These authors found that for the period of 1975/76 through 1981/82 parole release rates for manslaughter were between 51% and 64%. These percentages are approximately ten percentage points in excess of a less serious offence (robbery) and 20 to 30 percentage points above the release rates for break and enter (see figure 2.12, pp. 27-29).

To summarize, it is clear that offenders convicted of more serious offences (such as manslaughter) serve a significantly smaller proportion of their sentences in custody than offenders convicted of much less serious crimes (such as fraud). As well, an offender convicted of a serious armed robbery may serve the same time in custody as a purse-snatcher. One consequence of this, as Mandel (1975) has pointed out, is to scramble the rankings of seriousness derived from the existing maximum penalty structure. Proportionality is lost in the shuffle from the sentence handed down by the judge to the early release of the offender on parole.

Another manifestation of the equalization effect can be seen in statistics of time served by parolees versus mandatory supervision releases. Thus, while inmates eventually released on parole were assigned, on average, much longer sentences than inmates released on mandatory supervision, the two groups ended up spending approximately the same amount of time in prison. This was noted by the Solicitor General's Study of Conditional Release (1981), and is also apparent from more recent data provided by the National Parole Board (1984).

The following statistics for manslaughter and robbery cases for the period 1982-83 illustrate the point. If one compares average sentence lengths of parole releases to mandatory supervision releases the difference is striking: those convicted of manslaughter and later released on parole were sentenced on average to 84 months. Those convicted of manslaughter and released on mandatory supervision were sentenced, on average, to 57 months. However, in terms of time served in prison the two groups are quite similar: 38 months for parolees, 41 months for those released on mandatory supervision (see National Parole Board (1984), Table 3).

The 1981 study of Conditional Release concluded: "Both sentence mitigation and sentence equalization, then, clearly appear to be effects of parole, despite the very firm National Parole Board position that they are not objectives" (p. 39). This effect seems undesirable for two reasons. First, because it violates the principle of proportionality, offering in effect a greater discount in time served to those convicted of more serious offences. This militates against equity and justice. Second, because it illustrates how the current system requires parole authorities to encroach upon the sentencing authority of the courts. This Commission is of the opinion that sentence equalization is a negative consequence of parole, and, thus, concurs with the position taken by the Goldenberg Committee (1974) in its report on parole in Canada.

2.1.4 Consideration of Parole and Remission by Sentencing Judges[7]

The already murky waters of sentencing are clouded still further by judges considering, at time of sentencing, release on parole and remission. (Remission will be dealt with in greater detail in the next section). This consideration may take many forms. For example, it is possible that at least some judges are aware of the unstated yet clearly manifested policy to release higher

proportions of serious offenders (for reasons of sentence mitigation and equalization) on full parole. If they are, judges may be increasing the lengths of sentences for certain offenders in anticipation of early release on full parole. Whether they follow this particular strategy or not, what evidence is there that judges are affected by the possibility of parole and remission? In the Commission's survey of sentencing judges (Research #6), only 35% of respondents stated that they never took parole into account at sentencing. Hogarth (1971) reported that two-thirds of judges in his sample admitted they sometimes adjusted their sentences in light of the possibility of parole being granted. To quote the *Solicitor General's Study of Conditional Release*: "In more candid moments, some judges will admit in effect to tripling the sentence in order to provide for a fixed period of "denunciatory" imprisonment (prior to full parole eligibility), for a remission period, and for a "parole" or "rehabilitation" period" (p. 111).

The question of whether judges should consider parole and remission has generated an inconsistent response. The case law does not provide for a uniform approach to this question. There appears to be support in some provinces for the position that this is a valid consideration for judges in the determination of the sentence (see Campbell and Cole, 1986; Ruby 1980). Clearly, inconsistent application of a rule concerning the consideration of parole and remission can lead to unwarranted disparities in sentencing. Ruby (1980) sums it up: "Regardless of the merits of the discussion it would certainly be desirable that some measure of uniformity on this issue be attained, as a prisoner serving a lengthy term in Ontario will quite rightfully have a sense of grievance with regard to the consideration given there to his parole possibilities as compared to that of his fellows in other provinces" (p. 327).

2.1.5 Concerns: Lack of Equity, Clarity and Predictability

It is difficult to discuss concerns regarding equity, clarity and predictability as separate issues since by and large, if a process lacks one, it lacks all three. So, for example, problems of equity arise when full parole release is seen to lack clarity and predictability. Concerns with the operation of these principles in the current system of discretionary release have been raised in earlier chapters but some points bear repetition here.

Critics of parole have long argued that the criteria for parole release are too vague and broad to provide any real guidance to the decision-maker. One regrettable consequence is that parole decisions – both regarding release and revocation – are often seen to be arbitrary by inmates.

Previous government reports have alluded to negative reactions to parole on the part of offenders. The Sub-Committee on the Penitentiary System in Canada (1977) noted that "inmates are under the impression that the Parole Board does not, in all circumstances, treat them fairly. The records contain many examples of inmates whose parole has been revoked because they arrived

a few minutes late and who were also charged with being unlawfully at large" (p. 151). This same report also stated the following (in reference to the need for a mechanism other than revocation): "It is, therefore, extremely disconcerting to hear of inmates having their paroles suspended and revoked for essentially trivial reasons" (p. 151).

One of the recommendations (#64) of the 1977 Sub-Committee on the Penitentiary System in Canada acknowledged these perceptions:

> The appearance of arbitrariness in parole, especially in parole revocation without notice or reasons, is an unsettling factor in penitentiary life. There is also much resentment of the fact that mandatory supervision places discharges under conditions similar to parole for a period of time equal to that of their earned and statutory remission.
>
> The parole system should be reviewed with a view to lessening these arbitrary aspects.

Similar findings emerged from surveys of offenders conducted by this Commission. In one, (*Ekstedt, 1985*) those who had experience with parole expressed reservations about the fairness of decisions. That the system is perceived to be arbitrary by those most critically affected by it lends a very real support to the concerns repeated in the literature. In addition to the perceived unfairness of a process grounded in wide discretion is the dilemma that some judges do and others do not consider the likelihood of full parole release in setting the length of a term of imprisonment. The practice of the Parole Board of effectively equalizing sentence lengths through parole release is further seen to undermine the sentence of the court.

There is no clear understanding on the part of offenders, criminal justice professionals, judges or the public as to the laws and practices surrounding discretionary parole release. The laws are complex, the practices vary and the result is that there is no shared understanding of what a sentence of imprisonment actually means. It is, in fact, not possible to predict with any accuracy the actual time in custody that most inmates will serve. Due to the wide discretion given to release authorities and the individualized nature of the release criteria, no convicted offender receiving a lengthy term of imprisonment can know how much time he or she faces in custody after hearing the sentence of the court.

Although general support was expressed for some form of early release, a recurring concern in submissions received by the Commission was the accountability of the releasing authority in the exercise of its discretion. Support was expressed for greater clarity in release criteria, guidelines for the releasing authority to ensure uniformity of approach and the need for some body to review early release decisions. Many groups and individuals stressed the need for better communication between judges who impose the sentence and the parole board and correctional authorities who ultimately administer it. The overall picture of a process fragmented by different approaches to sentencing emerged from the submissions.

The concerns expressed above primarily address the problems of discretionary parole release within the context of the existing sentencing

structure. The concerns become even more pronounced when full parole release is considered within the context of the Commission's proposals regarding principles of sentencing and its integrated set of recommendations. Proportionality and discretionary release on full parole are not natural allies. The reason for this is obvious – proportionality can only be drawn between two determinate quantities. The judge imposes a fixed term of imprisonment. This sentence is stated in open court and is subject to review by a higher court. The parole release date, of course, remains undetermined at the time of sentencing. In fact, in some cases the release decision is made on the basis of evidence that may not be revealed to the accused. The decision of the board is therefore not subject to public scrutiny or judicial review.

2.1.6 Recommendations

In order to achieve a uniformity of approach to the determination of sentences the meaning of a sentence of imprisonment must be clear to all involved in the sentencing process: most importantly, the judge who imposes the sentence, the correctional authorities who administer the sentence, and the inmate who must serve the sentence.[8] It is the view of this Commission that a common understanding of the meaning of a sentence of imprisonment will not be possible as long as a system of full parole release exists.

This chapter has not dealt exhaustively with the many arguments for or against parole. To do so would require a great deal more space than is available here; the literature to be addressed is voluminous. However, after reviewing that literature there did not seem to be any positive benefits of discretionary parole release which could possibly justify its continued existence within the integrated set of reforms advocated by this Commission.[9]

Although at present the eligibility dates are set in law, the parole board is given absolute discretion to fix the time of that release according to broadly-defined criteria. A sentence of life imprisonment for manslaughter can mean a term of custody from seven years to life. It is the view of this Commission that the length of time an offender will spend in custody should be fixed, as much as possible, at the time of sentencing.[10]

10.1 The Commission recommends the abolition of full parole, except in the case of sentences of life imprisonment.

The model of sentencing proposed by this Commission is not based on rehabilitation and the need for wide discretion. In the context of the proposed sentencing model, the Commission has decided to recommend the abolition of parole largely for three reasons. First, it conflicts with the principle of proportionality which the Commission has assigned the highest priority in its sentencing rationale. Second, because discretionary release introduces a great deal of uncertainty into the sentencing process. Third, because parole release transfers sentencing decisions from the judge to the parole board. These tendencies may result in unwarranted disparities in time served. Moreover, the

effects of this transfer are frequently quite dramatic, as shown by the data on percentage of sentences actually served in prison.

Under current law and practice it is difficult for judges to estimate how long offenders sentenced to prison will actually spend in custody. Small wonder then, that they sometimes take parole and remission into account when sentencing. Under the proposals of the Canadian Sentencing Commission this would no longer be the case. With the abolition of full parole, the only portion of an offender's sentence that would be served in the community is the one-quarter reduction effected by earned remission. (see section 2.2 below). Also, in order to aid their consideration of the appropriate sentence length, judges would be provided with guideline ranges which would further reduce the uncertainty surrounding sentencing. According to these proposals, sentences imposed in court would more closely reflect "real time" in the sense that an offender serves to a greater degree the sentence imposed by the judge. The necessity for other considerations (such as early release) would consequently diminish. Judges need not, and should not, consider early release when determining the appropriate length of custody.

In recommending the abolition of full parole, the Commission fully recognizes the continuing need for some method of reducing the time served in custody by an inmate, and so has also recommended the retention of a form of earned remission (to be described in the next section). Finally, the Commission recognizes that the objective of releasing inmates prior to the expiry of their sentence to allow for the re-integration into the community must continue to be pursued. Hence, we will recommend the retention of a form of day release in later sections of this chapter.

2.1.7 Impact of Recommendations on Prison Populations

The Commission contracted with experts in the field of sentencing statistics to assess the impact upon prison populations of the abolition of parole (see Appendix A, 3.11). It is hard for these impact studies to be exact, for several variables are undetermined. For example, since it is not known with precision the extent to which judges take parole into account, one cannot know the extent to which they would 'correct' sentences knowing that parole no longer existed. However, it is clear that there would be an increase in the federal prison population if parole were abolished and no changes were made to sentences handed down. The best estimate is that this increase would be in the area of 20%. More important than the exact percentage by which penitentiary populations would rise, is the fact that this increase would take place within a relatively short space of time. In fact, projections indicated that unless sentence lengths were modified, the abolition of parole would result in a substantial increase in the federal prison population within a period of two years. The results of these analyses then, underscore the need for modification of sentence lengths if parole is to be abolished in this country.

2.2 Remission-Based Release

2.2.1 Remission in Canada Today

Currently, "every inmate of a penitentiary may be credited with 15 days of earned remission of his sentence for every month he has applied himself industriously to the program of the institution in which he is confined. Such remission may be forfeited in whole or in part as a result of a conviction in the disciplinary court of the institution"[11] (National Parole Board, 1983). There are two elements involved in earning remission: participating in institutional programs (up to ten days a month) and demonstrating good conduct (up to five days a month). Remission cannot be earned by inmates serving life sentences.

It is claimed that if remission and parole were abolished, inmates would have no incentive of any kind to follow institutional rules and the system would have lost any opportunity to affect the course of prisoners lives until the expiry of their warrants of committal. Remission then, in theory at least, is supposed to serve two important functions: it provides prison administrators with a form of control and it provides prisoners with an incentive to reduce their time in custody by up to one-third.

In practice the remission system in its present manifestation falls short on both counts. Before discussing the deficiencies of remission as it now exists, it is worth stepping back a little to ask a basic question: what is the objective of the remission system? When this question was posed to a sample of senior correctional personnel (Badovinac, Harvey, Eastman and Wormith, 1986), the responses were revealing. First of all there was little consensus as to the overall objective of remission. The most frequently-mentioned purpose was "administrative control", but even this accounted for fewer than one-quarter of responses. Other purposes cited included: providing an incentive to inmates (19%); providing an early release mechanism (11%); providing a punishment system (9%); providing a way to instill positive attitudes to work; providing a way to hold inmates accountable for their actions (9%). These multiple purposes reflect the dual nature of earning early release through program participation and the manifestation of good behaviour.

A recent examination of remission (Ross and Barker, 1986) demonstrates that practice and theory have parted company. If remission were an incentive-based scheme, an offender would arrive at an institution with, say, a six year sentence, knowing that his behaviour over the next four years would determine whether he would be able to serve the last two years in the community (under mandatory supervision) rather than prison. Current practice among administrators, and the perception among inmates, is that the latter are notionally awarded full remission credits (two years in our example) upon arrival. Days are subtracted from this total if the inmate violates institutional rules. This procedure changes the perception of remission. As Ross and Barker (1986) note: "What was supposed to be a carrot quickly became a cudgel" (p. 14).

2.2.2 Commission Proposals

As has been noted, the thrust of the Commission's sentencing proposals has been in the direction of real time sentencing. This means, among other reforms, the abolition of discretionary full parole. The reader might well ask the following question: "If more determinate sentencing is the aim, why retain earned remission for any portion of the sentence?" The answer to this question is not simple and implies both practical considerations and questions of principle. Let us first address the issue of principles. Remission is used by prison administrators as an incentive to maintaining discipline within the institutions. The abolition of all remission may then have negative effects on prison discipline. It may be argued that prison administrators can resort to other means to maintain prison discipline, such as the denial of family visits, the frequent transfer of prisoners from one institution to another and solitary confinement. This argument misses the point that, if remission is abolished, harsher measures will have to be systematically used to ensure prison discipline. Not only would this contradict the principle of restraint in the use of punishment, but it may well be that increasing the repressive character of imprisonment will result in anger and despair which are, in turn, conducive to prison riots and hostage-taking. Hence, making prisons a more punitive environment than they already are, may eventually defeat the purpose of ensuring discipline. Incidents such as prison riots and hostage-takings signify a breakdown of all discipline. Furthermore, the Commission is firmly of the view that removing the more humanitarian measures available to inmates would be a retrograde step.

Secondly, the merits of a proposal must also be assessed in terms of the feasibility of the proposal. It must be remembered that there are now at least three channels for early release; namely, full parole, day parole and remission-based release. When all of these are taken into account, prisoners serve, on the whole, slightly less than half of their sentences in custody. It would be inconsistent to abolish full parole and earned remission and keep day parole as a weak safety valve which could not withstand for long the pressures generated by the abolition of all other programs of early release. The abolition of all forms of early release would result in at least doubling the prison population in a short period of time. The impact would be felt within a year in provincial prisons, where convicted offenders serve all terms of imprisonment which are under two years. There would be two ways of avoiding this outcome. One would be to reduce drastically the use and the length of custodial sentences. The other would be to make room for newcomers by granting conditional release to all applicants serving their sentence under the old rules. None of these solutions would work. It is unrealistic to expect that judges would drastically alter their sentencing practices overnight. Furthermore, resort to such radical solutions would be largely publicized and would profoundly shock the public. The second option of vacating prisons to make room for the new prisoners would also result in a mockery of justice and would generate a climate of great hostility among the new prison population. In other words, the total abolition of all forms of remission would be such a drastic step that one

could compare it to shock therapy for the penal system. Given that the benefits of shock therapy are dubious at best for individuals, it is expected that for a system which is as complex and unwieldy as the criminal justice system, shock therapy would in all probability lead to chaos.

In the absence of parole, then, the Commission felt it desirable to retain some method whereby inmates can earn a reduction in time served in custody. There are two components to the Commission's recommendations in this regard. The first concerns the manner in which inmates earn remission. Despite the intention of the *Penitentiary Act* to reward inmates for participating in programs and displaying good behaviour, the reality seems to be that mere passive good behaviour is sufficient. There is, therefore, a contradiction between what the system states it is doing and what it actually does. (This can only serve to contribute to the confusion surrounding early release).

In an ideal world, with equal access to educational and employment-related programs it might be desirable to retain the bifurcated nature of remission: time off for program participation *and* for good behaviour. The Commission is of the view, however, that given the diverse nature of programs available to inmates in prisons and penitentiaries any system which actually awards credits for "active" program participation would result in inequities unless access to such programs is available in every institution. For inmates serving short sentences, programs and other opportunities for affirmative activities are often not available. Ideally, programs for inmates should be universally available, but until they are, it would be unfair to base a remission system on active participation in these programs.

10.2 The Commission recommends that earned remission be retained by way of credits awarded for good behaviour which may reduce by up to one-quarter the custodial portion of the sentence imposed by the judge.

Some commentators have suggested that remission in its present form cannot be an incentive scheme. By subtracting time-off credits for misbehaviour, they argue that the system is actually one of punishment. Inmates are not rewarded for good behaviour, but punished for bad. The distinction is a fine one, and may reflect the manner in which the system is presented, rather than the nature of the system *per se*. The Commission is of the view that earned remission is not a system that is exclusively punishment-oriented, and prison administrators should attempt to dispel the misperception that it is. An inmate entering a penitentiary with a six year sentence will be presumed to serve a six year term. If the inmate demonstrates good behaviour, he or she will be credited, on an accumulating basis, with time credits to reduce that six year period. As time passes without disciplinary incidents, the offender will earn these credits. The circumstances which will result in a removal of credits will be explicitly laid out at admission.

The proposals of this Commission aim to reduce the discrepancy between the sentence imposed and the time served. In moving toward a system of "real time" sentences, we have recommended the abolition of parole, and with it the

reduction of statutory maximum penalties. It is consistent with these proposals to lessen the proportion of a sentence which can be reduced by remission.

The effect of abolishing parole and reducing remission from one-third to one-quarter will be to make time served more closely correspond to the sentence imposed by the judge. However, by reducing the proportion of sentence remitted, and by abolishing parole, it will also be necessary to change sentencing practice. With these two changes the average time served will be considerably longer if sentencing practices remain the same. There is, therefore, a need to take other measures to ensure there is not a disproportionate increase in the punishment actually inflicted on the offenders (i.e. there is no substantial increase in time actually served). Commitment to the principle of restraint as well as the terms of its mandate require the Commission to take into account the effect of sentencing practices on prison capacity.

In recognition of this, the Commission has developed guidelines to assist judges in determining sentence lengths where imprisonment is felt to be the only acceptable sanction. The sentence ranges provided by these guidelines were constructed to ensure that sentences imposed will not result in a general increase in time spent in custody (see Chapter 11). As well, it is important to emphasize again that the greatest reduction in prison population will be achieved not through changes to custodial sentences, but through greater use of community sanctions.

2.3 Conditions Upon Release

The Commission has proposed the abolition of parole release. This section will focus solely on the "conditional" nature of early release due to remission. Should some or all inmates released from custody prior to the expiry of their warrant of committal be released on conditions, and if so, what should these conditions be? Until 1970 all inmates released as a result of remission were released unconditionally to serve the remainder of their sentence in the community. Thus, almost all inmates who were eligible for, but not granted parole release, were released after serving two-thirds of their sentence and could not be returned to custody for any reason other than the commission of a new criminal offence.

2.3.1 History

In 1970, the *Parole Act* was amended to give the National Parole Board the extended mandate to place conditions on remission-based release for federal inmates. All inmates who previously were not subject to any state control after serving two-thirds of their sentence were now to be subject to supervision and the prospect of revocation for breach of those conditions. The objective of "mandatory supervision" was to ensure that all federal inmates, not just those "better risks" who were granted parole, would receive assistance and control when they left the penitentiary. Mandatory supervision does not

apply to inmates serving sentences of less than two years in provincial institutions.

Hence, it was only after 1970 that the federal inmates released from custody on remission-based release came under public scrutiny since, for the first time, these offenders were released on conditions subject to the supervision of the parole board. Consequently, since 1970, the issue of offenders re-offending while on mandatory supervision has attracted both concern and controversy in the justice system and the news media.

2.3.2 Concerns

It is not surprising that a great deal of confusion surrounds mandatory supervision. The term mandatory is often understood as meaning "automatic" release, but the release is only automatic to the extent that once remission credits have been earned, the inmate is not subject to further review before he is released. The "automatic" nature of the release is a result of remission – and has been for over 100 years – not of "mandatory" supervision. In fact, the release is not "automatic"; it arises from remission which is credited for good behaviour and may be withheld when disciplinary infractions are committed.

The term "supervision" is in itself misleading. First, since *all* federal inmates released prior to their warrant expiry date (i.e. on parole and mandatory supervision) are under the control of the Parole Board, the actual "supervision" they receive is minimal. Inmates released on mandatory supervision must report to a parole officer, and are subject to conditions imposed by the Parole Board. These conditions may include a prohibition against drinking, owning guns, incurring debts and leaving a 25-mile radius without permission. Occasionally there is a condition requiring that the inmate reside in a half-way house upon release from custody. The average length of time an offender spends on mandatory supervision is 11 months (Correctional Law Review, 1985).

The Commission surveyed the opinions of probation and parole officers on a number of issues central to its terms of reference. Research was conducted in Québec (*Rizkalla, 1986*) and in the Atlantic Provinces (*Richardson, 1986*). Respondents were generally critical of the volume of paperwork required of them in fulfillment of their roles as parole or probation officers (*Rizkalla 1986*). Although most respondents in both Québec and the Atlantic Provinces acknowledged that their primary function was to supervise parolees, 52% of respondents in the Atlantic Provinces answered that their caseload was too heavy to allow them to exercise effective supervision. Twenty-eight percent of Québec respondents also believed that their caseload did not allow them to effectively supervise offenders on parole. Only 4% of Québec respondents did not voice reservations about the weight of their caseload.

Second, supervision is a misleading term in that it encompasses two very different aspects of early release: control (conditions) and assistance (re-

integration with the community). Parole officers are placed in the position of having to perform duties which sometimes conflict. Commission surveys of parole officers have shown that the majority of them believed that they were mostly performing a surveillance (control) function (*Rizkalla, 1986*; 132; *Richardson, 1986*; Appendix B, p. 14). For reasons of clarity, we will deal with the issues of control and assistance after the proposals are outlined.

2.3.3 Proposals

Within the context of the other proposals with respect to early release:

10.3 The Commission recommends that all offenders be released without conditions unless the judge, upon imposing a sentence of incarceration, specifies that the offender should be released on conditions.

10.4 The Commission recommends that a judge may indicate certain conditions but the releasing authority shall retain the power to specify the exact nature of those conditions, modify or delete them or add other conditions.

10.5 The Commission recommends that the nature of the conditions be limited to explicit criteria with a provision that if the judge or the releasing authority wishes to prescribe an "additional" condition, they must provide reasons why such a condition is desirable and enter the reasons on the record.

10.6 The Commission recommends that where an offender, while on remission-based release, commits a further offence or breaches a condition of release, he or she shall be charged with an offence of violating a condition of release, subject to a maximum penalty of one year.

Research shows that whether an offender is released with or without conditions has almost no effect on recidivism rates. Waller (1974) found that release on supervision merely postpones rather than prevents subsequent recidivism. When clients are no longer under conditions they offend at rates similar to those who have not been subject to conditions. Due to very heavy caseloads, parole officers simply do not have enough time to spend with their parolees. If conditions are reserved for the more serious cases, then the "supervision" may be more real and effective than its current illusory nature. The Commission is of the view that those offenders who require that conditions be set upon their release should be provided with real assistance and supervision. The current system of "supervising" all offenders on release misleads the public by implying that all offenders are indeed effectively supervised.

Consistent with the policy of the Commission that the judge should have a greater role in determining how the sentence should be carried out, we propose

that the judge, upon imposing sentence, specify whether or not the offender requires conditions upon his release on remission. If the judge decides that release conditions are required, he or she may further specify the nature of those conditions. These are in the nature of recommendations rather than a court order. This is to permit the subsequent change of conditions by releasing authorities who may be in a better position to assess the inmate at release. Although the discretion to set release conditions should remain with correctional authorities, the latter would be required to take into account the recommendations, if any, made by the court at the time of sentencing.

Currently, release on mandatory supervision may be suspended where a breach of a term or condition has occurred, to prevent a breach of a condition or "to protect society" (s. 16, *Parole Act)*. If such a supervision is followed by revocation of the release, the offender is recommitted to custody and forfeits his/her earned remission.

The introduction of mandatory supervision – which resulted in conditions being imposed upon released inmates who otherwise would have left the institution free – engendered much bitterness in inmates. Many saw it as unfair in that having earned full release, this release was now being qualified. As a report by the Correctional Law Review (1985) notes: "the pre-1970 reward of scot-free time is no longer available and this fact alone has tended to undermine the meaningfulness of the program in the minds of many" (p.20). Also, while they had been denied conditional release on parole, they were now released under virtually the same conditions as parolees. Most offenders who obtain early release would, according to our proposals, do so without conditions; the incentive to earn that release should be substantially greater under the proposed remission scheme.

a) Control

In order to ensure that conditions are clear and enforceable, the court, in recommending conditions, and the administration in setting those conditions, must be guided by explicit criteria. The creation of an offence of violating a condition of release implies that the condition must necessarily be clear in order to be enforceable.

The criteria governing the kinds of conditions that may be imposed should be in the nature of the probation criteria specified in the Criminal Law Reform Act, 1984 (Bill C-19) (see Appendix I). In addition, there is a requirement that the criteria must be offence-related. If the court wishes to recommend a condition that is not expressly listed in the criteria, the court should provide the reasons why such a condition is considered desirable. The reasons will be entered in the record of the proceedings, or where not recorded, written reasons will be provided. The broader the scope of conditions, the easier it is to revoke conditional release. Given that revocation results in an extended time in custody the Commission felt that the exercise of discretion to impose conditions and to choose the nature of those conditions should be subject to explicit guidelines.

b) Assistance

For those offenders who have earned full remission credits and are released into the community after serving three-quarters of their sentence in custody, voluntary assistance programs should be made available.

10.7 The Commission recommends that voluntary assistance programs be developed and made available to all inmates prior to and upon release from custody to assist them in their re-integration into the community.

The provision of voluntary assistance programs prior to release into the community should be available to all inmates. In addition, most inmates who will be released after serving three-quarters of their sentence in custody may have benefited from other community-based programs prior to their release (see Day Release).

2.4 Withholding Remission Release

2.4.1 Recent Legislation

The controversy surrounding the release of all federal inmates who have earned their remission credits has culminated in the passing of legislation that permits the Parole Board to prevent the release of certain inmates who might pose a serious risk to the community.

This proposed procedure was originally referred to as "gating". It referred to the process by which an inmate entitled to release according to remission credits could on the authority of the Parole Board be turned around at the gate and kept in custody. The very recent enactments to the *Parole Act* ensure that the inmate is no longer subject to last minute "gating". Instead, the *Act* gives the Correctional Services the responsiblity of identifying those inmates who, according to expressed criteria, might be subject to a review prior to their release on remission.

2.4.2 Proposals

Given the nature of the Commission's package of proposals, the need for a mechanism such as this is greatly reduced. However, Parliament has recently expressed the view that in some exceptional cases there may be a need to withhold the release of offenders even though they have earned their remission credits. Since the effect of withholding release would be to prolong the inmate's stay in custody for up to one-quarter of the sentence imposed, it is important that this procedure be restricted to exceptional cases, and that the decision to withhold release be made according to strict criteria.

10.8 The Commission recommends that a Sentence Administration Board be given the power to withhold remission release according to the criteria

specified in the recently enacted legislation: ***An Act to Amend the Parole Act and the Penitentiary Act.***[12]

The Sentence Administration Board will ultimately replace the Parole Board.

The following procedure, similar to that prescribed in the recent legislative amendments is recommended by the Commission:

The Correctional Service of Canada would, according to criteria specified in the amendments, identify the inmate for review prior to remission release.

Once the inmate is identified for review, the Correctional Service of Canada may;

i) set conditions for remission-based release (e.g., residence in a half-way house), or

ii) recommend that release be denied and refer the case to the Sentence Administration Board.

An inmate is only subject to review if:

i) he or she is convicted of an indictable offence listed in the Schedule (See Appendix I),

ii) he or she has caused death or serious harm, and

iii) there are reasonable grounds to believe that the inmate is likely to commit, prior to the warrant expiry date, an offence causing death or serious harm.

Where the Sentence Administration Board 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 *may*,

i) direct that the inmate shall not be released on remission-based release, or

ii) impose a condition on the release that the inmate reside in a community-based residential facility.

As specified in the amendments, this Board shall review, on a yearly basis, the case of every inmate who has been denied release on remission or whose release is subject to his or her residing in a community-based residential facility.

The decision by the Correctional Service of Canada to set conditions for release is reviewable by the Sentence Administration Board. The decision of the board to deny release is final, reviewable only by the existing modes of judicial review.

Correctional authories are in the best position to identify those inmates who may be reviewed for purposes of withholding release on remission. Few

inmates would be subject to this review. In fact, it would affect only those who (a) were convicted of offences involving serious harm to persons (see Schedule, Appendix I) and (b) were considered by the correctional authorities likely to commit, prior to the sentence expiry date, an offence causing death or serious harm to another person.

Unlike the procedure set out in the amendments to the *Parole Act*, we propose that the Correctional Service of Canada be given the power to set conditions prior to release. Given that the Commission has recommended guidelines for the imposition of conditions, it is only necessary to refer a case to the Board when the Correctional Service of Canada recommends that release should be denied. In addition, the case may be referred to the Board if the inmate requests a review of the conditions. The Board would conduct its inquiry in a quasi-judicial manner to ensure that inmates' rights are fully respected. In order to ensure consistency of approach, one central decision-making body would be desirable.

2.5 Day Release

Under the current system, prior to full parole release or remission-based release inmates are eligible for day parole and temporary absence passes. Since these two release programs have different purposes, the Commission proposes separate recommendations for each.

Day parole is a program of release granted for the purpose of allowing an inmate to attend an educational, residential, treatment or other program approved by the institution. It was created in 1970, by amendment to the *Parole Act*. Day parole involves the release of an inmate from custody on a daily basis for a period of up to six months, and requires his or her return nightly to a minimum security institution or half-way house. Most inmates become eligible for day parole after serving one-sixth of their sentence or six months, whichever is greater. It is currently granted to inmates considered by the Parole Board to be good candidates for future full parole. The criteria for release are the same as full parole except that in the case of day parole the Board is not required to consider whether the inmate has "...derived the maximum benefit from imprisonment" (s.10, *Parole Act*).

Only federal inmates have a day parole program. In the provincial system, temporary absence passes, granted for a shorter period of up to 15 days, may be renewed by the prison administration to allow for an extended period of release that closely resembles parole ("back-to-back t.a.'s").

It is desirable for reasons of clarity, to distinguish a system of day release from short-term releases on temporary absence. The purpose of day release into the community prior to full release on remission is to aid in the re-integration of the offender in the community. Day release thus excludes temporary absences for humanitarian and medical reasons (illness, family death, etc.). The Commission is of the view that a system of day release should

be retained to allow inmates to be released at a point prior to their remission release date to attend courses, self-improvement programs or to work in the community, all measures which may ultimately facilitate their integration into the community.

10.9 The Commission recommends that all inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the requirements for withholding remission release.

Participation in the program should be available to all federal and provincial inmates except those few who may have their full release on remission withheld because of the serious nature of their crimes. The release at two-thirds of the sentence would be under the same conditions as currently specified for day parole (e.g., returning nightly to the institution or half-way house). It must be stressed that this is not a form of discretionary parole release and is not to be used as such by the prison administration. Unlike the current system of day parole, day release will not provide a "trial period" for suitability for full release. The decision as to whether an inmate should be granted day release depends on the availability and suitability of work and other day programs.

Given that day release is not a form of full release from custody and is more in the nature of providing opportunities for inmates than shortening the custodial portion of their sentence, the Commission is of the view that discretion as to whether to release an inmate for the purpose of attending such a program is best exercised by the prison administration.

For those inmates whose remission-based release is withheld according to the criteria, the only mechanism to ease their re-integration into society is through their participation in voluntary assistance programs. As was recommended earlier, voluntary assistance programs should be developed and made available to all inmates prior to and upon release, especially for those inmates who are not eligible to participate in a graduated release program.

2.6 Special Leave

There are currently two types of temporary absence passes: escorted and unescorted. The rationale underlying the escorted temporary absence pass is to provide a brief period of release for a specified length of time, under strict conditions, for humanitarian or medical reasons (e.g., for funerals or emergency medical attention). Escorted temporary absence passes are under the authority of the Correctional Service of Canada.

Release on an unescorted temporary absence pass (for a period of less than 72 hours per quarter) more closely resembles a form of limited day parole and is in fact used as a preliminary test for the day parole program. The authority to grant unescorted temporary absence passes lies with the Parole

Board, (although the Board delegates that authority to the Correctional Service of Canada for inmates serving less than five years and for a second or subsequent granting of an unescorted leave). Since the Commission has already made proposals regarding forms of day release, the unescorted temporary pass (as a system of day release) will not be addressed as an issue of "special leave". By special leave the Commission means leave in the nature of escorted temporary absences.

10.10 The Commission recommends that the granting of special leave according to explicit criteria remain at the discretion of the prison administration. Inmates shall be eligible for special leave passes immediately upon being placed in custody.[13]

Special leave should not be used as a method of re-introducing parole release. Its purpose is to provide a release mechanism in special circumstances for humanitarian or medical reasons, and the length of that release should be restricted to the minimum length of time necessary to achieve the specific purpose of the release.

2.7 Clemency

Clemency refers to mercy in the exercise of authority or power. With respect to sentences of imprisonment, clemency can affect early release by way of parole by exception or through the use of pardons as an exercise of the Royal Prerogative of Mercy or through the statutory power found in section 683 and 685 of the *Criminal Code*.

2.7.1 Parole By Exception

Pursuant to section 11.1 of the Parole Regulations, the Parole Board is given the power in some cases to grant full or day parole to a prisoner before he or she has reached the relevant statutory eligibility date. This form of release is known as parole by exception. A prisoner may be considered for parole by exception if he or she can satisfy one of the three statutory pre-conditions:

a) the inmate is terminally ill;

b) the inmate's physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement; or

c) there is a deportation order made against the inmate under the *Immigration Act*, 1976 and the inmate is to be detained under that Act until deported.

In respect of a prisoner who meets one of these pre-conditions, the Parole Board can exercise discretion to grant parole prior to eligibility but only does so in exceptional cases. Significantly, the power to grant parole by exception is *not* available when the prisoner is serving a sentence of life imprisonment or an indeterminate sentence or a sentence which, according to the regulations is classified as a violent conduct offence.

As to condition (c), the Commission is of the view that deportation cases normally should have nothing to do with discretionary parole release or clemency. In the past, parole release has been used as an "artificial" procedure to allow deportation. The Commission suggests that it would be preferable to provide a specific authority in immigration law to allow for the deportation of convicted offenders in specified circumstances.

2.7.2 Pardons and the Royal Prerogative of Mercy

The Royal Prerogative of Mercy can be described as the "residue of discretion or arbitrary authority which ... is legally left in the hands of the Crown (Dicey, Law of the Constitution, 8th edition, 420, quoted in *Re: Royal Prerogative Mercy upon Deportation Proceedings*, [1933] 2 D.L.R. 348 (S.C.C.) at 351. In Canada, this prerogative empowers the sovereign's representative, the Governor General, upon the advice of a Minister of the Crown, to grant a free pardon, conditional pardon or remission of sentence. The Governor in Council (the Cabinet) is empowered by sections 683 and 685 of the *Criminal Code* to grant free and conditional pardons, but this statutory power does not restrict the availability or exercise of the Royal Prerogative of Mercy. In practice, applications are administered by the Clemency Division of the National Parole Board who conduct the necessary investigations and make recommendations to the Solicitor General. The Solicitor General then advises the Governor General or Governor in Council as the case may be.

While there may be some controversy as to the scope of the appropriate premises to consider applications, the Policy and Procedures Manual of the National Parole Board describes the power to intervene in lawfully imposed sentences as arising when "the fallibility of human institutions has produced a condition of hardship and inequity". Inequity is said to exist when "the consequences which flow from either the sentence or conviction are out of proportion to the nature of the offence and the consequences which would have resulted in the typical case". Recognizing the need to maintain the independence and authority of the judiciary, Parliament has enacted section 617 of the *Criminal Code* which empowers the Minister of Justice to refer cases back to the courts for reconsideration after all ordinary routes of appeal have been exhausted. This power, only rarely exercised, usually arises in cases of new evidence and has substantially limited resort to the Royal Prerogative of Mercy in respect of claims of injustice.

2.7.3 Proposals

Consistent with the Commission's proposals regarding the abolition of full parole release, and given that cases involving hardship and inequity fall within the purview of the Royal Prerogative of Mercy, the Commission recommends that only the Royal Prerogative of Mercy be retained.

10.11 The Commission recommends that parole by exception be abolished and that cases where the inmate is terminally ill or where the inmate's

physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement shall be dealt with by way of the Royal Prerogative of Mercy.

10.12 The Commission recommends that the Sentence Administration Board should conduct the necessary review and forward submissions regarding clemency to the Solicitor General.

10.13 The Commission recommends that the Canadian immigration law should provide the necessary authority for the deportation of convicted offenders in specified circumstances.

3. Open Custody

3.1 The Meaning of Custody

Early release has a major impact on the meaning of a sentence of imprisonment. It materially affects the length of time an inmate actually serves in custody. The meaning of "custody" itself, however, depends on whether the sentence is to be served in complete segregation or involves less extreme deprivations of freedom.

The Commission has previously recommended that the court should have a greater role in determining how the sentence is carried out. The Commission has also recommended that the role of the judge in imposing the sentence be expanded, recognizing that the sentencing process does not end at the imposition of the sentence.

3.2 Proposals

At present, custodial sentences involve varying degrees of constraint on the offender. To reduce the demand on secure custody prison resources,[1] less constraining facilities should be made available to appropriate offenders. Consistent with our policy of restraint, we recommend that, in appropriate cases and given the existence of an open custody facility, the role of the judge in sentencing the offender should be expanded to enable the judge to sentence an offender to open custody. The Commission believes that the judiciary should have a greater role in determining the degrees of custody to which an inmate should be subject.

10.14 The Commission recommends that where a judge imposes a custodial sanction, he or she may recommend the nature of the custody imposed.

10.15 The Commission further recommends that federal and provincial governments provide the necessary resources and financial support for the establishment and maintenance of open custody facilities.

The Commission recognizes the need to give judges a greater say as to the nature of the sanction imposed, be it a community sanction or a custodial term. This recommendation stresses the importance of expanding both the choice of sanction and the role of the judge in recommending the nature of that sanction. If the principle of restraint is to be given proper scope and use, facilities providing something less than secure custody are required. Furthermore, the cost of establishing and maintaining open custody facilities should be considerably less than that of secure custody institutions. It should be noted here that the sentencing guidelines will ensure that open custody facilities are used only for those cases where custody is justified and not in cases where less onerous sanctions might otherwise be imposed.

The prison administration currently decides whether a sentence will be served in open custody (e.g., a bush camp, a farm camp or a community training residence) or closed custody (e.g., a prison or penitentiary). This recommendation empowers a judge to recommend that the sentence may be served in an open custody facility, where such a facility is available. If judges are to have any meaningful role in determining the nature of the custodial sentence imposed, federal and provincial governments must pledge the necessary resources to expand existing open custody facilities and make them available for initial sentencing. In addition to presently existing facilities, new types of institutions for sentences of open custody could eventually be created in rural or urban settings. These new facilities could receive convicted offenders serving an intermittent sentence or could be used to allow convicted offenders to keep their jobs and support their families.

The purpose of the Commission's recommendations is not to provide judges with an exhaustive list of custodial settings, but rather to stress that judges should be given greater scope to determine the meaning of the sentence imposed (ranking from community sanctions to closed custody). In specifying the nature of the "in" decision, the judge may clearly state to the offender and to the public the reason for the custodial sentence and the nature of custody required. There exist a number of choices regarding the nature of the custodial sanction. For example, it could be an intermittent sentence served on weekends in jail or in some other appropriate institution. As a further example, the sentence could require the accused to serve the custodial term in a half-way house.

As will be described in detail in Chapter 11, the decision of the judge as to whether to impose a custodial sentence will be guided by a "presumptive" disposition and range. If the judge feels that the circumstances require a custodial sanction, the next decision he or she faces is the nature of the "in" sanction. Earlier it was decided that restraint in the use of imprisonment was a principle which would require judges to consider all less onerous sanctions before imposing a custodial term. Clearly, open custody or an intermittent sentence is less onerous than a term of continuous and secure custody. The principle of restraint, then, will serve to guide the judge as to the type of custody to impose.

An enhanced role for the judiciary in determining the degrees of custody to which an inmate will be subject is consistent with real-time sentencing – it minimizes the degree to which the sentence of the court is undermined by "post-sentencing" decisions, and can only improve the understanding of the court and sentence administrators as to the meaning of the custodial sentence.

The Commission feels confident that in determining the nature of the custody, a judge will consider whether the offence was of such a violent nature that a term of "separation" in a closed custody setting is required. As well as considering the circumstances of the offence, the judge shall consider whether an open custody sentence would benefit the offender (e.g., in permitting him/her to continue working) or the offender's family (in preserving the family structure), or the community generally.

Two final points. First, the issue of open custody is not an early release issue. In the past, back-to-back temporary absences and day parole have been used to mitigate the harshness of a closed custody sanction. These decisions, however, are made by sentence administrators, not sentencing judges. Recommendations made earlier regarding release mechanisms and the use of temporary absences and day releases will serve to ensure that these mechanisms are no longer used to provide an open custody type of sanction. Instead, early release mechanisms will be restricted to providing a "release" function for the most onerous sanction, closed custody.

Second, these recommendations regarding open custody are not intended to affect or limit daily decisions of correctional authorities as to whether inmates should, for example, be transferred from maximum security to less secure institutions.

4. Sentences for Murder and High Treason

4.1 The Meaning of a Mandatory Life Sentence

In an earlier decision, the Commission resolved not to deal with the issue of capital punishment and to retain the mandatory life sentence for first and second degree murder and high treason. Having decided this, it followed that the penalty provisions for murder and high treason should be preserved. It was felt that a review of these penalties would necessarily entail a consideration of the death penalty, which implied stepping beyond the mandate of this Commission (see Chapter 1). However, in furtherance of the goals of the Commission, it was apparent that a review of the ineligibility periods for these offences was necessary. These three offences have unique characteristics: first, the sentence of life imprisonment is mandatory, and second; the meaning of the life sentence depends on the period of parole ineligibility prescribed by the *Code* or imposed by the judge.

Currently, inmates serving sentences of life imprisonment for offences other than murder and high treason are eligible for parole release after serving

seven years. First degree murder and high treason have a mandatory parole ineligibility period of 25 years. For these two offences an offender must serve 25 years *in custody* prior to eligibility for parole release. Second degree murder has a minimum parole ineligibility period of ten years which can be increased up to a maximum of 25 years. However, it appears that judges have generally been reluctant to exceed this ten year period. In over three-quarters of cases of second degree murder (1976-1983) the minimum ten year period was not increased (Canada, Solicitor General, 1984a).[14] In the case of first degree murder and high treason and where the parole ineligibility period for second degree murder has been increased in excess of 15 years, there is a provision for a judicial review (with a jury) after an inmate has served 15 years in custody.

4.2 Prison Populations

There has been extensive criticism of the 25 year term of custody without the possibility of parole. Many see it as inhumane: inmates have no opportunity to mitigate their sentences. Those inmates serving sentences of life imprisonment without the possibility of release for so long have no incentive to conform to institutional rules. Easily accessible data on the institutional behaviour of this group are not currently available. The data that do exist suggest that these inmates are more likely than the average inmate (i.e. the inmates with parole and remission opportunities) to be involved in institutional incidents. A review by the Correctional Service of Canada of 190 inmates serving a 25 year minimum term revealed that 47% had been involved in incidents recorded by the Preventive Security Division (Canada, Solicitor General, 1984a; 31).

At the present time there are 307 inmates serving life sentences for first degree murder (Correctional Service of Canada, 1986; 25). A projection exercise carried out in 1984 (reported in Canada, Solicitor General, 1984a; 33) predicted a first degree murder population of 877 by the year 2001.

4.3 Proposals

The maximum penalty of life imprisonment for all offences except murder and high treason has been reduced to 12 years or less under our proposed maximum penalties. For exceptionally serious crimes, we are proposing that for offences carrying a 9 or 12 year maximum penalty the judge may enhance the sentence by up to one-half. Within the framework of these proposals and of our theory of sentencing, the Commission is recommending that the mandatory life sentences for murder and high treason be retained. However, in light of concerns surrounding proportionality, consistency and restraint, the parole ineligibility periods for these offences have been reviewed.

Recognizing the need for consistency of approach to the meaning of sentences of imprisonment:

10.16 The Commission recommends that the mandatory life imprisonment sentence be retained for first and second degree murder and high treason.

10.17 The Commission recommends that inmates serving sentences for first degree murder or high treason be eligible for release on conditions after serving a minimum of 15 years up to a maximum of 25 years in custody. The court would set the date of eligibility for release within that limit.

10.18 The Commission recommends that inmates serving a life sentence for second degree murder be eligible for release on conditions after serving a minimum of ten years, and a maximum of 15 years in custody. The court would set the date of eligibility for release within that limit.

10.19 The Commission recommends that at the eligibility date, the inmate have the burden of demonstrating his or her readiness for release on conditions for the remainder of the life sentence.

10.20 The Commission recommends that the ineligibility period set by the court be subject to appeal.

The Commission recommends that the maximum ineligibility period for second degree murder be decreased from 25 years to 15 years in order to distinguish it from the more serious offence of first degree murder. The sentence for second degree murder could involve up to 15 years custody before consideration for release. If at the eligibility date the inmate can demonstrate to the court that he or she could safely be released into the community, then the inmate would be released to serve the rest of his or her sentence, that is life, subject to appropriate conditions supervised by the Sentence Administration Board. These recommendations change only the length of time served in custody prior to eligibility for early release. The current mandatory sentence of life imprisonment for first and second degree murder and high treason remains the same.

5. List of Recommendations

10.1 The Commission recommends the abolition of full parole, except in the case of sentences of life imprisonment.

10.2 The Commission recommends that earned remission be retained by way of credits awarded for good behaviour which may reduce by up to one-quarter the custodial portion of the sentence imposed by the judge.

10.3 The Commission recommends that all offenders be released without conditions unless the judge, upon imposing a sentence of incarceration, specifies that the offender should be released on conditions.

10.4 The Commission recommends that a judge may indicate certain conditions but the releasing authority shall retain the power to specify the exact nature of those conditions, modify or delete them or add other conditions.

10.5 The Commission recommends that the nature of the conditions be limited to explicit criteria with a provision that if the judge or the releasing authority wishes to prescribe an "additional" condition, they must provide reasons why such a condition is desirable and enter the reasons on the record.

10.6 The Commission recommends that where an offender, while on remission-based release, commits a further offence or breaches a condition of release, he or she shall be charged with an offence of violating a condition of release, subject to a maximum penalty of one year.

10.7 The Commission recommends that voluntary assistance programs be developed and made available to all inmates prior to and upon release from custody to assist them in their re-integration into the community.

10.8 The Commission recommends that a Sentence Administration Board be given the power to withhold remission release according to the criteria specified in the recently enacted legislation: *An Act to Amend the Parole Act and the Penitentiary Act.*

10.9 The Commission recommends that all inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the requirements for withholding remission release.

10.10 The Commission recommends that the granting of special leave according to explicit criteria remain at the discretion of the prison administration. Inmates shall be eligible for special leave passes immediately upon being placed in custody.

10.11 The Commission recommends that parole by exception be abolished and that cases where the inmate is terminally ill or where the inmate's physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement shall be dealt with by way of the Royal Prerogative of Mercy.

10.12 The Commission recommends that the Sentence Administration Board should conduct the necessary review and forward submissions regarding clemency to the Solicitor General.

10.13 The Commission recommends that the Canadian immigration law should provide necessary authority for the deportation of convicted offenders in specified circumstances.

10.14 The Commission recommends that where a judge imposes a custodial sanction, he or she may recommend the nature of the custody imposed.

10.15 The Commission further recommends that federal and provincial governments provide the necessary resources and financial support for the establishment and maintenance of open custody facilities.

10.16 **The Commission recommends that the mandatory life imprisonment sentence be retained for first and second degree murder and high treason.**

10.17 **The Commission recommends that inmates serving sentences for first degree murder or high treason be eligible for release on conditions after serving a minimum of 15 years up to a maximum of 25 years in custody. The court would set the date of eligibility for release within that limit.**

10.18 **The Commission recommends that inmates serving a life sentence for second degree murder be eligible for release on conditions after serving a minimum of ten years, and a maximum of 15 years in custody. The court would set the date of eligibility for release within that limit.**

10.19 **The Commission recommends that at the eligibility date, the inmate have the burden of demonstrating his or her readiness for release on conditions for the remainder of the life sentence.**

10.20 **The Commission recommends that the ineligibility period set by the court be subject to appeal.**

Endnotes

1. Comparisons are often made between the incarceration rates of Canada and the U.S.. Although in Canada the incarceration rate is less than half what it is in the United States there is even a larger difference between crime rates. Violent crime is five times more frequent in the U.S. One recent report concludes that our courts "are at least twice as harsh as their American counterparts" (Correctional Service of Canada, 1985; p. 18).

2. For information upon the approach of this project, see Correctional Law Review (1986a, b) for recently released working papers.

3. The National Parole Board is an independent government agency reporting to Parliament through the Solicitor General of Canada. Although the Board in its day-to-day operations works closely with the Correctional Service of Canada, an agency within the same Ministry, the National Parole Board remains independent in its decision-making (Government of Canada, National Parole Board, *National Parole Board Handbook for Judges and Crown Attorneys*, 1983, p. 12).

4. See *Parole Act*, section 2, definition of "day parole" and "parole" and *Parole Regulations*, section 2 for definition of "full parole".

5. Parole elgibility for inmates serving indeterminate sentences or sentences for murder and high treason will be dealt with separately later in this chapter. A "violent conduct offence" is one carrying a maximum penalty of ten years or more for which a sentence of five years or more was actually imposed and which involved conduct that seriously endangered the life or safety of any person or resulted in serious bodily harm or severe psychological damage to any person (*Parole Regulations*, ss. 8(1)). Inmates serving a sentence for a violent conduct offence are not eligible for full parole until they have served one-half of their sentence or seven years, whichever is the lesser.

6. This finding has consequences for general deterrence. We have already referred to comprehensive reviews of the literature on general deterrence. As noted by those reviewers, the force of deterrence is weak at best and not particularly a reflection of the severity of the punishment per se. (Some have known this for some time. Thomas (1979) quotes a writer in 1892 who noted that "moderate sentences are as effective as excessive ones in the repression of crime" (p. 21). Contemporary data support what was merely speculation almost a century ago). However, whatever deterrent effect does exist must perforce be diluted – irreparably perhaps – by the intervention of discretionary release. Deterrence can only be obtained when offenders and potential offenders can predict with accuracy the penalty which will follow conviction for a particular offence.

7. This issue is particularly relevant to impact studies attempting to assess the effects of abolishing parole. For, as Michael Mandel (1975) pointed out, there are in fact two effects of parole on sentence length: the direct effect and the indirect effect. By direct effect he refers to the intuitive notion that parole release results in less incarceration. By indirect effect he means a less obvious effect in the opposite direction: "Sentencers have merely lengthened the sentences they would otherwise have imposed in view of the fact that offenders may be paroled before the entire sentence is served." (p. 512). The net effect of parole then results from consideration of both these effects. Attempts at estimating them are difficult although Mandel estimates the direct effect to be a reduction of 10% in the time spent in prison and the indirect effect to be an increase of 11%.

8. It was in the recognition of the need for a uniform approach to the administration of sentences that the Law Reform Commission of Canada in its report "Imprisonment and Release " (1976) recommended the creation of a "sentence supervision board" to replace the current parole board. According to its recommendations, a judge would state the purpose of any sentence imposed. If the purpose was to separate the offender from the community because of the serious and harmful nature of his acts, then a pre-determined staging of early release would apply. The presumption would be that inmates would be granted stages of release at set points

in their sentences unless the sentence supervision board could show why they should not be released.

9. One of the putative benefits of parole concerns the reduction of violent crime. Compared to remission-based release (on mandatory supervision) offenders on parole are said to be less likely to recidivate. Comparison of the two populations however demonstrates little difference between them. Recent data from the National Parole Board (1986; Table 1) show that 1.8% of full parole releases were revoked for committing a violent offence. The comparable figure for mandatory supervision is 2.7%. Likewise for robbery: the percentage revoked for robbery is 2.8% for parole and 3.3% for mandatory supervision. These figures are outcomes to 1984 of releases from 1975/76 to 1979/80 (see also pp. 16-18 in Corrections Policy Division, 1985a). During 1983, of all releases to parole, 226 committed fresh offences. Violent offences (crimes against the person and robbery) comprised 22.5% of these (51 of 226). The comparable figures for mandatory supervision are: 561 re-offend, 22% violent offences (122 of 561). (Corrections Policy Division, 1985, p. 20). These figures hardly suggest that release on parole reduces the likelihood of violent re-offending.

10. The importance of an early "time-fix" is argued in greater detail in a report entitled *Abolish Parole?* (von Hirsch and Hanrahan, 1978).

11. See *Penitentiary Act*, sections 24(l), 24.2, 2.1(l).

12. *An Act to Amend the Parole Act and the Penitentiary Act*, Statutes of Canada, 1986, c. 42.

13. A similar recommendation was made by the Québec *Comité d'étude sur les solutions de rechange à l'incarcération.* See Document de Consultation, May 1986, p. 16.

14. This same report (Canada, Solicitor General, 1984a) shows that judges have a strong tendency to impose 10 or 15 year parole ineligibility periods. Thus 76% of cases are ten, with a further 9% at 15. Although many periods varying in length from 10 to 25 years could be imposed, in 85% of the cases they are either 10 or 15.