



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

**the
principles of
sentencing and
dispositions**

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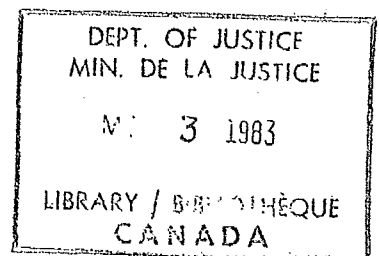
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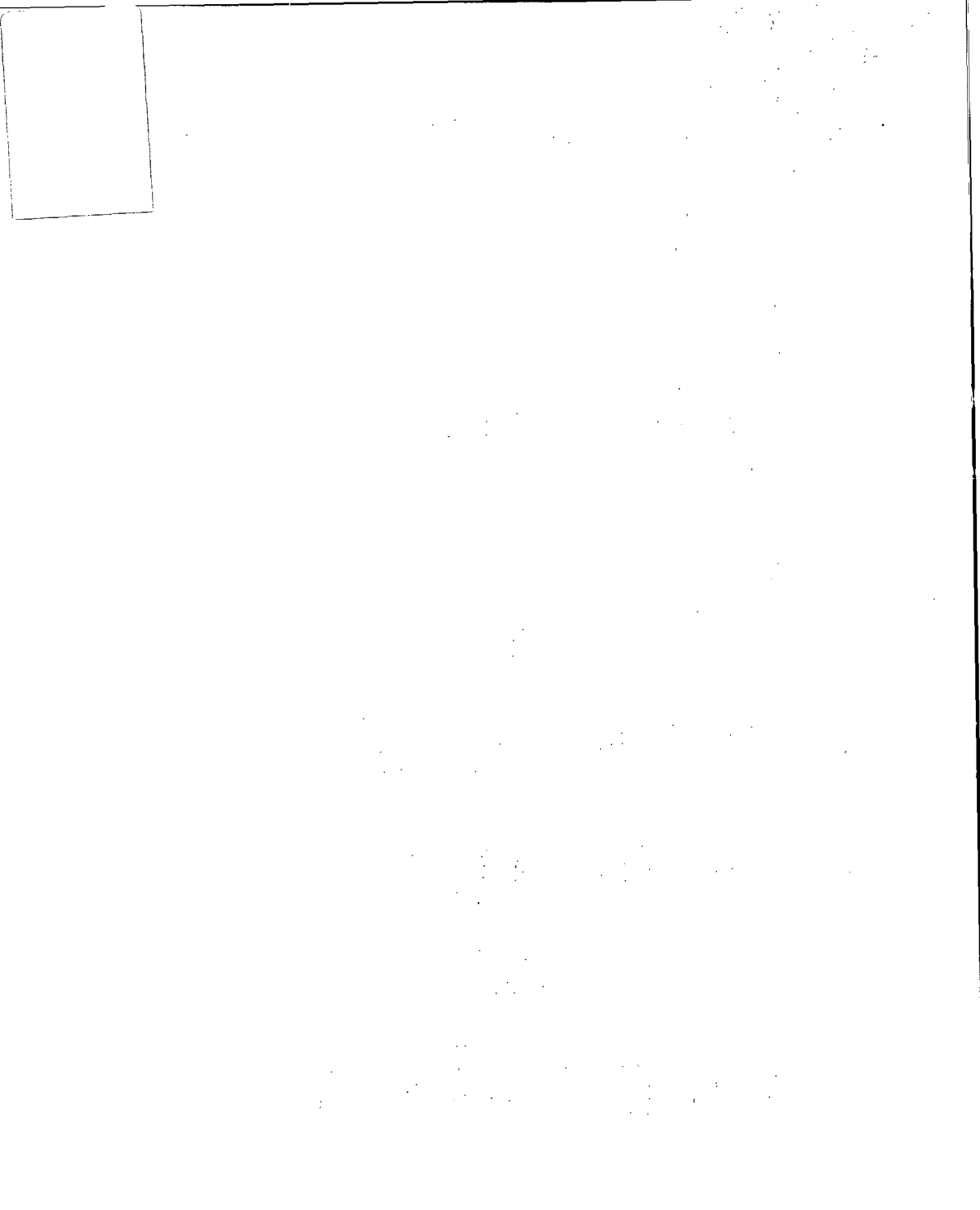
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March 1974





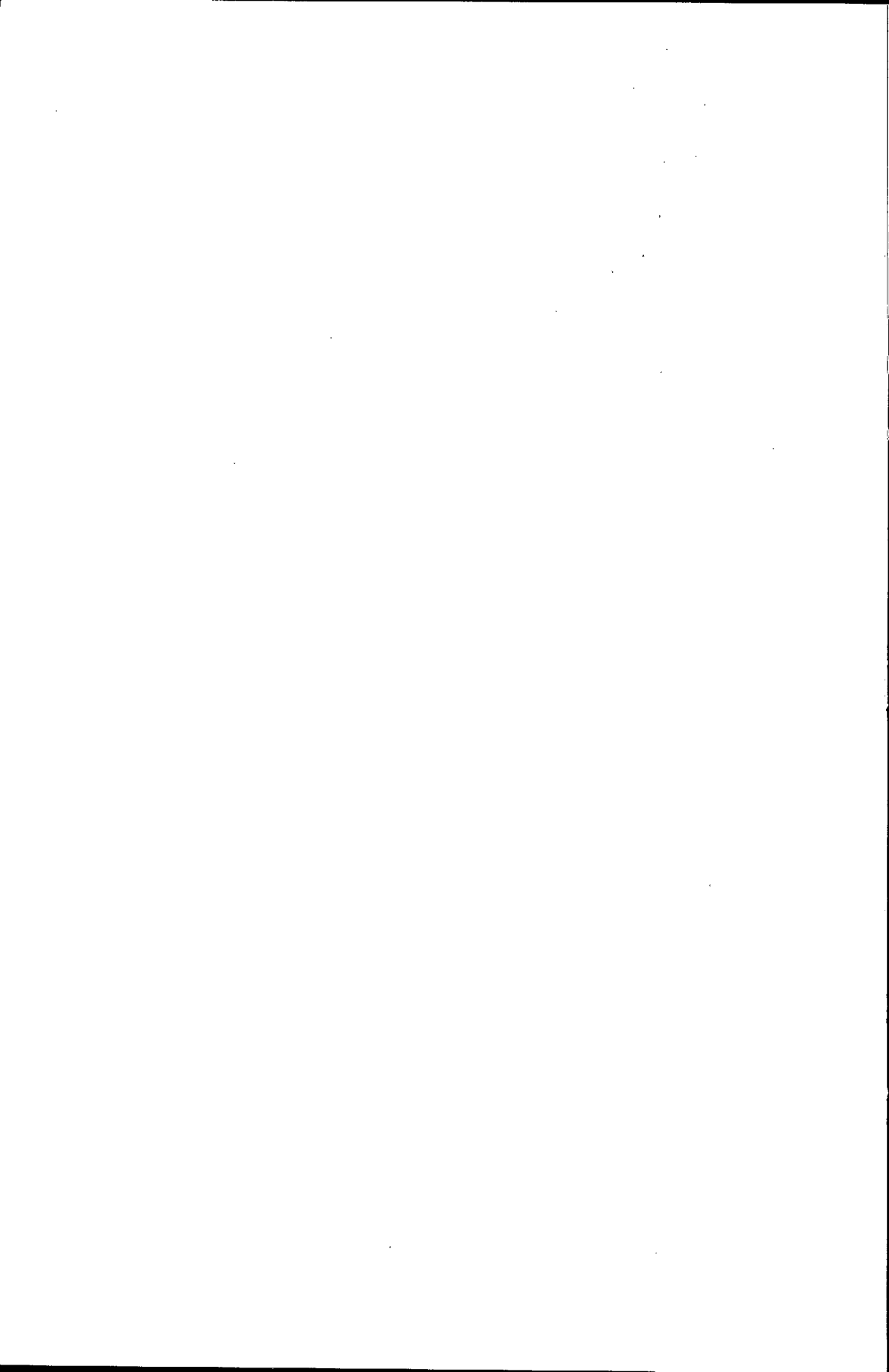
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NOTICE

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 by July 1, 1974, to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
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Commission

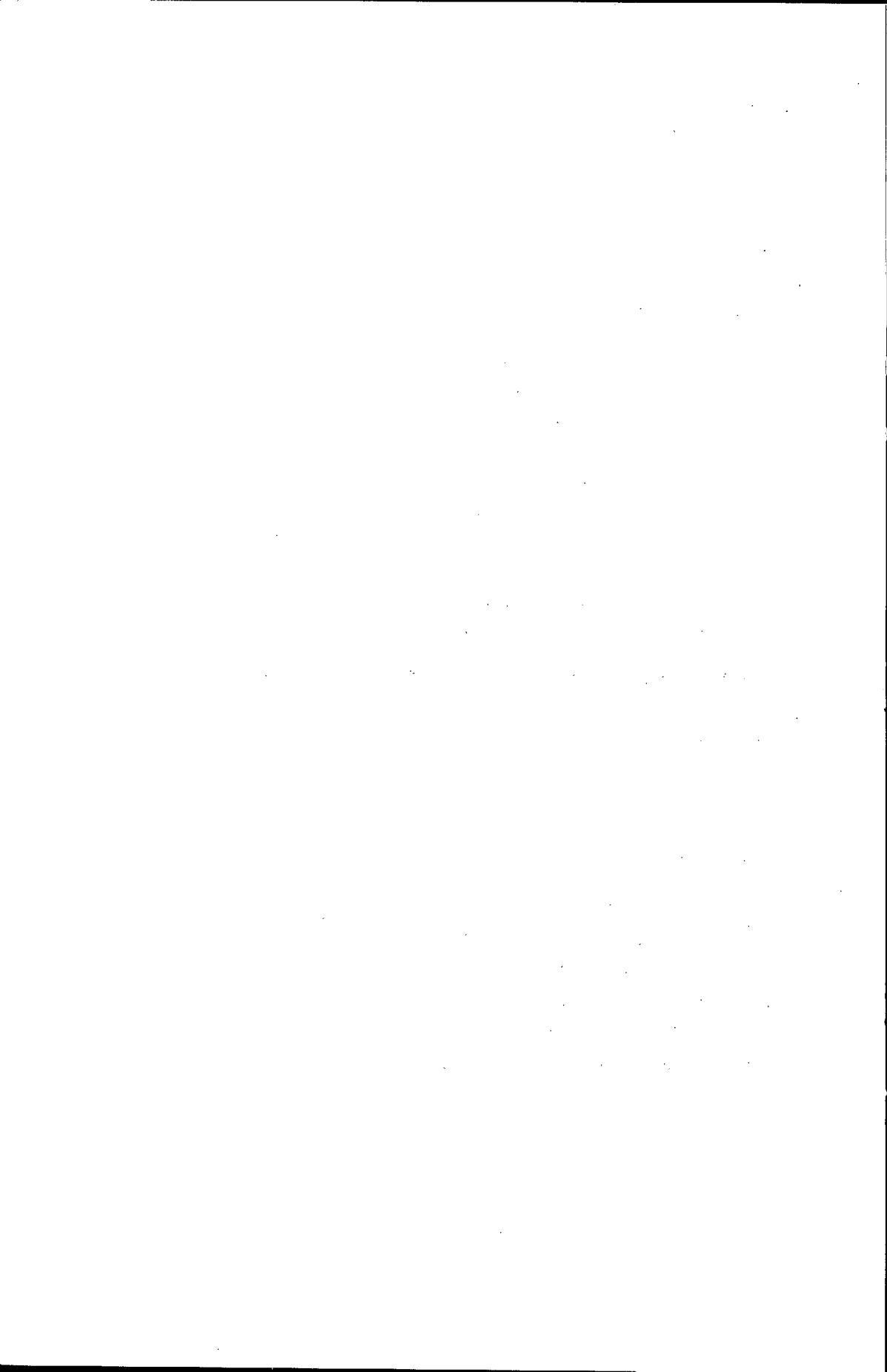
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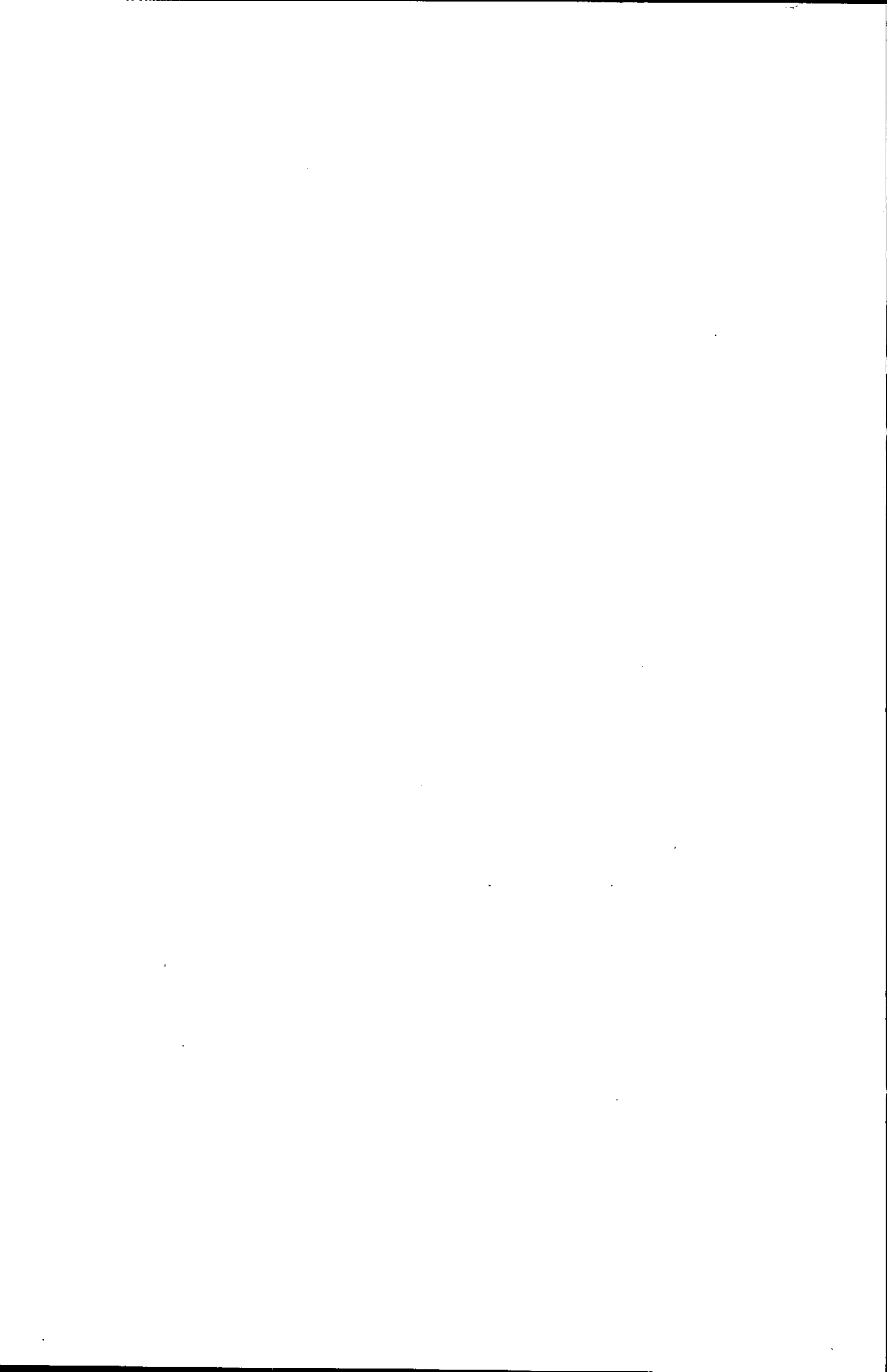
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Preface

This is a general introductory paper on the subject of sentencing and dispositions. It does not purport to be an academic treatise or a detailed analysis of all the issues in the area but rather seeks to identify the major issues while leaving further analyses for individual follow-up papers. For example, other papers will examine issues relating to imprisonment, deterrence, probation and compensation to victims of crime. Similarly, while the need for diversionary procedures are outlined in this paper it is contemplated that subsequent papers will examine such alternatives in more detail. In addition, other Commission papers will examine topics related to sentencing and dispositions such as the classification and definition of offences.

The purposes of this paper are to raise what are seen to be core issues in sentencing and dispositions, to indicate a general approach or position on these issues, to suggest that fairness and rationality in sentencing would be encouraged by a legislative statement of principles and criteria and to invite public discussion on these points. Consequently, the paper is not laden with detailed references to academic writings or scientific reports. Such writings and reports have been taken into account in formulating the paper. Supporting material and references are available at the Commission.

In drafting this paper, terminology has been an ever present problem. Words such as "punishment" and "treatment", for example, are used by different people in different ways. In addition, "retribution", "rehabilitation", "deterrence" and "incapacitation" have various meanings that may not be clear even to those who use them. They, nevertheless, imply ideological approaches to the question of sentencing. Today, changing values and concerns over the purposes of criminal law and sentencing suggest not an abandonment of the old terms but a decreased emphasis on them. Accordingly, in this paper rather than define "punishment" to mean any imposition by the state in the name of criminal law including medical or other treatment, the word "sanction" has been used.

In this sense, "*sanction*" means a penalty imposed; it may be imposed for purposes of punishment, protection, restitution, or treatment. The notion of "sanction" is wide enough to include such orders as conditional or absolute discharge: orders which can hardly be described as either punishment or treatment. Sanctions may be con-

sensual as in restitution, or they may be imposed without the consent of an accused as in the case of imprisonment. In the sense that they take note of the wrong done, sanctions have a value in themselves.

Punishment is used in the narrow sense of a sanction imposed for the purpose of giving adequate expression to the seriousness of the offence and concern over damage done to individual rights and social interests. In reflecting a need to right the wrong and to relate the disposition to the seriousness of the offence, punishment may contain elements of a limited retribution and emphasize the common good and the need for public protection.

Deterrence as used in this paper, refers both to "general deterrence", sanctions imposed for the purpose of threatening or "educating" potential offenders to stay within the law; it also includes "specific deterrence", sanctions imposed for the purpose of restraining a specific accused from repeating his offence.

As used in the paper, *rehabilitation* relates less to the common good and more to specific offenders. It refers to those procedures that are used in favor of offenders. In a sense, these procedures are by way of mitigation of sanctions.

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

Disposition is used to refer to the actual sanction imposed in sentencing, whether this be at a pre-trial diversionary procedure or following conviction at a regular trial.

The organization of the working paper shows that we do not consider "sentencing" as a function which begins at the end of the trial and ends at the beginning of the sanction but as a process related to all stages of the administration of justice. The pronouncement of an amount of money to be paid or of a time to be served in an institution or even the imposition of such measures as probation, do not provide sufficient grounds to re-evaluate and to re-shape what many consider to be the cornerstone of the criminal process.

Introduction

The purposes of the criminal law and of sentencing and dispositions are closely tied together. Unless we know what the purposes of the criminal law are, or ought to be, we will not know how to formulate a consistent and rational sentencing policy. How a society defines those purposes and aims tells us a great deal about the kind of people who live in that society and what their values are. Quite clearly, in a fast changing society, such as ours today, it can be expected that the criminal law may be regarded differently than in a stable society which saw the enactment of the present criminal code over seventy years ago.

In those days, men were confident that they had the answers to a whole range of social problems including criminal law; today men are not so confident, for many of the assumptions of Victorian morality have been abandoned under the impact of rapid social and technological change.

This rapid and accelerating change in values is one of the most dramatic developments in the history of man. Many people grappling with the problems of drug use, of increasing petty theft or death and injury caused by automobile drivers or the risk to life and health posed by industrial and urban pollution, may agree with Alvin Toffler when he says that changes in values are now so rapid that the identity between one generation and the next is shattered. Should this generation presume to use the criminal law to bind the values of future generations?

Since the criminal law is only one of the ways in which society attempts to promote and protect certain values respecting life, morals and property, it becomes important, if we are to avoid unnecessary social conflict and alienation, that the criminal law be used with restraint. We may choose to be tolerant of different life styles and values rather than rigidly repressive.

As to certain core values respecting the dignity and well-being of the individual or the ultimate authority of state power, there may be a wide measure of agreement and support. In respect of other values relating to life style and morality, including the use of alcohol and drugs, obscenity or certain kinds of sexual conduct, there may be a wide measure of disagreement as to which values should prevail.

Where conflict arises in an area in which values may be changing or uncertain, or where the injury to the protected value is small, we may

not wish to resort to the full force of the criminal trial, conviction and sentence. Within the criminal law, is there not room for settlement and arbitration as well as for adversary court room trials? Is there not room in a large number of cases for recognizing the injury to the victim as well as the injury to society? The least damaging intervention by the state and the most satisfying intervention as far as the victim is concerned may often be encouragement of restitution or other settlement or an arbitration at the consent of the victim and the offender, again with a view to restitution and compensation.

Such an approach draws from historical experience indicating the inevitability of crime and the futility of trying to stamp out conflict between individuals. It recognizes the need to protect, support and make clear core values without assuming that offenders are sick and in need of treatment. Nor does it assume that simple vengeance is an appropriate response to crime generally. Rather, it is suggested that society's interest in having certain values upheld and protected can often be met by giving primary attention to the injured victim and by promoting a fair and just reconciliation between the offender and the victim.

In framing a criminal law and sentencing policy for the next few years, can we do better than to recognize the limitations of criminal law and corrections? Can we do better than to insist that whatever state intervention is taken through the criminal law in the lives of individuals, it should be justifiable as serving some common good, and that the intervention be limited by considerations of fairness, justice and humanity?

Purposes and Principles

In the sentencing and disposition of offenders, a prime value ought to be the dignity and well-being of the individual. It is self-evident that criminal law and social change in Canada seek to articulate, distribute and protect this and other values important to society. Laws protecting inviolability of the person and sanctity of life are simply illustrations of the prime value placed on individual dignity and well-being. This value commands that attention be paid not only to the interests and needs of the collectivity but to the offender and victim as well.

Enhancement, re-alignment and protection of community values justifies intervention by the state in the benefits or rights enjoyed by an offender. Such intervention, however, cannot be justified where there is no net gain to the interests of the community, including the victim and his family.

Thus, there are two bases upon which to justify an initial intervention by criminal law and sentencing: the common good and the sense of justice which demands that a specific wrong be righted. In other words, state intervention to deprive offenders of their property or freedom may be justified on a theory of justice according to which the wrong done ought to be righted. It would seem, however, that as a preliminary justification, it should be shown that state intervention would serve the common good; otherwise it could be said that men should be subject to sanctions, even though such sanctions appear useless.

No matter which of the two bases is used as a justification for initial state intervention, it is important, in deciding questions of sanctions, that state intervention be limited so that (1) the innocent are not harmed, (2) dispositions are not degrading, cruel or inhumane, (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally, and (5) sentencing and dispositions take into account restitution or compensation for the wrong done.

The above criteria offer a place for deterrence and rehabilitation in a sentencing policy but a place that has limitations. The common good provides a means whereby deterrence, particularly through the educative aspect of sanctions, may be used, along with incapacitation, to underline the wrong done to common values and to re-affirm or protect those values. Justice, on the other hand, in focussing on the wrong done and the need to restore the rights of the victims, provides an opportunity to

individualize the sentence and to emphasize the need for reconciliation between the offender, society and the victim. Thus, within the context of a sentence which reflects the gravity of the harm done and is humane, there is room for restitution and rehabilitation.

Rehabilitation, in the sense of improving the offender's ability to cope with life, may not be an unimportant factor in sentencing. Too frequently, rehabilitation is measured only in terms of reduced recidivism, a measure that has repeatedly demonstrated the limited capacity of treatment or rehabilitation to control crime. Yet, to improve an offender's life skills or to reduce his personal suffering are simple, humane gestures that should have a proper place in sentencing policy. Such rehabilitative efforts, indeed, may even have indirect benefits in reducing recidivism in particular cases.

This indirect benefit, however, is at present tenuous and difficult to achieve. First, there is the problem of proven treatment programs. It is very difficult to point to any particular treatment program and claim proven results in terms of crime reduction. The reports are equally disappointing whether the program was designed to change attitudes and outlook or develop educational and job skills. Secondly, in selecting those offenders appropriate for treatment, science constantly confesses an inability to predict accurately who is in need of treatment. This problem of inadequacy in prediction is common to bail and parole applications as well but takes on special significance with respect to treatment of allegedly dangerous or violent offenders. If it is not possible to identify accurately those in need of treatment, nor to run programs successful in preventing crime, it would be unwise to base sentencing policy on rehabilitation and treatment. Nevertheless, as indicated above, a sentence determined on the basis of what is fair and just may well provide for rehabilitation within its confines.

Ignorance and uncertainty respecting deterrence likewise raise deep moral and practical problems for the legislator or judge who bases dispositions on the false assumption that a bigger stick is the answer to crime. While criminal laws, arrest and trial procedures, sentencing and the experience of jail probably do have a collective deterrent effect for some classes of persons in respect of some types of crimes, the deterrent effect of sentences *per se* is problematical. Longer terms, generally, do not appear more effective than shorter terms in reducing recidivism and prison appears no more effective than release under supervision in preventing recidivism.

When a judge sentences an offender to jail "to protect the community" what does he mean? Does he mean that the jail term will reduce the likelihood of this particular offender committing another crime, or does he mean that while the offender is locked up the com-

munity will be free of his depredations, or does he mean that the sentence of imprisonment will deter others from committing similar crimes? Of these three possible meanings, only the second can be fully accepted and even then the security offered by imprisonment is short lived: the average term of imprisonment for break and enter, in Canada, for example, is fourteen months. Since the law remits one-third of the sentence as a reward for good behaviour and permits release on parole at an early stage of the sentence, the actual time spent in the institution, on the average, is less than ten months for this offence.

The first of the three possible interpretations, above, is definitely unfounded by the evidence; if anything, it is said, jail is likely to strengthen recidivism rather than reduce it. As to imprisonment serving as a general deterrent to the rest of us, the evidence is highly uncertain. Professional criminals probably are deterred by a real risk of being put out of business for a year or two. Other persons who have previously been imprisoned probably are not greatly deterred by the knowledge that the court has imposed a term of imprisonment on someone else. For the vast majority of law abiding people, arrest and trial and the shame and stigma of conviction probably are a greater deterrent than imprisonment. But even these are becoming less effective deterrents as an over-extension of the criminal law in drugs, drinking, gambling and other crimes affects greater and greater numbers of otherwise "law-abiding" citizens. In addition, for a marginal group, whose conduct is not dominated by passion or sub-conscious drives who live on the borderline of crime, imprisonment may have some deterrent effect, but how much greater it is than the deterrent effect of arrest or trial is now known.

Some further light on the probable deterrent effect of sentencing and dispositions can be gained by taking a look at what is actually happening in respect of selected crimes. It stands to reason that if the chances of being charged and convicted are very low, the deterrent effect of the threatened sentence is probably low as well. Studies show that greater deterrence is more likely to result from increased certainty of apprehension rather than increased severity of sentence.

This being the case, it is instructive to note that, among the most common offences, various crimes against property, most are not cleared up by police. In 1970, in respect of theft over \$50.00, charges were laid only in ten cases out of every one hundred reported. In break and enter, charges were laid in sixteen cases out of one hundred. In addition, another six to twelve per cent of cases were cleared up in some other way than by laying a charge. If the risk of charges being laid is only about one out of ten in theft and break and enter, there is a limit to what sentencing can do to measurably increase the deterrent effect of

the law. Needless to say, if unreported thefts and break and enters were taken into account, the risk of being charged would be even lower. Indeed, certainty of apprehension in respect of some of the most common crimes in Canada is so low that it is unreasonable to expect harsh sentencing laws to compensate for this weakness.

To a lesser extent the same point may be made with respect to the most common crimes against the person: assaults (assaults constitute almost 70 per cent of offences against the person) robbery and rape. The percentages of such cases cleared by charge in 1970 were 34.5, 26.8, and 47.8 respectively, although when clearance by other modes were taken into account, it can be said that approximately seven out of ten reported assaults, woundings and rapes were cleared by charge or otherwise and one out of three robberies.

While the ability of criminal law and sentencing in particular to deter or treat offenders is obviously limited, this does not mean that nothing should be done. Without the criminal law, one could imagine that crime would flourish with impunity. From the scholarly research and examination of practices, however, we can draw some better understanding of what the criminal law cannot do very effectively; we can get some insight into what ought to be the primary purposes and emphasis in sentencing and dispositions. Is it realistic to expect the law to do more than to take note of the gravity of the offence and, through a range of dispositions, to affirm, uphold and protect core community values?

An Alternative Procedure: Diversion

Crimes brought to the courts under the criminal Code in rank order of frequency are (1) thefts and possession of stolen property, (2) automobile offences including impaired driving, (3) being drunk or causing a disturbance, (4) assaults, and (5) break and enter. Many of the thefts involve property values of less than \$50.00 and even in break and enter, in general, the average value of property stolen is less than \$150.00. In short, the bulk of the work of the courts in Criminal Code offences involves rather minor violations of property values or such problems as impaired driving or being drunk in public, some of which could, perhaps, be dealt with more informally and economically as regulatory offences. The luxury of an adversary battle in the criminal courts and the stigma of criminal conviction and sentence may not be necessary in all of these offences.

To protect property values, particularly in minor cases, or to protect the value of inviolability of the person as it arises in cases of assault, the criminal trial, again, may not be all that effective. Rights of possession and dignity of the person are protected by tort law as well as by criminal law. Family law protects and enhances fundamental values arising out of domestic disputes, including assaults. In family law, juvenile law or labor law, for example, the values that are protected and supported by law are not necessarily fought out in an adversarial court setting, but in a settlement or conciliation procedure. This mode of proceeding appears to be effective in underlining and clarifying interests and community values. Moreover, unlike the adversarial setting, conciliation encourages full recognition of the interests of the victim and the need for restitution and compensation. At the same time, the issue of responsibility is not evaded but worked out with fairness, humanity and economy. Settlement and conciliation procedures might well be used in a range of rather minor offences, many of them property offences, where neither justice nor utility warrant the full exercise of the state's criminal law power through arrest, trial, conviction, sentence and custodial detention.

Provision for some consistent and rational means for diverting minor criminal cases from the court and into settlement procedures is also demanded on the basis of fairness: similar types of conduct should be treated more or less equally. Yet one of the most disturbing criticisms about sentencing and dispositions is that they tend to fall heaviest

on the young, the poor, the powerless and the unskilled. It is a fact that the greatest number of persons appearing in magistrates' courts charged with offences against property or causing a disturbance or assault are young people, either unemployed or working at low paying jobs. In addition to the purely economic factors, it may be agreed that the life styles of the young and the poor are more likely to bring them to the attention of police than is the case with business or professional classes. Discretion in law enforcement tends to divert business or professional classes from the criminal courts. Business frauds or thefts may often be dealt with by way of private settlement or restitution. On the other hand, people without money or influence, when caught in petty theft or shoplifting frequently are given no opportunity to make redress, and large numbers of them are prosecuted directly in the courts. These ordinary people, frequently, do not have the prestige, possess the bargaining skills, nor command the psychiatric, educational or economic resources to enable them to enter into settlements that result in a diversion of cases from the criminal courts. One of the most important things sentencing and dispositions can do is to attempt to overcome this inequality. To allow it to continue undermines the legitimacy of law itself.

Hence the importance of procedures that permit a consensual settlement of minor cases involving restitution, work, education or the taking of treatment where necessary. Where the accused is unemployed or without economic resources, he should be provided the opportunity to do work in private industry or the public service at no less than a minimum wage, paid by the state, if necessary. Educational opportunities already exist, many at state expense, as do psychiatric or general medical treatment. That is to say, the services necessary to make diversion operational are already available in many areas. What is needed, is not necessarily more services but a means whereby the services are made equally available despite social and economic differences among alleged offenders.

As already indicated police, prosecutors and judges now engage in diversionary practice on an *ad hoc* basis. A policeman will induce a thief to restore the goods and the victim agrees to drop the complaint. A Crown prosecutor agrees to stay proceedings providing the accused seeks psychiatric treatment. A judge adjourns a case *sine die* on condition that the accused be of good behaviour and finish his year's education. Indeed, in juvenile cases, family disputes and, to a lesser extent, in shoplifting cases, police in some cities and towns have developed a policy of diversion. In some centres, special units of the police are set aside with skilled personnel trained in handling these special kinds of disputes. In the United States, projects conducted by the Vera Institute

for Justice and others have demonstrated the value of court employment projects and other types of diversion schemes both before and following conviction. In certain Canadian cities, various judges and crown prosecutors have run informal diversion schemes over the years. More recently, in various provinces, the Native Peoples' Court Communicator Projects are trying out the feasibility of diversion schemes integrated with intensive follow-up services. Experience to date tends to show not only that diversion is feasible but that it reduces costs and offers a satisfying disposition without encouraging impunity.

As an alternative to the full adversary contest in the magistrates' courts, then, certain cases could be diverted for settlement or conciliation before a justice or other official. The settlement would result in a court order embodying the terms of the settlement and subjecting the offender to recall in default of performance. The justice would then have a discretion to vary the terms of the settlement or refer the case for trial in the usual way. References to alternative procedures will also be found in future Working Papers relating to criminal procedure and further reference to the functions of judge and prosecutor will be found later in this paper.

While there would be no conviction or sentences as such involved in the settlement, the process itself would have a deterrent effect in that it would be a valuable learning process for the offender. This would stem from his having to appear in answer to a charge, face the victim, acknowledge responsibility or partial responsibility for the alleged wrong and meet the challenge to come forward with some concrete undertaking to restore the wrong done. The settlement process itself would underline the values that society insists be respected. The settlement or conciliation procedure in its educative effect would thus promote the protection of core community values.

For the offender, such an experience may have an additional positive value. To see the victim as a person whose rights have been violated, paves the way for expiation. This incidental effect of settlement procedures may be especially helpful to some offenders. Unfortunately, the adversary nature of the criminal trial, where positions are polarized and where the psychological effect is such that the offender might well begin to believe himself blameless in a winner-take-all situation, is not conducive to an acceptance or responsibility or a recognition of the rights of others.

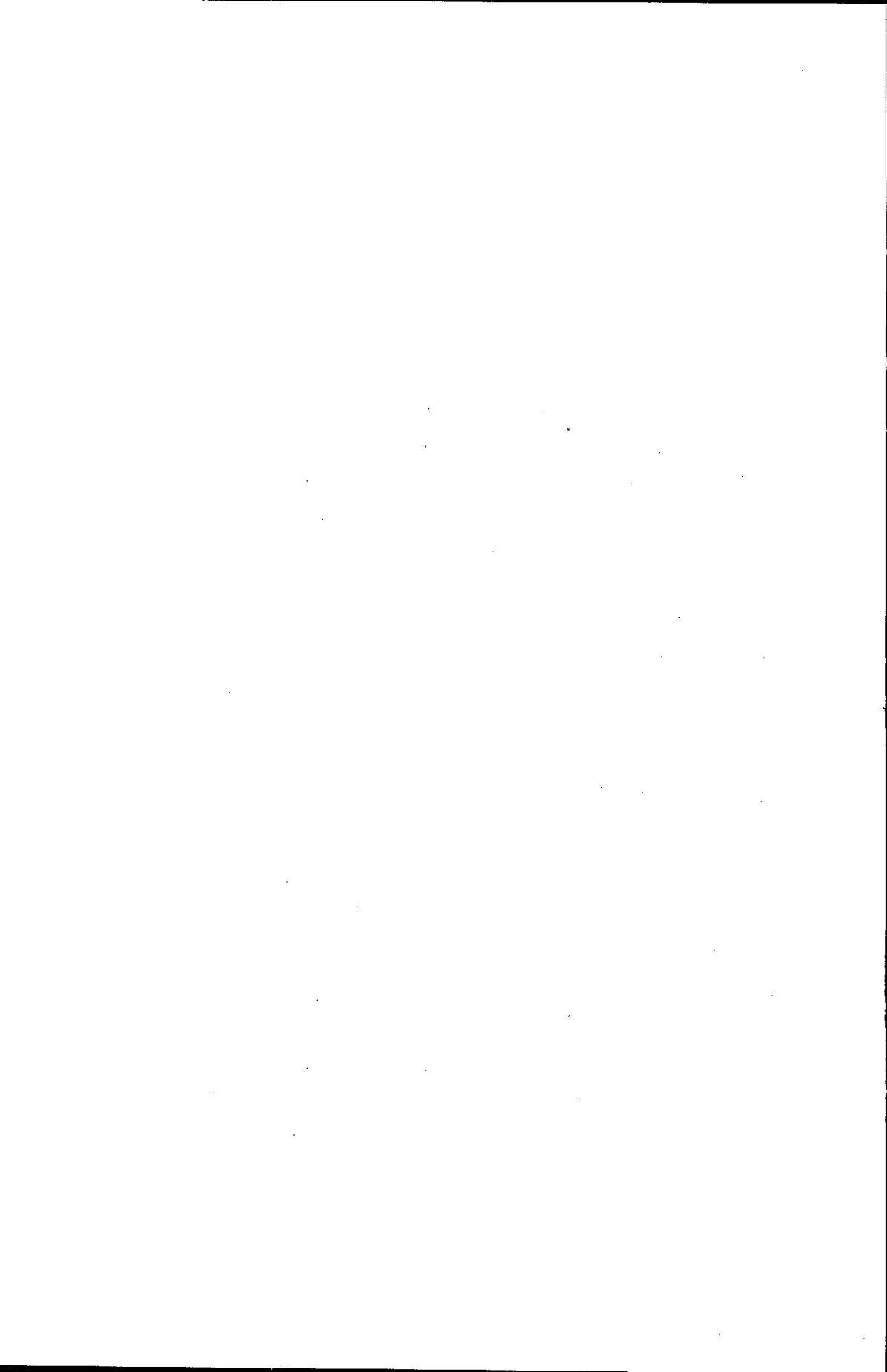
For the victim, the criminal trial may be equally unrewarding and destructive, whereas, the proposed settlement process restores him to the centre. What was his role in the alleged offence? What does he demand by way of satisfaction? We should not overlook the fact that, historically, before the king took collection of fines for revenue purposes,

compromise and settlement were commonly used. Now that Her Majesty is no longer dependent upon fines in order to balance the budget fresh consideration should be given to using diversionary or settlement processes as an alternative disposition.

Intake Service: Criteria

A diversion program such as is proposed here assumes an Intake Service to screen cases as they come in. The precise details of the screening service remain to be worked out but presumably a magistrate or some other person with experience and training, working according to certain standards and criteria, would make an initial determination whether a case should be sent on to trial in the ordinary way or diverted for settlement. In keeping with the philosophy already expressed, serious cases would not be appropriate for diversion. For these, the adversary contest of the criminal trial and the emphasis on a just and fair sentence should be retained. At the other extreme, there are cases where diversion clearly ought to apply, and in the middle, a range of cases where diversion might be appropriate depending upon the circumstances. For example, petty theft or having possession of stolen property under \$200.00, common assault, homosexual offences, bestiality or exhibitionism, family disputes, mischief to property, joy riding, minor break and enter cases or cases involving certain types of mental illness, probably should be diverted unless there are strong factors pointing to the desirability of a trial. Other factors that might well affect the decision to divert would include whether or not it is a first or second offence, whether or not the offender is a juvenile or youthful offender, and whether there are community agencies or services available to assist in a satisfactory settlement of the case. Another consideration should be that the facts of the case make it reasonably clear that the offender committed the alleged act. Where there is a great uncertainty as to the facts, the case should be referred for trial with the option of having it sent back for settlement at the discretion of the trial judge. Needless to say, the consent of the victim and the offender are pre-conditions to diversion, settlement or mediation. A working paper on diversion procedures should also be concerned with who is to make the decision to divert, and on what kind of evidence.

To ensure justice, the decision whether or not to divert should be made in an open hearing. This also means there must be some record of the decision and the reasons for it. Without such protection, the intake officer would be open to charges of influence and bias that might be difficult to refute.



Custodial or Non-Custodial Dispositions: Criteria

Although a diversion procedure may provide an alternative disposition for certain kinds of cases, more serious cases would still be dealt with by way of trial with imprisonment as a possible sanction. Because of the doubtful effectiveness of imprisonment in reducing recidivism, however, and the high costs of imprisonment, both economic and social costs, as well as direct and indirect costs, economy demands that imprisonment be used with restraint. This is not to say that complete deprivation of liberty may not be a deterrent in some cases. After all, it is estimated that from 35 per cent to 60 per cent of those imprisoned as first offenders do not return. It may well be, however, that had they been placed on probation or fined they may not have returned either. No one really knows much about the effectiveness of sanctions. Because there is some reason to think that one sanction may be as effective as another, however, the principle of restraint may be a wise one. To assist the courts in deciding whether a custodial or a non-custodial sentence is proper, a Sentencing Guide should contain a statement of priorities and criteria to be considered in reaching such a decision. It is suggested that as a rule, the priority should be to impose a non-custodial sentence unless otherwise indicated upon consideration of the following criteria:

- (1) the gravity of the offence;
- (2) the number and recency of previous convictions; and
- (3) the risk that the offender will commit another serious crime during his sentence unless he is imprisoned.

In applying the foregoing criteria it is suggested that a Sentencing Guide list factors such as those proposed in the New Draft Code (U.S.) that ought to be accorded weight in favor of withholding a custodial sentence:

- (a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;
- (b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person nor his property;
- (c) the defendant acted under strong provocation;

- (d) there were substantial grounds which, though insufficient to establish a legal defence, tend to excuse or justify the defendant's conduct;
- (e) the victim of the defendant's conduct induced or facilitated its commission;
- (f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;
- (g) the defendant has no history of prior delinquency or criminal activity, or has lead a law abiding life for a substantial period of time before the commission of the present offence;
- (h) the defendant's conduct was the result of circumstances unlikely to recur;
- (i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;
- (j) the defendant is particularly likely to respond affirmatively to probationary treatment;
- (k) the imprisonment of the defendant would entail undue hardship to himself or his dependants; and
- (l) the defendant is elderly or in poor health.

There may also be need in a Sentencing Guide for extended terms of imprisonment for selected offenders such as habitual offenders and sexual offenders. Whether the so-called dangerous offender should also be dealt with by way of an extended term or by way of civil commitment, following completion of his ordinary term, will be the subject of another paper. In all such cases standards and criteria should be clearly spelled out in a Sentencing Guide as an aid to the court.

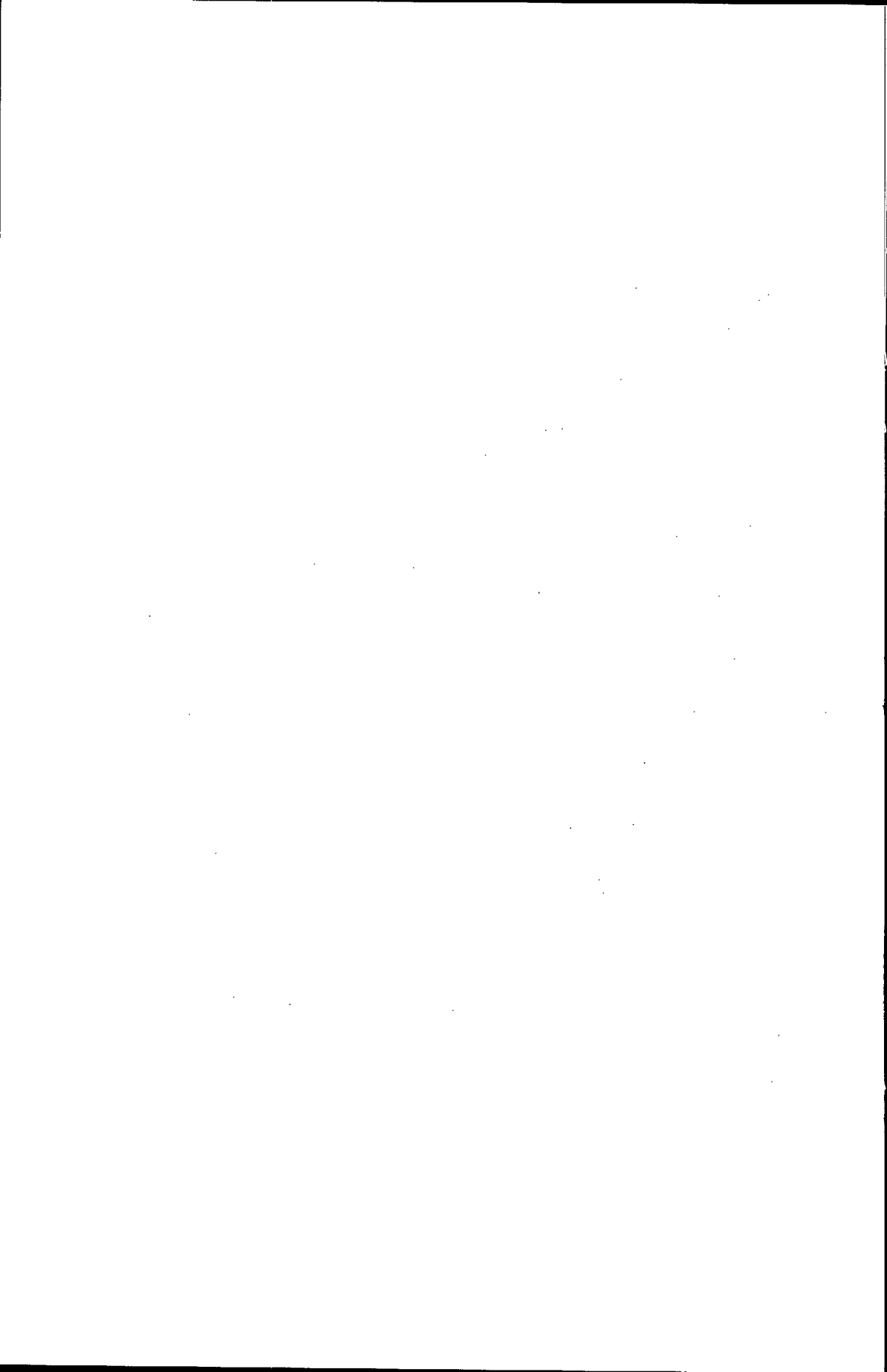
Where a court decides that a sanction involving complete deprivation of liberty is necessary, it should not, at the same time, ignore the question of treatment. The Commission will want to consider whether or not custodial sentences, in some cases, for humanitarian and rehabilitative reasons, should be served in a treatment institution. In such a case, the sentence ordering deprivation of liberty may be combined with a hospital order, permitting treatment on consent.

In addition, neither punishment nor public security demand that all custodial sentences involve absolute deprivation of liberty. There is room for week-end detention or detention in community hostels or work camps with varying degrees of control over residence requirements.

Release Procedures

Where imprisonment is imposed, a further problem arises in release procedures. Should the prisoner be detained until his full sentence has expired or should the sentence be shortened for various reasons? At present, sentences of imprisonment are almost always shortened either through remission for good behaviour or by parole. Under provisions of various statutes, a prison sentence is reduced by one-third if the prisoner behaves himself. In addition, prisoners can be released even earlier, on parole supervision. Do these release procedures make sense or should the law be straight and simple, so that a two year sentence means that the prisoner walks out a free man only when the two years have expired, no more, no less? Is remission for good behaviour essential to good discipline in the prisons? Can parole still be justified on the ground that it reduces recidivism? If parole cannot be shown to be effective in this respect, and there is some evidence to show that it cannot, should parole continue to be an integral part of sentences that deprive offenders of their liberty? Does common humanity or a desire to save public expense suggest an amelioration of loss of liberty by release under supervision where such release does not pose any substantial risk to the community?

One of the problems associated with release procedures involving remission and parole is that of fairness. Remission and parole decisions as well as those involving probation increase greatly the amount of administrative control over the prisoner. Is such increased control justifiable in terms of the purposes to be achieved? If increased administrative control over the offender can be so justified, is the power exercised fairly and according to criteria that the offender knows and understands? If remission and parole release procedures are not effective in achieving agreed-upon goals and if they increase the dependency and frustration of prisoners why should they be retained? These questions and others related to the need for standards of fairness in release procedures will be examined independently in a forthcoming paper.



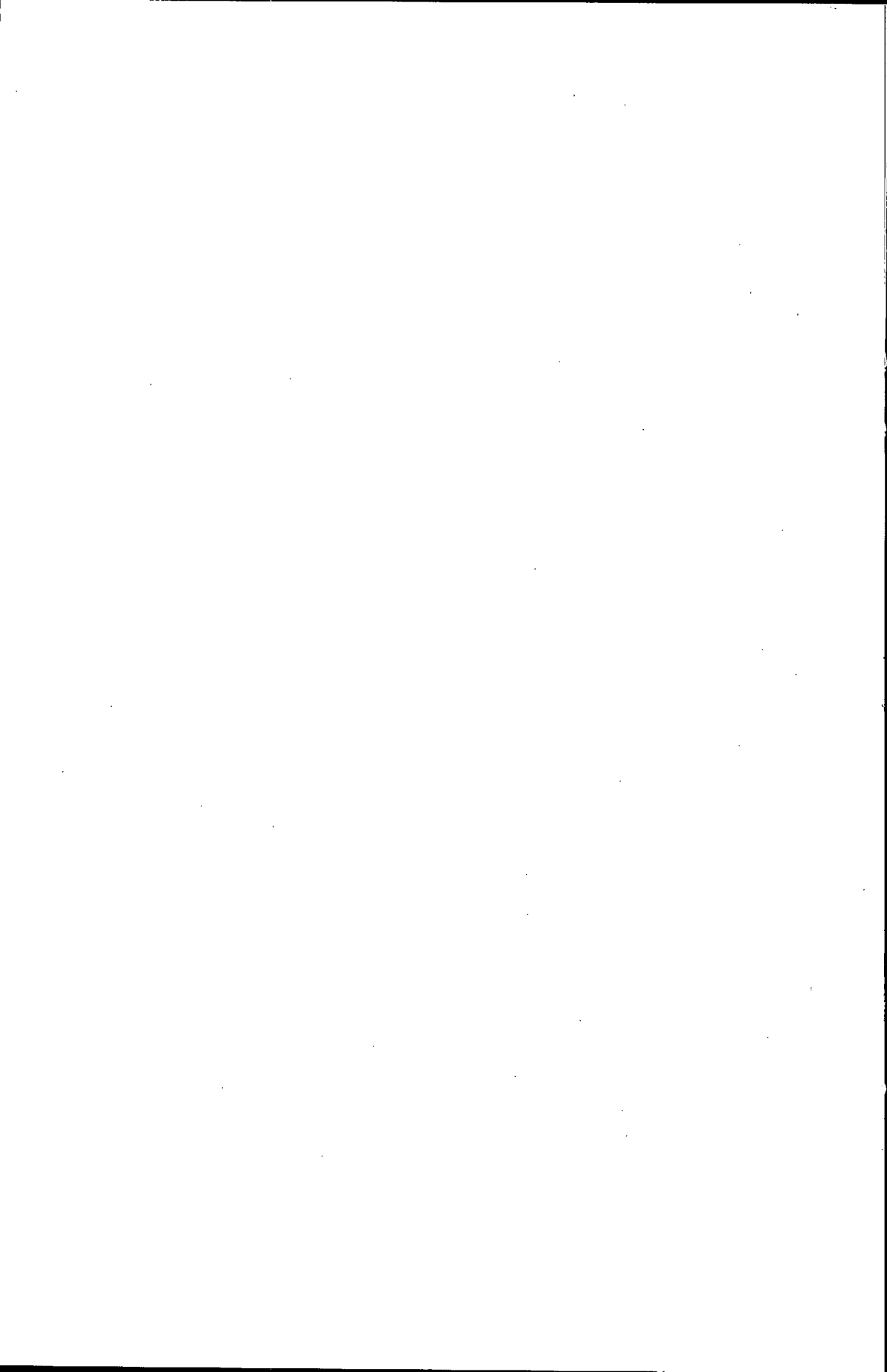
Supervising the Execution of the Sentence

Once the judge has passed a sentence of imprisonment, the offender passes into the hands of the correctional system which supervises the carrying out of the sentence. The prison system may classify the offender according to various criteria and transfer him from one institution to another: work, educational or therapeutic programs may be made available to the offender, or denied him for various reasons. While in prison, he is subject to the rules governing the institution and may be punished for their breach. Such punishment no longer involves corporal punishment but it does run, for example, from isolation cells to loss of remission time, loss of work or recreational privileges, refusal to grant parole or revocation of parole. In addition, the prisoner may be subjected to brutality and degradation at the hands of guards or other prisoners.

Until very recently, the courts and Parliament have taken the view that what happens to the prisoner within the correctional institutions is entirely a matter of administrative discretion and not an area in which the traditional rules of fairness must apply. There is now some evidence that the courts, at least, are not willing to continue to turn their backs on abuses and unfairness within the prison and parole systems.

With minor exceptions, an unchecked and unstructured discretion runs throughout dispositions and sentencing down to and including parole hearing and release, and dispositions within the prison Warden's court. It is important to the credibility and legitimacy of the administration of justice that decisions taken within that system be perceived to be fair and rational. It is no longer sufficient to excuse correctional law from the usual standards of fairness that prevail in other areas involving discretion. For this reason, a Sentencing Guide should contain a part setting forth standards that should prevail in key areas of correctional decision-making.

Clearly, in evaluating the quality of justice in the execution of the sentence, some considerable emphasis should be given to devising techniques that render decision-making more open, more visible and more accessible to the community. Various techniques other than judicial review and legislative guidelines can be suggested for further analysis including the concept of an ombudsman for prisoners, the French and Italian institution of "le juge de l'exécution des peines"; a Visitors' Committee along the English model or the provision of legal aid services within the institutions.



Roles and Functions within the Sentencing Process

1. The Victim

In the administration of justice, concern for protection of core values or protection of the community as it is sometimes called, means that one of the goals of the system should include satisfaction of the victim's needs. This in turn means that fresh consideration should be given to the role of the victim in sentencing and dispositions. The alleged offence, having injured a protected community interest, finds its origins in the infringement of the victim's rights and expectations. The extent of the injury to the community and the victim will depend, in part, upon the circumstances, including the role of the victim in relation to the offender. Was the assault, for example, the result of a long standing feud over landlord-tenant relations? Did the victim share some responsibility in precipitating the alleged offence? If so, can the victim's interests, society's and the offender's be met through a settlement or an arbitration, or is the injury so serious that a criminal trial is the best way of protecting the community interest?

In any event, the need for the victim's active and informed participation in settlement and arbitration are self-evident. Even at trial, concern for the violation of the victim's interests should manifest itself in several ways including (1) respect for the convenience of the victim in granting requested adjournments, (2) an opportunity for the victim to express a view as to the appropriate sentence, and (3) priority in sentencing and dispositions to restitution and compensation for the loss or injury suffered.

The increased role of the victim may give rise to fears of disparity in sentences. However, such disparities, if they do occur will be within the moderating confines of legislative principles and criteria applied by a court. Similarly, the risk of intimidation of victims cannot be overlooked and must be provided for.

2. The Offender

At the same time the role of the offender ought to be viewed differently. Rather than the passive role, he is now encouraged to assume in denying total guilt and seeking acquittal on legal grounds, the offender ought to be encouraged to meet directly with the victim in minor cases where the facts are not in dispute, and to accept his share

of the responsibility for the wrong done by proposing a fair and equitable settlement. In giving the offender some control over the decisions that affect his life, rehabilitation may be truly effected. Even at trial, the sentence should as far as possible encourage the offender's active participation and encourage him in restoring the harm done. To encourage the offender to accept responsibility and to exercise some power over his own destiny not only enhances respect for individual life and well-being but in encouraging a reconciliation of the offender, the victim and the community, greater community protection may result.

3. *The Prosecutor*

To protect the social interest in fair and equitable settlements or dispositions, the crown prosecutor may be expected to play an active role. Already the prosecutor under existing law enjoys a wide discretion in screening charges, withdrawing charges, suspending prosecutions and negotiating pleas. In a system where greater emphasis is placed on pre-trial settlement procedures or on arbitration, with the trial reserved for more serious cases, the functions of the prosecutor take on added importance. First, the prosecution would serve as a back-up to absorb those cases not settled voluntarily by the parties or by the police. Secondly, the prosecutor, presumably, would always be available to receive a complaint or information in those cases where the victim for one reason or another is unwilling to settle the case at the police level and wishes to proceed either to mediation or trial. The prosecutor in such cases would exercise a discretion whether the complaint should be proceeded with, and, if so, in what manner.

If the case proceeds to mediation, the functions of the prosecutor would come to an end, for it is not contemplated that the prosecutor should also serve as the mediator. If the case proceeds to trial, the prosecutor again ought to represent the state's interest. Traditionally, the Crown prosecutor, unlike his American counterpart, was supposed to have a benign disinterest in the outcome and disposition. Indeed, in some provinces, this has been carried so far that it is considered to be improper for the Crown to make a recommendation as to sentence. Another view, however, is that the state, through the prosecutor, has a very real interest to protect through the trial, conviction and sentence. It is not the function of the judge to represent the state's interest or to reflect community desires in particular cases. Rather such interests can best be put forward by the prosecutor.

The judge at sentencing, however, has a prime function to see that justice is done with fairness and humanity. Where imposing a sanction would appear to serve no purpose in protecting societal values or in giving fair satisfaction to the victim's needs, the judge should have

authority to determine that justice and the common good would both be served by passing a sentence that clarifies the conflict but does not involve a sanction. The function of the judge, then, ought not to be to represent the state's interest in sentencing or disposition but, having listened to the victim, the prosecutor and the offender, to determine, with reason and compassion, what sentence is just and equitable within a framework of sentencing policy.

4. *Judges or Sentencing Boards*

At present, the trial judge makes the sentencing decision. In other countries, the jury or a sentencing board may pass sentence. Still other variations provide for lay assessors to sit with the judge and to assist in sentencing. More recent proposals in the United States stemming from a strong concern over inequalities in prison terms suggest, that when a judge decides to impose a sentence of imprisonment, the term should not be within his discretion but should be a mandatory term provided by statute.

Very few people in Canada, at least, seriously suggest that the sentencing power be taken from judges and given to juries. There is some support, however, for the notion of sentencing boards. This support derives from several motives. First, there is a recognition of the complexity of sentencing, particularly where rehabilitation is the primary aim. Accordingly, sentencing boards are looked to by some people as devices whereby the expertise of the social sciences may be brought to bear in support of the criminal law. Secondly, there is a discontent with wide disparities in sentencing: boards are looked to as devices whereby consistent policies and practices may be followed by a handful of men and women, thus bringing a greater uniformity to the administration of the criminal law.

The desire to bring expertise to the sentencing process, as indicated, stems from a belief that, in sentencing, the disposition must fit the offender rather than the offence. It reflects a faith in rehabilitation and treatment and an assumption that the means to treat and cure are at hand if only we have the wit to use them. It has already been said that this paper rejects this approach to sentencing as mistaken and unfounded. Where the basic approach reflects a just but humane sentence, there is no need for the special knowledge of the social scientist to displace the common sense of the judge.

The social sciences should rather be used in testing assumptions in a sentencing policy and providing evaluation of the effects of sentencing practices, thus contributing to improved sentencing options and policy.

As for greater uniformity in sentencing, it seems reasonable to suppose that a board might be able to proceed with less disparity and greater consistency than one thousand or more individual provincial court judges and magistrates spread across half a continent. Logistically, however, one board could not begin to handle the almost one hundred thousand convictions recorded annually, under the Criminal Code. There would have to be many boards, one in each judicial district, for example. Even then, it is not likely that the Boards would be expected to deal with anything other than the more serious cases. As between the boards there would still be need for coordination and consistency.

Where sentencing boards are in operation, in California and in the state of Washington, their function is limited. Neither of the Boards in those states has jurisdiction unless a judge first passes a sentence of imprisonment. Thus one area of disparity remains even with those boards, and that is in the initial decision to impose a custodial as opposed to a non-custodial penalty.

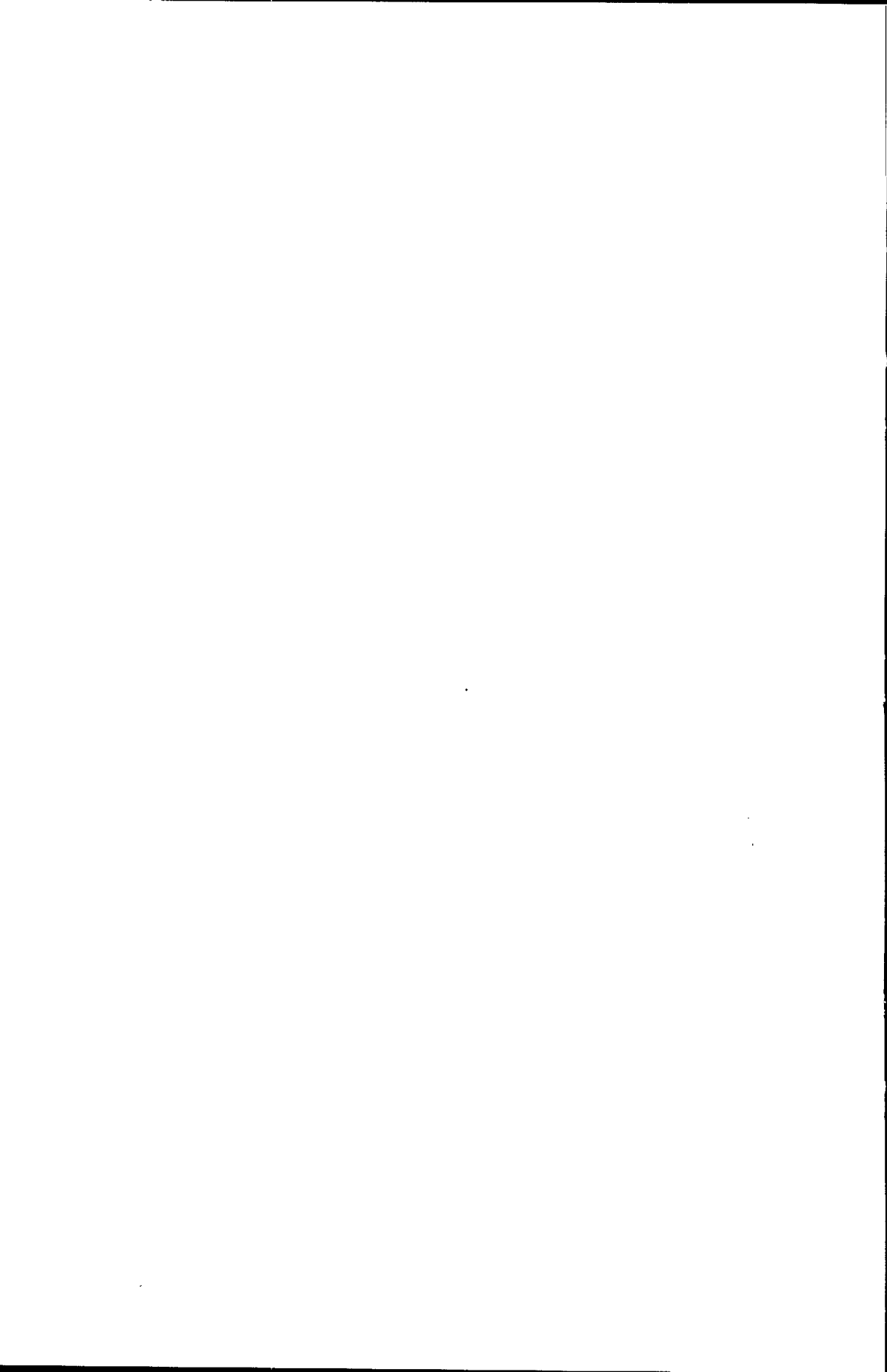
In the state of Washington, once the judge decides that imprisonment is called for, he must impose the maximum sentence set out in the statute; the judge may, however, set the minimum term to be served before release on parole. The Board may then re-examine and re-determine the term of the sentence that must be served. The California Board has similar powers, but in addition, the Board, not the judge, sets the minimum term. In addition, both the Washington and California Boards serve as the state parole authority.

The experience with the California Board has given rise to persistent criticism both by prisoners who resent the uncertainty of the indeterminate sentence and writers who point to the long terms of imprisonment served in California and the inequality and disparities that have resulted from the Board's work. Incidentally, the California Board has not lived up to its expectation of providing social science expertise in the sentencing process. Most Board members, until recently at least, were former policemen or correctional personnel.

From the above, it can be seen that sentencing boards offer no panacea to the problems of expertise or uniformity. Indeed, the elusive goal of justice in sentencing has given rise to legislation where discretion in determining the length of the terms of imprisonment to be imposed is removed altogether. The disparity problem, however, is not cleared up, it is simply removed to the parole release stage. The disparities are not so visible but may be even greater at that level. At yet another level, sentencing boards may promote disparities. The Washington Board, for example, leaves power with the judge to set a minimum term

before the parole board can release. This discretion can give rise to disparities, albeit on a reduced scale.

If discretion is removed altogether as to the length of the prison term, judges may respond by increasing the proportion of cases disposed of by non-custodial sentences. While this may have the desirable consequence of reducing the number of offenders sentenced to imprisonment, it ought not to be achieved at the expense of justice. In addition, where judges or Crown prosecutors wish to avoid a term of mandatory imprisonment, there may be attempts to alter the charge or accept a plea to a lesser offence. It goes without saying that plea bargaining can nullify the purposes of sentencing and reduce dispositions to a level of bargaining devoid of justice or fairness.



Structuring Discretionary Power in Sentencing

Rather than resort to drastic curtailment of discretion in sentencing and dispositions, attempts have been made in other jurisdictions to promote uniformity through structuring and channelling discretion. One important means of doing this is through a legislative statement of basic policy setting forth the philosophy, the purposes, standards and criteria to be used in sentencing and dispositions. These provide a common starting point, common assumptions and common goals. Discretion remains in the sentencing judge to apply the policy to particular cases. In so doing and in weighing the various circumstances and factors, individual values and beliefs of the judges will inevitably influence the final outcome. It is unavoidable. The most that can be hoped for is that such subjective influences do not produce results markedly different from agreed upon objective criteria.

As another device to develop uniformity in application of criteria and in weighing circumstances, sentencing councils have been used. Judges, within a particular area, study and discuss cases coming up for sentence. Each judge retains responsibility for ultimately imposing sentence in his own court, but through the council "the moral solitude of the sentencing decision is lifted from his shoulders" and he is put to the test of defending his sentencing decisions in the face of an honest and rational appraisal by equals. Such an approach is currently being taken in various forms by judges in Ontario and New Brunswick, for example. In different cities and regions in Canada, judges are involved in sentencing seminars or regular sentencing councils. Indeed, various jurisdictions have used sentencing councils to some advantage and the expanded use of sentencing councils has been recommended in recent years by several law reform bodies.

Sentencing Institutes, such as those used in British Columbia, are yet another institution whereby information can be brought to judges respecting the availability or effectiveness of various sentencing options. Unlike the sentencing council which provides for a weekly discussion, institutes may be annual conferences drawing on a larger body of judges and others with interests in sentencing and dispositions with a view to discussing a wide range of issues including objectives of sentencing, current services in corrections and statistical feedback on current practices. Such meetings should help to foster a common understanding and

a common perspective with respect to purposes and dispositions in different types of cases.

Another aid to structuring discretion in sentencing is the requirement for written reasons for sentence. It would be an impossible administrative burden and quite unnecessary to require reasons in every case. At the crucial point of determining that a custodial sentence is required, however, written reasons would help promote uniformity in application of criteria and in weighing various factors. Written reasons are also an aid to greater rationality in sentencing and a guide for judges on appeal. In addition, not only may written reasons have therapeutic values for the offender, but they should be of help to correctional authorities.

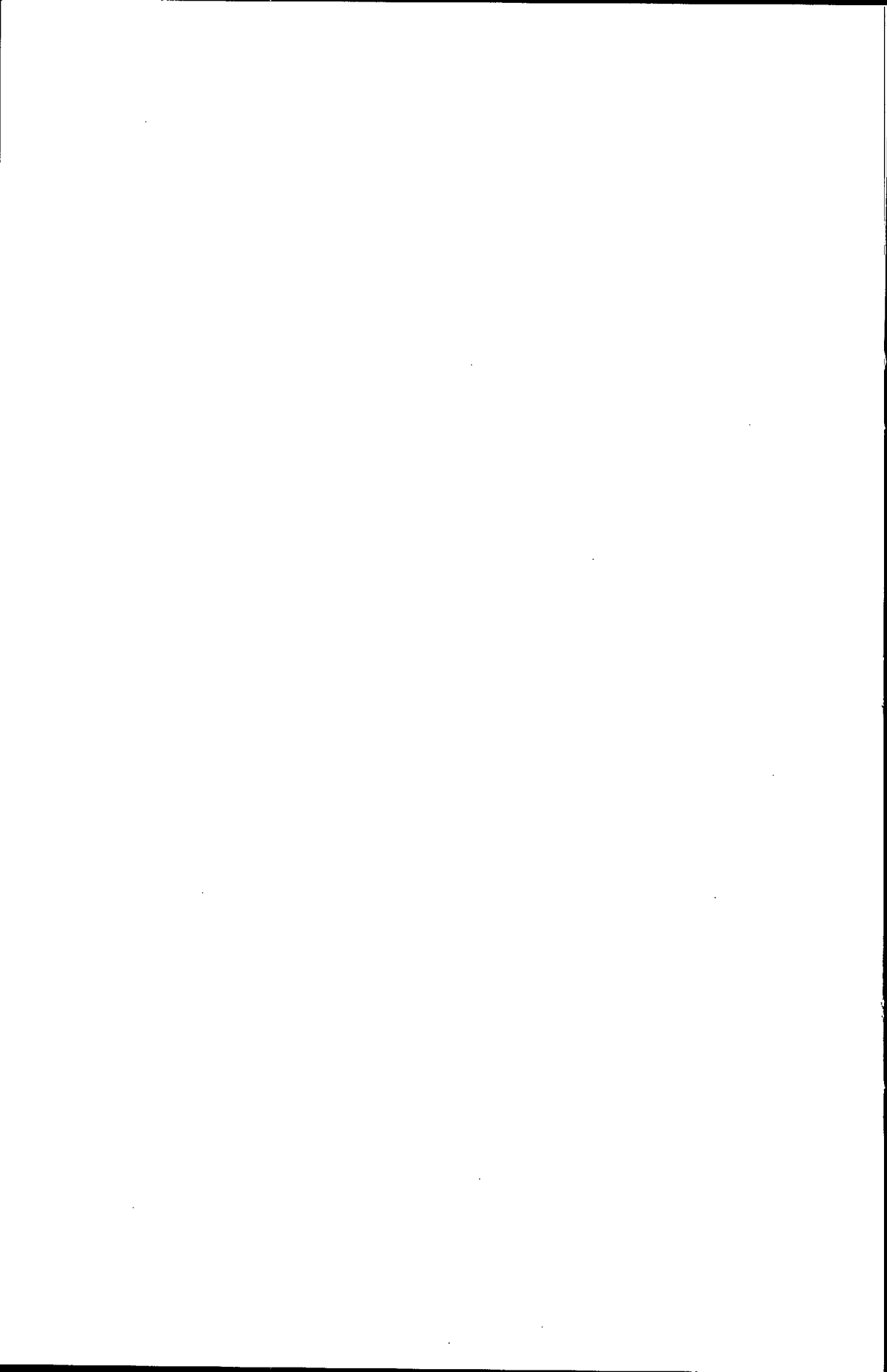
It goes without saying that justice demands that sentencing procedures, particularly in serious cases, should require specific findings on all disputed issues of fact relevant to the question for the sentence. This record along with the stated reasons for the sentence and the precise terms of the sentence should not only promote greater uniformity of approach in sentencing but also increase the feeling that justice is being administered openly and impartially.

Essential to sentencing and dispositions is an adequate information base. This is particularly important where the conviction results from a guilty plea. In such cases, the facts may be only partially known and the wider surrounding circumstances may never come before the court. To a certain extent, this is true even in a contested trial. The rules of evidence and the demands of the trial are such, that, frequently, the situation that gave rise to crime is presented to the court within the narrow restrictions of legal issues and relevant evidence. The background of the case may never clearly emerge.

Where the offender is represented by counsel, and if counsel is conscientious, the judge should be able to get considerable assistance from the defence counsel's presentation. Too often, unfortunately, lawyers view their function as all but terminated as soon as the conviction is entered. A Canadian study, for example, showed that Crown counsel spoke to sentence in 72 per cent of the cases while defence counsel spoke in only 24 per cent of the cases. The more recent diversion techniques, especially those that are operational in New York City and elsewhere indicate the important role that defence counsel can serve, not only in bringing information before the court, but also in arranging for community support services to assist in the supervision of a non-custodial sentence or in arranging for pre-trial diversion.

Currently the pre-sentence report is commonly relied on as an information base where the judge is not certain in his own mind as to the proper disposition. Studies on pre-sentence reports raise questions

as to the effectiveness of these reports and point to conflicting views as to their purposes. There is some evidence to suggest that the contents and recommendations of a pre-sentence report are not solely determined by sentencing policy but by what the probation officers think the judge wants. As in police work, interests in professional advancement and the perceived expectations of others influence dispositions. Since a great deal of the professional probation officer's time is spent in preparing pre-sentence reports, consideration should be given to the best use of pre-sentence reports as an information base in sentencing and dispositions.



Community Input in Dispositions

Throughout this paper, emphasis has been placed upon the need to keep open contact between the administration of justice, the victim and the community. In comparison with social controls arising from the community, law is a frail last defence of fundamental values. Thus community support and resources to enhance family life, individual physical and mental health, satisfying economic opportunities, decent housing and sound social relationships are the best investment people can make in protecting core values against attacks by others. Where individuals and agencies within the community do not provide the police and the courts with helpful alternatives to conviction and imprisonment, justice suffers. At the pre-trial level, especially in connection with diversion programs, there is room now for much help from volunteers to assist in providing counselling, friendship, work, guidance, education and jobs for many young offenders. Following conviction, the need for a sustained relationship between the community and the offender remains paramount. To reduce the criminalizing and injurious effects of conviction and imprisonment, there is need for individuals and organizations to provide an array of visiting services, counselling, therapy, work, recreational or other services.

Indeed, at the sentencing stage itself, one way of maintaining contact with the community and its sense of values is to have individual citizens from the community sit with the judge to assist in the disposition and sentence. Countries such as Denmark have used this device for years and while judges may not be enthusiastic about such a procedure, the community, at least, seems to welcome the opportunity to participate.

Whether it is feasible in Canada to have community input at the sentencing stage, as in Denmark and other countries, is difficult to say without further investigation. If there were to be such a contribution, persons should probably be selected from the voters' lists and asked to sit one day a week for four months. Assuming a modest fee were payable for this service, the cost should not be prohibitive.

Citizen participation in sentencing, particularly where citizens have the power to out vote the judge, may raise a problem of increasing disparities in sentences, or bias, or even prejudice in sentencing unpopular offenders. If there are two citizens to assist each judge they may out vote him but it is more likely that lay persons would seek an

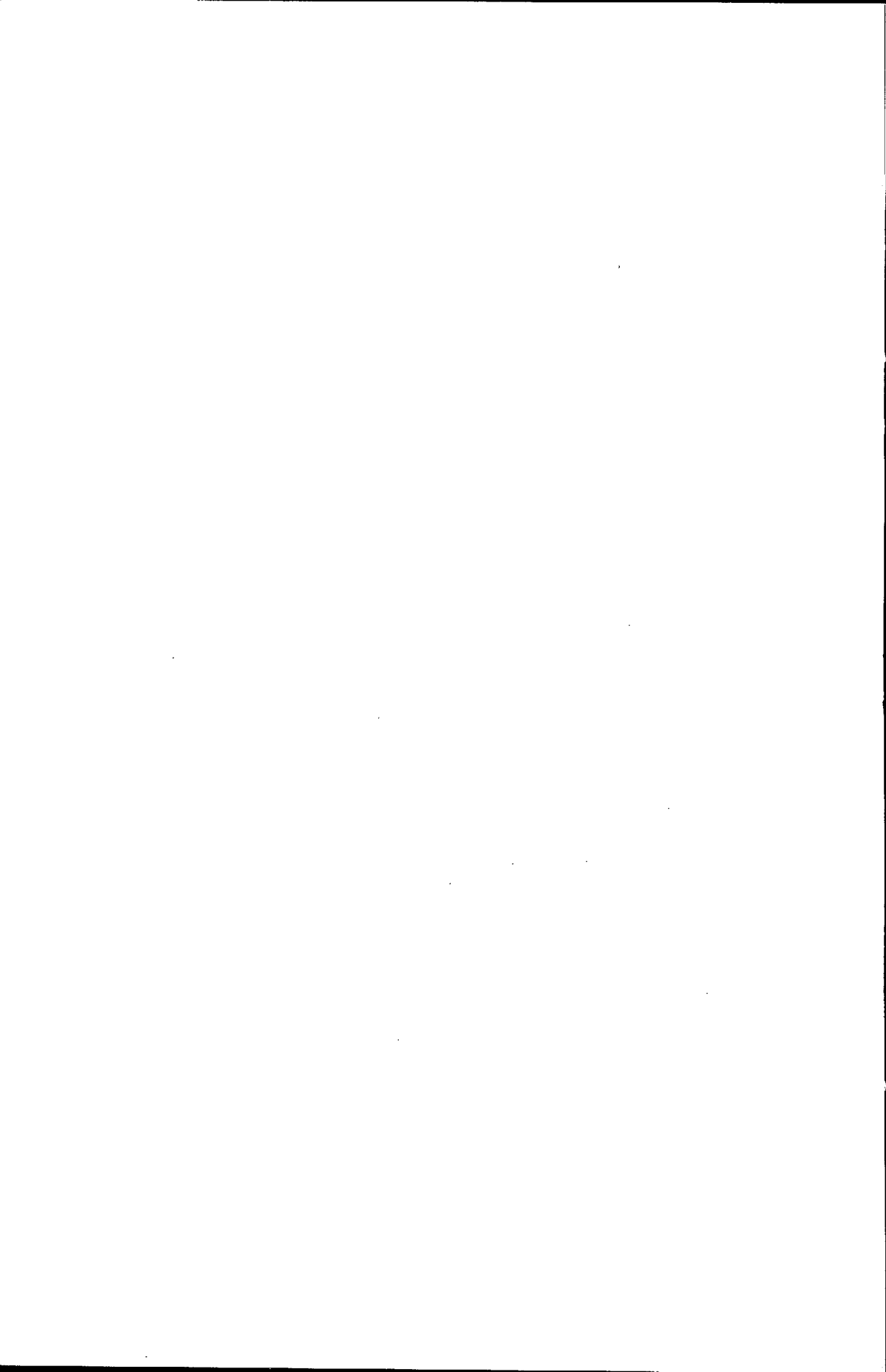
accommodation of views with the judge. If the judge is out voted, as long as the sentence is in accordance with the principles and standards set forth in a Sentencing Guide, there can be no real objection. Sentences would, as now, be subject to appeal, so that if a sentence were out of line with other sentences in similar cases it could always be corrected. The risk of prejudice, irascibility or unreasonable disparities is probably not greater with individual citizens than with judges. Studies of sentencing by juries as compared with judges do not support fears of undue bias or prejudice among lay members. Moreover, abuses in discretion can be guarded against, as suggested, by a statement of purposes, criteria and standards in a Sentencing Guide and through provision for review of sentences on appeal.

The benefits to be gained from citizen participation in sentencing and dispositions would reinforce the socializing effect of the criminal law upon many persons in the community. It should strengthen the forces tending to reduce crime and enhance community interest and participation in the administration of justice. At the same time, the primary values and interests that the community wants to see protected can be made clear in a variety of differing circumstances. Participation of citizens should thus foster the main purposes of sentencing and dispositions: the protection of the community by reinforcing fundamental values relating, for example, to privacy, property or inviolability of the person.

Compensation

Finally, if sentencing and dispositions is to give satisfactory recognition to the role of the victim and the need for restitution, it will be necessary to make renewed efforts to provide offenders with employment and to pay them wages that do not fall below minimum standards. Even so, there may be cases where the offender is not able to make adequate restitution. In such cases and in cases where the offender has not been apprehended or convicted, the state should supplement the payments of the offender or, on its own initiative, provide compensation so that the victim is fairly compensated for his loss. Various types of compensation schemes may be found in different countries but relatively few are soundly tied to a theory of sentencing or corrections.

The justification for a compensation scheme may be said to arise from the social reciprocity which H. L. A. Hart suggests is the basis of society. As Workmen's Compensation is a recognition of the social obligation to make good individual losses arising out of exposure to risk in performing highly useful industrial work, so, too, in a society that places a premium on openness and freedom from pervading police control, the citizen who falls victim to a crime should be compensated as a matter of social reciprocity. Thus, compensation to victims of crime is not purely a matter of private civil law, for a public interest is at stake; it is not only a matter of humanitarian concern and welfare law but a matter of fairness and justice. Indeed, on a practical level, a comprehensive compensation scheme serves to promote over-all security. The victim's as well as the public's apprehension, resulting from a crime, may be allayed in part by prompt compensation. To the victim, particularly, such support is likely to be as great a psychological support as it is financial. Forthcoming papers will examine this aspect of sentencing policy in greater detail.



Summary

Assuming that one of the purposes of the criminal law is the protection of certain core values in society, is it not an important function of sentencing and dispositions to assist in making clear what those values are? The educative effect of the sentencing process cannot be lost sight of. Through the sentence the court may influence the behaviour of others by confirming for them that their law abiding conduct is approved and that it is still worthwhile to resist temptation. In other cases, the sentence of the court may make clear that certain conduct is more blameworthy or less blameworthy than was the case in former days. This may be particularly true in a transitional society where values are undergoing constant reconsideration.

History and the social sciences indicate that almost all human societies, regardless of their political structure, must be prepared to accept the reality of criminal activity. At the same time, an accumulating body of research and writing throws growing doubts upon the deterrent effects of sentencing itself as opposed to the total deterrent effect of apprehension, arrest, trial and public conviction. Moreover, penological studies indicate that the rehabilitative ideal is not the heralded remedy it was once thought to be. Both rehabilitation and deterrence, moreover, raise ethical questions concerning the moral right of society to use one man solely as an example to others or to give treatment to prisoners without their consent, especially where such treatment may be "experimental" or result in lasting bodily or personality changes.

Despite doubts about the rehabilitative or deterrent effects of sentencing, however, common sense demands that the criminal law continue to impose sanctions in order to discourage criminal conduct. On the positive side, sentencing and dispositions can be used to take note of the wrong done to protected values, can re-affirm the values that are at stake in the particular criminal offence and can assist in restoring the social balance after the crime has been investigated.

If emphasis is to be placed on sentencing and dispositions as a learning process, in classifying and re-affirming values, alternative procedures may need to be developed. In many crimes, the offence is not one between two strangers but arises out of family or neighbourhood disputes. Need such criminal offences be dealt with in the adversary context of a criminal court? Is there not room for developing settlement and arbitration procedures for this type of offence?

To recognize crime as a form of conflict has implications not only for the procedure to be used in resolving the conflict, but also for the role of the state and the victim in such procedures. It is suggested that in many crimes the state can afford to forego its paramount role and permit the victim to take an active part in settlement and mediation. Even in cases proceeding to trial, the victim's role and interests should be given greater priority than they are in the usual criminal trial.

Recognition of crime as conflict and the importance of criminal law in clarifying the values at stake in the conflict, places importance on providing for dispositions of cases without conviction or, in some cases, disposing of a case, even on conviction, without imposing the usual sanction. It would be a matter of judgment, exercised according to specified criteria, whether the wrong done in each case deserved the elaborate ritual of a trial and sentence or whether settlement, mediation or a simple conviction would be sufficient. The arrest and trial and the settlement and mediation procedures in themselves are seen to carry an educative and sanctioning effect. In this way, sanctions may be seen to be operating at three levels: (1) pre-trial diversion by settlement or mediation, (2) the trial itself, and (3) the sentence of the court.

To fulfill the educative function of sentencing and dispositions, and to recognize the wrong done to the victim, emphasis may well be placed on restitution supplemented by a comprehensive compensation scheme to take care of criminal injuries. Through restitution, the reconciliation of the offender, victim and society is encouraged. Even in more serious cases that go to trial, restitution and community oriented sanctions should not be lost sight of. Imprisonment, because of its costs and doubtful efficacy, should be used with great restraint while various forms of limited deprivation of liberty, coupled with probation, may be seen as an alternative to traditional imprisonment for some offenders. Indeed, restitution, imprisonment and probation will be the subject of forthcoming papers.

The above view of the nature of crime and the function of the sentencing process means that dispositions and sentences should be governed by what is fair and just. It has already been suggested that the justification for the state's intervention through sentencing and dispositions is that it serves to protect core values. The extent and degree of intervention, however, ought not to be measured solely on the basis of the common good but ought to be limited by common notions of fairness and justice. Thus, the innocent ought not to be subjected to the sentencing and dispositions process; dispositions and sentences ought not to be inhumane or cruel; dispositions and sentences ought to be proportional to the offence; and similar types of situations ought to be dealt with more or less equally.

At some future day, more may be known about treatment, rehabilitation or deterrence and distate a sentencing policy framed in those terms. At present, rehabilitation should not be ruled out entirely but given scope within the confines of a sentence or disposition determined on the grounds of fairness and justice. Similarly, deterrence, to the extent it is operative, and incapacitation may give expression to the need to serve the common good.

In application of the above principles, it is expected that many offences can be dealt with fairly and with justice on the basis of restitution. Undoubtedly, deprivation of liberty will be necessary in some cases, particularly where the offence has been extremely grave, or where the offender has had repeated convictions, or where there is evidence to suggest the likelihood that the offender, if released, would soon commit another crime of violence.

An important aspect of sentencing philosophy as suggested here is the claim the victim has upon society for compensation for criminal injuries. While compensation could be based on charity, or on a notion that society is in breach of its promise of protection to the individual, it may be preferable to see compensation as a claim arising from the reciprocity of social living. In the interests of a free and open society, some minimal level of crime must be tolerated; the alternative is a closed society, heavily fortified and severely repressive. In the interests of pursuing a relatively open society, however, recognition should be given to those who are victims of crimes and whose injuries cannot be totally compensated through restitution.

Another issue in sentencing and dispositions relates to disparity, particularly among prison terms. This is of concern to the extent that the disparity arises out of a failure to follow common principles. The solution does not lie in taking all discretion away from prosecutors, judges or parole personnel but rather in channelling and structuring discretion through a statutory statement of principles, purposes, standards and criteria. Other aids to the uniform exercise of discretion include written reasons for decisions, sentencing councils and decisions openly arrived at with provisions for review and appeal.

Finally, a primary concern for justice in sentencing and dispositions requires that further attention be paid to the whole question of fairness in decision making in matters affecting prisoner's interests. This will be the subject of a separate paper, as will compensation for victims of crime.

This paper has attempted to lay out the basic principles which will guide our approach to specific issues and concrete recommendations. Responses to this working paper, at this time, are important for our further work.