Law Reform Commission of Canada
Commission de réforme du droit du Canada

Imprisonment and Release

Working Paper 11

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1975

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing within three months to:

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Foreword

This paper, which focuses on one of the law's most drastic dispositions, imprisonment, is the eleventh working paper to be published by the Commission. Like those before it, it can be seen as a separate unit, standing on its own. We suggest, however, that it would be far more satisfying to view this paper as one in a series of working papers on the Criminal Law, and that it should be read in the light of these previous works. For, as the number of working papers increases, it is simply not possible to reiterate in detail all the assumptions that have previously been made and that have contributed to the development of our proposed position.

In addition, failure to view this paper as one in a series of working papers may result in some unexpected—and perhaps unfortunate—consequences. Our criminal justice system is an extremely complex one. A change in one area of the law may seriously affect many other parts of the system. Unless we are continually aware of these interdependencies, we are in danger of introducing changes that may have totally different consequences than those we intended—consequences that may not be at all appropriate to the aims and purposes of our system.

However, before we can evaluate the effects of these changes, we must first establish exactly what the aims and purposes of our criminal justice system are. We, as a society, must develop a common understanding of its meaning and limits. This, in effect, is what our series of working papers has struggled to provide.

In our working papers on *The Meaning of Guilt* (#2) and *The Limits of the Criminal Law* (#10), the basic prin-

ciples of criminal law were discussed. The meaning and nature of the criminal process was examined in *Discovery* (#4). And the fundamentals of sentencing and punishment were treated in *Principles of Sentencing and Dispositions* (#3) which was followed by proposals on *Restitution and Compensation* (#5), *Fines* (#6) and *Diversion* (#7). We also have published more detailed studies on related topics.

Quite clearly all these papers have a bearing on our present subject: *Imprisonment*. No subject in the criminal law is more important: today it is, in practice, the last resort of both our criminal and civil sanctions. For this reason, readers of this paper should bear in mind the conclusions reached in Working Paper #2:

> that all serious, obvious and general criminal offences should be contained in the Criminal Code, and should require *mens rea*, and only for these should imprisonment be a possible penalty; and that all offences outside the Criminal Code should as a minimum allow due diligence as a defence and for these in general imprisonment should be excluded. (p. 38)

Working Paper #3 then analyzed the traditional reasons for sentences. It looked at punishment, deterrence and rehabilitation. Applied to imprisonment, it found that these concepts had become questionable and problematic and were no longer able to serve as guiding criteria. The thrust of the paper was towards reconciliation with the community, a thrust which was carried further in Papers #5, 6 and 7.

Working Paper #10, in exploring the limits of the criminal law reminds us of what we easily forget: "The best things in life may well be free, the rest must all be paid for. In our world everything costs something, and law is no exception." In the light of the guiding principle of maximization of freedom (for everyone) there is a loss of freedom not only through crime but through the criminal law itself and, in weighing what should be a criminal offence, this balance must be the principal deciding factor. Not all forms of wrongdoing, such as certain forms of lying, breaking promises or other matters of common morality, can be made crimes. There has to be harm involved, but not all harms can constitute crimes either

or we would have to stop doing things like driving automobiles. Harms have to be linked to core values and in fact the criminal law should constitute an articulation of these core values and the criminal process should be a demonstration of them.

Before coming to the views expressed in this paper on the place of imprisonment in the structure of sanctions, we have also analyzed, to the extent possible, the present system. These studies will be released as background papers and pay particular attention to present special problem areas such as dangerous sexual offenders, habitual criminals and present release procedures. This working paper reflects the findings of these studies although it does not give the details. Needless to say, much of the literature and experience in other jurisdictions was also examined before coming to the present proposal. It is also clear from the paper that a great deal of further detailed work has to be undertaken before a proposal such as this can be translated into legislative and practical reality. Before undertaking such work, however, the Commission wants to assure itself that the basic thrust of the paper is sound and it strongly urges the public to respond to the proposals.

1

Introduction

In Canada, imprisonment as we understand it today dates back only to 1835 with the building of the Kingston Penitentiary. The penitentiary sentence was an American invention, having been introduced by the Philadelphia Quakers in 1789 as a more humane alternative to the harsh punishments of the day. The Quakers felt that a sentence of imprisonment served under conditions of isolation with opportunities for work and religious contemplation would render the offender penitent and reformed. In New York the penitentiary sentence was adopted not out of religious motives but out of a belief that work and training in the penitentiary would lead to a reduction in the overall crime rate. The penitentiary sentence in the form of long terms of imprisonment then spread to England as an alternative to exile and transportation of offenders to the colonies. While Canadian law followed the English model, prison institutions were influenced by developments in the United States.

Depending on the temper and outlook of the times imprisonment, then, has been justified on many bases: the promotion of religious objectives, the provision of work and training for the criminal, and more recently, the deterrence and rehabilitation of the offender. While failing to achieve any of these objectives in any measurable sense, it is apparent that imprisonment does serve as a means of denouncing certain behaviour in very strong terms and it also serves as a place of exile. When not used with restraint, imprisonment continues

to give expression to latent vengeance or to serve as a dumping ground for minor social problems.

In Canada today, on any one day, roughly one in every 1,000 residents is serving time in a penal institution—a total of 20,000 imprisoned adult offenders. Although statistics are inaccurate on this subject, it is estimated that over 75,000 persons are incarcerated each year either in federal penitentiaries, in provincial institutions or in municipal jails.

Close to one-half of the 4,000 persons sent to penitentiaries each year are serving sentences for having committed non-violent offences against property or the public order. Indeed, less than 20 percent of offenders are imprisoned for committing acts of violence against the person. Statistics reveal similar results in respect of provincial institutions.

Almost 50 percent of prisoners in some provincial institutions were imprisoned because they could not pay fines.

A study by the Commission showed that one out of every seven persons appearing in court for the first time in Canada and convicted of a non-violent offence against property was imprisoned. On a second conviction for a non-violent property offence almost 50 percent of offenders were imprisoned. In the light of this type of information we must ask, what do we hope to accomplish by using imprisonment?

Far from having fulfilled its humanitarian expectations, imprisonment today is seen to be a costly sanction that ought only to be used as a last resort. It is costly to society, to the prisoners and to the guards and prison officials as individuals. How do these costs manifest themselves? To keep a person in a prison costs around $14,000 a year depending upon the nature of the institution. In addition there are the indirect costs arising out of welfare and increased social services to the prisoner's family. It is difficult to see how an expenditure of $14,000 can be justified unless the harm done is correspondingly high and cannot be paid back except through imprisonment.

Industrial work or its equivalent is not common even in the larger penitentiaries. Less than seventeen percent of

federal inmates are engaged in industrial work. Because prisons tend to be remote and closed institutions, prisoners are often cut off from work and from the usual education and manpower training programs in the community.

The prisoner, unlike the free citizen, is not engaged in the regular work process; hence in federal institutions, wages rarely exceed $13.50 a month. The prisoner is not expected to pay taxes as free citizens do, or to pay restitution or fulfill other obligations expected of citizens. In undermining the offender's self-image and depriving him of the opportunities to help sustain his family, pay his debts and contribute to unemployment and pension funds, prisons add to the burdens of society as a whole.

The psychological depression and the anxiety that can be induced by the first few months of imprisonment have been well described in the literature. News reports of suicides and attempted suicides and of violence in prisons give further reality to another aspect of the pressures of prison life.

The effect of all of this on the prison guards and administration cannot be overlooked. What does imprisonment do not only to the captive but to the captor? What social and psychological forces press upon his personality? Are these sufficiently recognized as a cost that society passes on to the prison worker and his family?

There is another and more pervasive cost of imprisonment as presently organized. It tends to generate a lessening of respect for the administration of justice. This loss of respect arises from several causes. Various statutes deal with imprisonment in different ways and fragment decision-making powers relating to sentencing; in part the courts have a say, in part the prison officials have a say, and in part the parole authorities have a say. The problem is that the various statutes do not reflect a common or coherent philosophy. The community hears conflicting statements about what imprisonment is supposed to mean. In the result the public is confused when the judge gives a sentence for a specific time and the offender reappears much earlier in the street. In

fact, some judges also feel thwarted, as do the police. There is a need to clarify what we mean by imprisonment.

Loss of respect arises as well from the closed nature of the prison or correctional system. It lacks sufficient visibility and public accountability. Decision-making in corrections until recently was generally beyond outside review and complaints about unfairness were handled by the correctional branch in its own setting.

At the same time it is known that while the officials are in charge of penal institutions, it is at least partially true that large security prisons can only be run with the co-operation and tacit consent of the prisoners. There are understood limits beyond which the administration may go only at its peril. Yet the almost invisible and non-accountable nature of the prisoners' power results in tension, coercion and injustice within the institutions.

Perhaps these costs are inevitable as long as imprisonment means a place: putting people in boxes and keeping them there. Yet, if imprisonment means sending a person to a place of exile initially, but, depending on the purpose of the sentence, with a clear expectation that part of the sentence will be spent under varying conditions of work and supervision in the community, then some of the costs may be reduced.

2

Aims of Sentencing

As we mentioned in our Working Paper on Sentencing, one of the objectives of criminal law is to protect certain fundamental values including the maximization of freedom and protection from harm. Sentencing and dispositions serve as important reflections of these values.

The Commission has also expressed the view that sentencing and dispositions should seek to restore the harm or social imbalance resulting from the offence, serve as an educative statement about the values society considers important, and in certain cases, aim at separating or isolating the offender.

The settlement or arbitration process considered in our first Working Paper on Sentencing and in the Working Paper on Diversion reveals the importance the Commission attaches to restitution and compensation and its concern for resolution of conflict as an aspect of sentencing and dispositions. This involves a consideration of the victim and his interests. Sentencing and dispositions should be aimed at repairing the harm done, re-establishing human relations and trust, and affirming fundamental values.

We believe the educative aspect of sentencing and dispositions is one part of crime prevention in general. Indeed, sentencing is a very clear expression of the disapproval of certain acts by society. By demonstrating that certain acts are unacceptable, society reaffirms the importance of certain

social norms and, thus repeatedly, reassures law-abiding citizens that their behaviour is approved.

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. In our view the courts should not resort to imprisonment unless convinced that no other sanction can achieve the objectives contemplated by the law. In other words the use of imprisonment should be restrained by the principle of the least drastic alternative.

This principle is doubly important. First, it implies that the choice of a sanction, such as imprisonment, is justifiable only by objectives set out by law. It further implies that the state, through the crown prosecutor, must demonstrate that the suggested sanction is the least drastic means of achieving the objective. Before imprisonment is imposed, the prosecutor should demonstrate to the court's satisfaction that this extreme penalty is necessary to meet the principles and objectives of sentencing provided by law.

In this context the principles of justice, humanity and economy must be taken into account in sentencing. Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective. In this sense the humanitarian sanction is the minimal or least drastic sanction. This is strengthened by the principle of economy which aims at minimizing the burden to society, the penal system, the convicted offender and his family.

3

Reasons for Imprisonment

Imprisonment in its modern context came into general use less than two hundred years ago and, as indicated earlier, has since been widely used and justified in a number of ways. It is often said that imprisonment is what offenders deserve. Its deterrent value has also been emphasized in the belief that an exemplary sanction would deter from crime persons tempted to commit an offence. Some also argue that a prison sentence can intimidate the person serving it, and thus put an end to his criminal conduct. Finally, there is a widespread though declining belief that prison is a good place to rehabilitate a person.

Experience and research in the social sciences now make it difficult to accept with easy assurance the usual justifications for imprisonment. Generally, it is difficult to show that prisons rehabilitate offenders or are more effective as a general deterrent than other sanctions. At the same time it is clear that imprisonment serves to separate or isolate the offender and constitutes a denunciation of the harm done. Considering this, it appears prudent to exercise restraint in imposing this criminal sanction. Imprisonment should be an exceptional sanction and should only be used for the following reasons:

(a) to separate from the rest of society for a period of time certain offenders who represent a serious

threat to the life or personal security of others; and, or

(b) to denounce the behaviour that is deemed highly reprehensible because of its violation of fundamental values; or

(c) to sanction offenders who wilfully fail in carrying out obligations imposed under other types of sentences.

A. *Separation*

Separation or isolation is justified for persons who have committed serious crimes and who represent a serious threat to the life and personal security of others. Included in these offences would be the usual offences of violence including those committed against persons in the course of organized crime. The criteria we think ought to limit imprisonment for the purposes of separation are set out in the next section. The Commission is of the view that it is unjustifiable to use imprisonment for the purpose of isolating persons who have committed minor offences against property or the public order. Nor do we think separation or isolation can be justified because of a lack of other social resources to deal with persistent or annoying criminal conduct of a minor nature.

B. *Denunciation*

Some offences not representing a continuing threat to the life and security of others, may, nonetheless, constitute such an affront to fundamental values that society could not tolerate their punishment or denunciation by any sanction other than imprisonment. This may well include cases of flagrant abuse of trust or public office, or offenders convicted of murder or other serious crimes against the person but who are unlikely to react with violence against other persons.

However, we believe that, as a general rule, we should attempt to achieve the social effect sought by denunciation through the publicity of trial, conviction and pronouncement of sentence without resort to imprisonment.

Since most offences that necessitate separation of the offender are also subject to denunciation there is an overlap between these two reasons for imprisonment. These reasons express, however, different aims calling for different procedures in executing the sentence.

C. *Wilful Default*

Imprisonment must remain as an exceptional sanction, used only when other sanctions appear to be ineffective. In this sense the courts may have no alternative but to use it as a last resort against offenders who wilfully default in carrying out obligations imposed under other sanctions. Persons who are able to pay fines or restitution to the victim, but wilfully refuse to do so, or persons who wilfully default in carrying out their obligations under probation, for example, ought not to escape with impunity. The courts sometimes have no other choice but to impose a sanction of a short prison sentence.

On the basis of these criteria, imprisonment for cases of non-violent offences against property or the public order should rarely be used.

4

Who Decides the Sentence?

The sentence is a statement about values at stake in a conflict involving a victim, an offender, and the state. As indicated in Working Paper No. 3, then, it is appropriate that the sanction be imposed by an independent judicial officer. Thus, sentencing should be a function of the courts and imprisonment should be decided by a judge. Ideally, one can see not only the selection and pronouncement of sentence but the conditions of imprisonment and supervision of release procedures as matters for the courts. As a practical matter, however, the courts are not able to deal with all these concerns. In part, it is a problem of training; in part, of time or resources. For the present, then, some aspects of sentencing must be left to the correctional administration.

The division of responsibility between the courts and the administration with respect to different parts of the sentence must be related to the reasons for imposing imprisonment. Where the sentence is imposed for denunciatory reasons alone, as contemplated in the second category mentioned above, no major changes in the conditions under which the sentence is served should be made except with the consent of the court.

Where the sentence is imposed to separate the offender from the rest of society, there is also an element of denunciation. In these cases the denunciatory portion of the sentence, as indicated later, should remain within the control of the

court. In these sentences, however, the major interest is in the question of continuing risk to the personal security of others. The conditions of the sentence may then vary over a period of time in accordance with the assessment of risk. This assessment and the varying of conditions appropriate to it, should, at this time at least, be left to the correctional administration with ultimate recourse to the courts for the purposes of review only.

Because the sentence of the court ought to serve as an educative statement and be understood as a reasoned disposition, the sentence should be accompanied by written reasons. Such reasons should work for fairness in the system by keeping unnecessary disparities to a minimum and facilitating the task of the courts where appeals are taken. They should also assist the administrative authorities in making decisions affecting the sentence and thus help to avoid conflict and misunderstanding.

5

Guidelines for Imprisonment

It is not enough to decide who is to impose the sentence. It is important to consider what factors or criteria should affect the decision to impose imprisonment. It is also important to consider ways in which decisions affecting sentences of imprisonment can be made as rationally, consistently and fairly as possible. Previous working papers pointed out the importance of sentencing guidelines. Such guidelines would provide explicit principles and criteria to facilitate rational sentencing. When the objectives and criteria governing the use of sanctions are altered, as proposed in this paper, express guidelines become even more important. Without them, it would be more difficult to apply a sanction in accordance with new objectives, to evaluate whether these objectives are met and whether the anticipated results are obtained. In the absence of express guidelines there is also a risk that tradition and existing practices would be perpetuated and the old standards and precedents would continue to determine sentencing. With these considerations in mind, the following guidelines are suggested.

A. *Separation*

In considering imprisonment for the purpose of separating the offender from the rest of society two necessary conditions must be met:

(1) the offender has been convicted of a serious offence that endangered the life or personal security of others; and

(2) the probability of the offender committing another crime endangering the life or personal security of others in the immediate future shows that imprisonment is the only sanction that can adequately promote the general feeling of personal security.

In determining the probability and degree of risk among the other factors, the judge should consider:

(1) the number and recency of previous offences that represented a threat to the life or personal security of others;

(2) the offender's personality;

(3) the police report on the offender's prior involvement with the criminal law;

(4) a pre-sentence report;

(5) all material submissions including expert opinion and research from the behavioural sciences.

In determining the probability and degree of risk the court should place considerable weight on the most reliable predictive factors now available—past conduct. But even so, predictions of future risk are likely to be inaccurate. For example, as a result of research it would appear that for every twenty persons predicted to be dangerous, only one, in fact, will commit some violent act. The problem is in knowing which one of the twenty poses the real risk. This should lead to caution in making a finding of risk, and has implications for conditions of sentence and release.

The court should rarely make a finding that a person is a probable risk to the life or personal security of others unless he has committed a previous violent offence against persons within the preceeding three years as a free citizen in the community. This is not a formula, however, to be rigidly applied. For example, it may be that for a large part of the previous three years, the offender was under strict supervision

or control. Many factors must be considered, weighed and balanced. In the end, however, the policy of the law should take note of the tendency to over-predict risk. As a consequence, there is need for decision-makers to follow clear criteria before making findings of risk.

B. *Denunciation*

Although the court may decide not to impose imprisonment in a given case for the purposes of separation or isolation it may still wish to imprison for purposes of denunciation. Before imposing imprisonment for this purpose, however, the court must be convinced that no other available sanction is sufficiently strong to denounce the offender's criminal conduct. In coming to this conclusion the court should consider:

(1) the nature, gravity and circumstances of the offence; and

(2) the social reprobation in which the offence is held.

C. *Non-compliance*

The third purpose for which imprisonment may be used relates to cases of last resort where the offender's wilful refusal to pay a fine, make restitution or comply with other non-custodial sanctions demonstrates to the satisfaction of the court that a short term of imprisonment is the last resort.

6

Length of Prison Terms

A. *Upper Limits*

Drawing up a detailed scale of prison terms to apply across a range of criminal offences is difficult unless accompanied by studies covering a re-definition and re-classification of offences covered by the Criminal Code. While further work in this respect remains to be done, we would like to present a general framework regulating maximum prison terms.

One of the most striking aspects of prison terms under the present Code is the very wide discretion given judges in selecting a term. Various offences under the Criminal Code are punishable by life imprisonment, fourteen years, ten years, five years, two years or six months imprisonment. Breaking and entering a dwelling house, for example, is punishable by any term up to life imprisonment. So is rape. Theft over $200.00 is punishable by up to ten years and theft under $200.00 by up to two years. Common assault prosecuted as a summary conviction offence can be punished by six months imprisonment while manslaughter carries a sentence of life imprisonment.

These high maximum sentences place an unreasonable burden on judges in requiring them to exercise an unnecessarily wide discretion. In fact these maximum terms appear to be disproportionately high, even anachronistic, when

compared with the range of actual sentences pronounced by the courts. About one to four percent of admissions to penitentiaries in a given year carry terms in excess of fifteen years. It is unusual for a sentence for breaking and entering to exceed three years. The average prison sentence for this offence over the years has varied from fourteen to sixteen months, yet it is punishable by life or fourteen years depending upon whether the premises broken into was a dwelling house or a place of business.

Over the years the very wide discretion given judges in selecting prison sentences appears to have settled around an established average, but wide deviations in particular cases raise a risk of unequal treatment and are a source of unrest in prisons. Moreover, in principle discretion should be no greater than necessary and be subject to reasonable guidelines. The Commission is of the view that the maximum prison terms presently provided by law could be reduced without unduly limiting the discretionary power of the court.

What should be the upper limits in sentences of imprisonment? First of all, the sentence should not deny the offender the possibility of eventual discharge—no sentence of imprisonment should deny hope to the offender. We recommend, therefore, the abolition of life sentences of imprisonment. The circumstances of an offence may lead us to ask why give hope to the offender when he gave no consideration to the victim. The reply must surely be why take our measure of response from the criminal?

Secondly, the upper limits of terms of imprisonment should be related to the purpose of the imprisonment. Prison sentences imposed primarily to separate from society offenders whose conduct represents a serious risk to the life and personal security of others should carry a higher maximum than those aimed at denunciation, and prison terms imposed for wilful default of other sanctions should be of short duration.

Separation or isolation of the offender convicted of crimes of serious violence to persons may justify quite a high maximum. These should vary with the offence and its circumstances, but the Commission is of the view that a sentence of up to twenty years should provide adequate security. At the end of that time there can be recourse to mental health legislation if the offender is mentally ill and a danger to others. Such a procedure should be subject to the same conditions and safeguards as those for civil commitment. Experience shows that most offenders who are believed to be a danger to others appear to be less of a risk with increasing age. Moreover, the difficulty of predicting with accuracy who may or may not pose a risk is so great that the law should proceed with caution. Considering that nearly all prisoners today are detained for less than fifteen years, that prolonged imprisonment makes the eventual successful return of the offender to society more and more difficult, and that very long periods of parole supervision appear to be unnecessary and burdensome, an upper limit of twenty years in the interests of promoting the general security would seem to be adequate. One also has to keep in mind that the function of the prison system itself is endangered by conditions of hopelessness. Beyond a certain point the price to society in economic as well as human terms outweighs the gains.

In some cases, denunciation will be the primary purpose of the sentence of imprisonment, as in cases of flagrant breach of trust, or of serious violent offences against the person where the offender's conduct does not represent a continuing risk to the life and personal security of others. In these cases a maximum term of three years may be adequate. This would apply equally to the denunciatory part of a longer sentence given for the purpose of separation.

When imprisonment is used to deal with offenders who are wilfully in default of obligations imposed under other sentences such as fines, the imprisonment should not, in general, exceed six months.

B. *Minimum Terms*

Should there be minimum or mandatory terms of imprisonment? Such terms are rare under the existing law, but upon conviction of importing drugs under the present provisions of the Narcotic Control Act, for example, the court must impose a prison term of not less than seven years. A second conviction for impaired driving carries a minimum term of two weeks imprisonment.

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.

The phrase "minimum term" is sometimes used in a second sense. In the context of release procedures, it can refer to that part of the prison sentence that must be served behind walls before release on various conditions in the community. Reference has already been made to this question in the context of imprisonment imposed for reasons of denunciation. Apart from this it is difficult to see why there should be a minimum time to be served in complete custody. The emphasis should be less on prison and more on the process of serving a time period under varying conditions of custody and limited access to the community. The question of release procedure is discussed more fully later in this paper.

C. *Consecutive Terms*

What provision should be made in a sentencing structure for consecutive sentences in the case of persons who are sentenced simultaneously on several different convictions? If an offender is currently serving a prison term while convicted of a second offence, should the second term be consecutive to the first or concurrent to it so that the offender serves both at the same time? At present, the court exercises discretionary powers in this respect and can ordinarily determine whether the offender will serve his prison sentences concurrently or consecutively.

If the law makes provision for consecutive sentences, there is a risk of extremely long sentences cumulating in individual cases. Unless some limits are imposed, such sentences may not meet the objectives of separation or denunciation as already described. In addition long consecutive terms would run counter to the principles of justice, humanity and economy. On the other hand, the complete abolition of consecutive sentences might be interpreted as allowing certain serious criminal acts to go unpunished and might even encourage some offenders to take further risks. In exceptional cases, the sentence might even be considered as unfair and too short in comparison with other sentences imposed on others.

We believe therefore that the courts should retain the power to sanction several offences by a common sentence that can be longer than that for a single offence. However, such power should not apply to offences arising out of the same criminal enterprise, but to wholly separate conduct. Finally, the sentence in such cases should always respect the general objectives of imprisonment and take into consideration the criteria for the imposition of a common sentence formulated in the sentencing guide.

In general, we believe the maximum term for each category of offence will be sufficient to reach the objectives the court has in mind and when it is necessary to exceed such maximum terms by imposing consecutive sentences, the court

should justify its decision in terms of the doctrine of the least drastic alternative. However, no common sentence should be in excess of double the maximum permitted for the most serious offence and in any event no more than twenty years.

7

Exceptional Cases

The general public is sometimes shocked, and with good reason, by acts of violence committed by some offenders. These offences, though few in number, undermine the general security and give rise to the impression that our society is prone to violence. Such events, which are generally unforeseeable, understandably give rise to public criticism and demands that Parliament amend the law in order to give greater protection to citizens.

A. *Habitual Offenders*

The first group of offenders to be the subject of special sentencing provisions and indeterminate life sentences were those found to be habitual offenders. The motivation behind this type of legislation was the desire to lock up the dangerous hardened criminal for long periods of time. Canadian legislation enacted in 1947 was modelled on an English statute of 1908 which was later repealed as ineffective. This type of legislation has been strongly criticized by various writers and committees, including the Canadian Committee on Corrections (The Ouimet Committee).

In their report on corrections in Canada, the Ouimet Committee pointed out that the habitual offender law was applied unevenly across Canada, and that it tended to reach

petty offenders against property rather than dangerous or professional criminals. In addition, this law has failed to create special opportunities to reform or rehabilitate the offender.

The Commission is of the view that the habitual offender legislation has not been effective and recommends its abolition. Persons already sentenced under those provisions should have their cases reviewed immediately by a judge with a view to their possible release under supervision or control and termination of their sentence after a given period of successful living in the community.

B. *Professional Criminals*

Apart from the habitual offender legislation, Canada has not had any law specifically aimed at professional criminals. In the United States there continues to be a high interest in special sentencing provisions of up to twenty years as a means of striking at such criminals and organized crime.

While one may sympathize with this desire to legislate prison terms for professional criminals, it raises many difficulties. Is the problem one of not having long sentences available or of not being able to get convictions? How does one define "professional criminal" with precision? Again, our law is based on the assumption that a man should be sentenced for the harm he has done, not for what he is. Yet "professional criminal" and "organized crime" refer to a way of life, to a status or condition, and not to criminal acts. Must the Crown prove such a way of life beyond a reasonable doubt?

The most recent attempt at definition is provided by the National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections as follows:

> ... [A] professional criminal [is] a person over 21 years of age, who stands convicted of a felony that was committed as part of a continuing illegal business in which he acted in concert witth other persons and occupied a position of management, or was an executor of violence.

> An offender should not be found to be a professional criminal unless the circumstances of the offence for which he stands convicted show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources that do not appear to be from a source other than criminal activity.

In our opinion the criteria in this definition are too vague. "Illegal business", "acting in concert" and "position of management" are elastic terms. While the definition does appear to be directed toward crime's upper management, the experience with laws relating to drug traffic and habitual offenders show how often such legislation is applied to petty offenders or underlings while seemingly "respectable" leaders in the illegal business avoid detection. Most of the persons aimed at by this kind of legislation escape, for hard evidence is difficult to obtain and convictions are infrequent. Special sentencing provisions then become more symbolic than real.

As we have recommended earlier in the paper, however, evidence of conduct in the community as contained in police and pre-sentence reports should be available to the court for the purpose of determining the length of sentence. It will also be available to subsequent authorities for determining the nature of control necessary. Having regard to the general failure of special forms of legislation we recommend that exceptional cases be dealt with under the general sentence structure.

C. *Dangerous Sexual Offenders*

Another attempt to deal with exceptional cases was the enactment in 1948 of special laws for the detention of persons found to be dangerous sexual offenders. Experience with this type of law in Canada and elsewhere, however, has been one of general failure. Growing experience and research shows the difficulty of making reliable findings about dangerousness. Faced with this unreliability the indeterminate life sentence

now provided for this class of offender is open to criticism. Progress in developing treatment has been disappointing as well. In addition, the law appears to be unevenly applied across the country and has been criticized for its lack of fairness and sufficient safeguards by the Canadian Committee on Corrections and others.

As already mentioned, it is difficult to describe with accuracy the class of persons that should be designated as dangerous sexual offenders. Vague and imprecise laws spread their net too widely. As a result persons are brought within their provisions who probably should not be. Another vital criticism is that we now realize how very badly we make judgements about dangerousness. Not even psychiatrists are of real help here. We do not know how to predict dangerousnees or degrees of dangerousness with accuracy.

The problem is compounded by the difficulty of predicting how a man will behave on the street by assessing his performance behind bars. It cannot be done at all effectively. The best way of assessing risk is to make observations under conditions of controlled release. This is consistent with the finding that the best predictor of future behaviour is past behaviour. Nor can the special sentencing laws for dangerous sexual offenders be depended upon any longer, as they were at one time, on the ground that long-term medical treatment would reduce or eliminate dangerousness. It is an illusion. We know very little about changing human nature even under the best of conditions.

Serious offences, including sexual offences, should be dealt with under the ordinary sentencing law. If the offence warrants a sentence of imprisonment for purposes of separation, this offers the possibility of a long period of custody and release under controlled supervision where needed. Experience seems to show that with maturity and age offenders are less likely to commit further crimes of violence. In view of the limits of rehabilitation, the costs of over-prediction, and the general principles enunciated earlier, a possible sentence of up to twenty years in cases of serious violence against persons

should be adequate to deal with offenders who are thought to be a continuing risk to the personal security of others.

It should not be forgotten that a prisoner can also be prosecuted and convicted for offences committed during his imprisonment. Prisoners who commit offences while under sentence could be sentenced for these additional offences within the limits described earlier under consecutive sentences. In addition, some prisoners who present a serious threat to the personal security of others may suffer from a mental illness justifying their hospitalization during or after their sentence.

The existing law relating to dangerous sexual offenders should be abolished. Further, a judge should be appointed to inquire into the cases of the men already found to be dangerous sexual offenders with a view to establishing a release program, a periodic review of their cases and termination of their life sentences after a given period of successful living in the community.

8

Conditions of Sentence and Release Procedures

A. *Jurisdiction*

We have just indicated the reasons justifying the use of imprisonment and the objectives and criteria to be used as guides by courts in imposing prison sentences. We also proposed a sentencing guide and simpler types of prison sentences to ensure that this severe sanction is used with restraint and in a clear and just manner. A consideration of these matters revealed the importance of two further issues: the control and the content of conditions of imprisonment and release.

Conditions of sentence and programs for the release of offenders should reflect the purposes of the sentence. Where imprisonment is for purpose of denunciation only, the ultimate control of the sentence, as indicated earlier, should be with the court. This is subject to the recommendation that in such sentences the final third should be fixed by Parliament as a portion to be served in the community in order to facilitate the offender's re-entry into the community. During the first two-thirds, however, any significant change in the conditions of the sentence should be subject to review by the court. This would not prevent the prison administration from making day-to-day decisions in the ordinary way, but should those decisions be seen as seriously modifying the denunciatory aspects of the sentence, the court would have a power of review. During the final third of a sentence imposed for purposes of denunciation, the offender would be released to the

community with such help or assistance as might be needed. The offender would not be returned to the institution unless he was subsequently convicted.

If a sentence is imposed both for purposes of denunciation and separation, two-thirds of the denunciatory portion would be under the ultimate control of the courts as outlined above. The remainder of the sentence would follow the procedures outlined for sentences of separation.

Jurisdiction over a sentence or a portion of a sentence imposed for purposes of separation should be with the correctional authorities as described below. Since this type of sentence involves an assessment over time under varying conditions it can best be supervised by the correctional authorities. As indicated earlier, ideally, control in this type of sentence should also rest with the courts, but at the present time this is not practical.

B. *Conditions*

Imprisonment may sometimes be necessary even though harsher sanctions cannot be shown to be more effective than those that are less severe. Despite the negative influences of imprisonment and its generally damaging effects on individuals, prisons may still be necessary to isolate, to denounce and to make sure the law can cope with wilful default.

Yet the assumption is that the offender, as a general rule, will return to the community. This necessarily affects the conditions of the sentence. Imprisonment is a sanction involving a greater or lesser deprivation and restriction of access to the community, its resources and human relationships. The extent of this deprivation will vary depending on whether the purpose of the sentence is the separation from society of those who have endangered others, or simply denunciation of reprehensible conduct, or sanction for wilful default under other sanctions.

Where imprisonment is imposed to separate those who have endangered others from the rest of society, different restrictions on freedom of movement are necessary than in the case of pure denunciation. In the interests of security, reasonable limitations may need to be placed on visiting, correspondence, purchase or movement within or outside prison walls. In general, the object of facilitating the offender's successful return to the community will be enhanced by permitting living conditions in prison to approximate those in the community.

This is important in three respects. First, it assumes that the prisoner is expected to discharge the normal duties and responsibilities of all citizens; such as, for example, to work in order to help support himself and his family; to pay out of wages any dues covering hospital insurance or unemployment insurance and pension schemes; to pay restitution to a victim who may have been injured; to further educate himself in a manner and at a pace as similar as possible to that of other citizens; to contribute to the decision-making and upkeep of the institution to the extent that it is possible and practical under the circumstances; to maintain contact with his family and to make reasonable plans for his return to the community; and to discharge with responsibility his obligations on his return by stages to the community.

Second, it follows from these duties that the offender should have many of the opportunities for work, pay, education and access to health or other community resources that are available to other citizens. Moreover, his participation in recreational activities, socio-cultural programs or strictly therapeutic programs should be voluntary to the same extent as in a non-imprisonment environment. Participation in these matters should not interfere with the discharge of an offender's responsibilities and duties as a citizen. One should not forget that there are disadvantaged members among free citizens who are also expected to meet their social obligations.

The third object of letting living conditions while imprisoned approach as much as possible living conditions outside of imprisonment enables better decision-making about the prisoner. Since consideration of an individual's behaviour

is a valuable indicator of the risk he may pose to the security of others, the closer conditions of imprisonment approximate those in the community, the more likely will an accurate assessment of risk be made. Such conditions also provide an opportunity for the offender to demonstrate to what extent he is able or willing to assume his responsibilities as a citizen.

C. *Release Procedures*

Many offenders, particularly those imprisoned in order to separate them from the rest of society, have problems of adapting to society. We are convinced that more effective assistance can be given them in facing their problems under conditions of controlled liberty than under total confinement. As someone once said, it is difficult to train an airplane pilot in a submarine! The doctrine of the least drastic alternative as well as public protection requires that imprisonment include a controlled release program.

Where the sentence of imprisonment is imposed in order to separate the offender from the rest of society we recommend a graduated release from complete custody through various stages to ultimate release. The prescribed staging should be developed through the Sentence Supervision Board, described later, and progress from one stage to another should depend on the offender's behaviour during the previous stage. With this category of offenders, decisions to release would include an attempt to identify offenders less likely to commit offences endangering the life and security of others and those more likely to do so.

The progress from one stage of release to the next of offenders less likely to commit further acts endangering the personal security of others should present few problems; any given stage might even be by-passed on recommendation of the releasing authority. In dealing with the group more likely to commit such offences, however, the releasing authorities, applying definite criteria, could deny transition to a subsequent stage and could even authorize a prisoner's return to a

previous stage. However, as a rule, progress should be normal with automatic admittance to the next stage of conditional freedom unless by his conduct the offender indicates he is not yet ready for that stage.

The transition from total custody to stages of decreasing restriction of freedom should begin with supervised temporary absences at the appropriate time. With rare exceptions prisoners should be given absences to allow them to maintain, renew and build family and community relationships. In addition, such leaves would also test the offender's ability to act with responsibility in the community. Temporary absences should be denied only in special cases where the correctional administration shows to the satisfaction of the releasing authority that such an absence would present a threat to the life and security of others.

A successful first temporary absence would entitle the prisoner to other periodic absences. These leaves should be progressively longer and granted at increasingly frequent intervals. When an offender has successfully completed his program of temporary absences over a period of time proportionate to the length of his sentence, he would enter the next stage, which we refer to as day release. He would then be able to attend school, work or seek employment in the community during the day but return to the institution, a community residential centre or a specific residence subject to conditions of personal restraint. The final stage would consist of release in the community under reduced direction, support and supervision. As indicated earlier, as a general rule, all offenders would have to serve the last one-third of their sentence in the community.

In general, the transition from one stage to another should depend on the absence of criminal conduct and the observance of the conditions of that stage; the decision should not be based on a prediction of risk in the abstract but on conduct. It is important to remember that rehabilitation cannot be used as a primary reason for imposing imprisonment in the first place. Therefore, it is logical that the timing of

release and the transition from complete custody to lesser degrees of restricted freedom should ordinarily not be dependent on the offender's reaction to treatment but on his behaviour and acceptance of responsibilities. In particular, transition from one stage to another should not be denied simply because the offender did not wish to participate in the voluntary institutional program relating to sports, cultural activities or rehabilitation. Denial of entry to the next stage would, however, be justified if the offender failed to live up to his responsibilities by refusing to work or undertake an educational or training program. As indicated earlier, return to a previous stage would be justified where a prisoner committed a crime or failed to comply with the conditions of his release. In the interests of justice, these conditions should be specific and objective, and in the interests of fairness related to the offender's capacities. These conditions should be worked out in conjunction with the offender and clearly understood by him.

A graduated program of release through various stages, however, would not be necessary when imprisonment is imposed solely for purposes of denunciation. In such cases, conditions of imprisonment and release procedures are not affected by the need to re-socialize the offender or to develop and test his capacity to act responsibly in a graduated release program. In cases of simple denunciation, and this includes the denunciatory portion of a mixed sentence, the primary concern is that release procedures should not be such as to undermine the seriousness of the sentence and ultimate control over the sentence remains with the court. At the same time the negative and damaging effects that usually accompany imprisonment should be offset so far as possible by the temporary absence program and by release under supervision for the last one-third of the sentence. These are not simply humanitarian gestures. They benefit society, the offender and his family in that the offender maintains links with his home and gets help in meeting tensions and problems arising during the transition period from an institution back to the community. For humanitarian reasons, upon applica-

tion by the offender, release before the two-thirds release date may be justifiable under certain conditions. Such early releases should be exceptional and subject to the approval of the court.

Imprisonment may sometimes be imposed in cases of wilful refusal to comply with conditions imposed under other penal sanctions. It is difficult to deal with the stubborn citizen who refuses to co-operate. The law's requirements should be met, but in so far as possible the conditions of imprisonment should leave the door open for re-socialization and early discharge if the offender discharges his obligations.

As indicated above, the purpose of the sentence, the custodial level and hence the degree of personal restraint should be in accord. These purposes will shape the conditions of imprisonment including the degree of security. Following the principle of restraint, prison institutions and conditions of imprisonment should avoid unnecessary restrictions whenever possible. Conditions of maximum security should be seen as a retrogressive stage to which the offender could be committed when his conduct shows that he is a high escape risk or poses a serious risk to the life and security of others thus making such conditions necessary. The decision to place an offender in severe security conditions should be ratified by the Sentencing Supervision Board, referred to later in this paper, and continued detention under oppressive security should be permissible only when the Board so decides. Moreover, the Board should be obliged to review such cases at periodic intervals and be satisfied that continued detention under special security is absolutely necessary.

Studies have shown that the offender's conduct during the post-release period is one of the best indications of whether he is likely to commit further offences. An individual who has not returned to crime in the two years following his return to the community, will very likely not recidivate. Thus, in order to lighten the burden on the supervision service and correctional budgets, and in order not to subject the offender to unnecessary pressure or restraint, we recommend that all

prisoners on release in the community should no longer be subject to conditions and supervision after two successful years, unless the correctional administrators are able to show that supervision and assistance are still required. A reduction of conditions of supervision would not terminate the sentence; the offender would still be liable to imprisonment to complete his sentence if he were found guilty of a criminal act before he had served his entire sentence.

Finally, supervised release in the community should not be too long. Several committees and commissions have already recommended that sentences of imprisonment should be terminated in cases where the prisoners have served a given portion of their sentence in the community without committing new offences. There is merit in the suggestion that upon application to the court in such cases the judge should have the power to terminate the sentence.

9

The Sentence Supervision Board

Clarity and uniformity of approach in sentencing should be encouraged by clear and precise sentencing guidelines and express criteria for decision-making. Sentencing may also be improved by paying further attention to decisions affecting the carrying out of the sentence. Indeed, the Commission is of the opinion that from the point of view of the public, the prisoner and correctional officials, there is much to be said for making some types of correctional decisions openly and in a way that is reasonably simple and fair. While there can be no doubt that many types of decisions currently made by prison officials and parole authorities should remain discretionary, other types of decisions affecting the sentence should be made initially by an impartial body or be subject to review by an impartial body.

The Commission's position on the extent and scope of such powers of review awaits the completion of studies now underway on decision-making by parole authorities and prison officials. Suffice it to say that the Commission's tentative position reflects a general concern for openness, visibility and fairness in the way decisions are made. The courts, the legislatures and administrative officials themselves, sometimes under criticism from various sources, are already moving in this direction.

In our view, it would be helpful to have a board independent of the correctional and prison administrations charged with the responsibility for making or reviewing key

decisions affecting conditions of imprisonment and release procedures. This board would not hear any appeals against sentence, for that is a judicial matter for the courts. Rather it should be concerned with seeing that the sentence is carried out fairly and according to law. In this respect such a Sentence Supervision Board should have powers to make decisions, to review, and generally, to supervise conditions of imprisonment and release procedures. In our opinion, such a board would be something like the existing Parole Board, but its jurisdiction would be somewhat different. Its decisions should be subject to the general control and supervision of the superior courts. We see no reason why the Board should not adopt reasonable and adequate rules of procedure to meet the requirements of the courts and the demands of sentencing.

The Board could be composed of persons such as members of the Parole Board. Members should have a variety of backgrounds and experiences. A number should have a good knowledge of the correctional field and at least some members should have legal training or experience in formal decision-making. The independence of the Board is important, and this could be secured in several ways. Among these we include appointment for a reasonable term at the pleasure of the Governor-General with reasonable remuneration. We recommend that this Board be set up so as to permit it to make decisions on a regional basis.

The Sentence Supervision Board, as already indicated, should have power of original decision-making in some matters, and powers of review in others. However, the prison administration should be free to make the initial decision in many of the matters listed below, with review being either automatic or optional depending on the gravity of the deprivation.

Ultimate control over conditions of sentences and release procedures as indicated would be with the courts or the Sentence Supervision Board depending upon the type of sentence. In sentences carrying elements of both denunciation and separation this divided jurisdiction may give rise to prac-

tical problems. Hence it is suggested that in all cases changes in the conditions of sentence or release rest initially with the prison authorities, with review by the Sentencing Supervision Board. In cases of denunciation, however, the decision of the Board would be subject to review by the court. The same, of course, applies to the denunciation portion of a mixed sentence of denunciation and separation. With experience, the Board, the courts and prison officials should produce policies and criteria to assist in the disposition of future cases. Through the Board uniformity and consistency in decision-making should be encouraged.

The matters that should be subject to review by the Board or the court in appropriate cases may include power:

1. to refuse a first temporary absence at the prescribed time or any other temporary absence provided by regulations;
2. to refuse to permit a prisoner to begin the next stage at the prescribed time;
3. to grant additional temporary absences to prisoners who request them or to shorten or disregard a stage, in compliance with the criteria stated in the regulations;
4. to impose special conditions of personal restraint at any stage where the offender does not accept them voluntarily;
5. to revert prisoners to a former stage through revocation of day release, community supervision, or through transfer to maximum security conditions;
6. to serve as a disciplinary court for serious violations of regulations, or for offences which entail severe punishment such as solitary confinement for a period exceeding one week, or fines or compensation involving large sums of money. In the case of serious offences, the prisoner should be prosecuted in court.

As indicated above, the prison administrators would continue to make most of the decisions affecting the daily routine

of imprisonment but the Board, subject to review by the court in cases as already indicated, should have the power to review more important decisions when the prescribed procedure has not been followed or when the criteria specified in the regulations have not been applied. We wish to emphasize that, in our opinion, the Board should intervene only in the more serious cases. It would be desirable to have some types of problems or disputes settled inside the institution by conciliation or other procedures which are less formal but nevertheless fair. Among the matters that should be reviewable by the Board and ultimately by the court are the following:

1. disciplinary sanctions;
2. all cases of offenders detained for six months under special security conditions;
3. deprivation of medical, psychological, psychiatric or other services normally available to citizens.

In recent years much attention has been paid to fair procedure and the rules that should govern the operations of various boards and tribunals. When, for example, should a hearing be held? How much time should a person have to prepare for such a hearing? What rights should offenders have to see their file or to know what is in it? How much information is required for effective participation in a hearing? What additional assistance is needed? Should a record be kept of what goes on at the hearing? Should all decisions be justified in writing?

As already indicated, the Commission has on-going studies in this area. When completed they should be of help in determining the procedures that would best meet the demands of justice and permit bodies such as the Sentence Supervision Board to operate efficiently and fairly. Later reports will describe our findings.

10

Conclusion

This, then, completes the outline of principles which, in our view, ought to govern the use of imprisonment. For various reasons imprisonment will remain a practical necessity in dealing with some offenders, particularly those who engage in violence against the person. We should, however, use imprisonment selectively and with restraint. Extensive resort to this sanction may only increase costs and risks to society rather than reduce them. We suggest in particular that imprisonment be imposed only for specific purposes. We further suggest that the sentence of imprisonment should be of limited duration and by its very nature be understood to involve varying conditions of custody or supervision inside and outside prison institutions. It is important in our view that the conditions affecting the carrying out of the sentence be consistent with the purpose of the sentence imposed. Major decisions affecting the carrying out of the sentence should be made openly and according to recognized rules of fair procedure.

These principles should provide the framework for the development of administrative policies, rules and practices. The Commission recognizes that much work remains to be done in this respect.

The proposals in this paper, for example, leave no scope for remission laws as presently conceived and will mean changes and simplification in other release procedures. Also, very little has been said about ways of dealing with problems

arising inside the prison such as those handled at the present time by Warden's Courts, Ombudsmen or Correctional Investigators. Their function has to be based on regulations that acknowledge the special conditions and problems arising in prison. Procedures and regulations have to be decided on the basis of legal principles that assure fairness and enable the community to become more familiar with the actual workings of the prison and release system.

These suggestions for safeguards in carrying out sentences of imprisonment bring to an end our recommendations on prison sentences. On the basis of our proposals and the work still to be done, we are hopeful that the correctional system will be more just, more humane and in better harmony with the principles of criminal justice and the needs of society.