

# An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment

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## Introduction

One of the largest, and perhaps most intractable, problems of the criminal law involves a consideration of what ought to be done with persons who are found to have committed a criminal offence. This problem is part of a larger question which asks what purposes are served by prescribing or imposing, or refraining from imposing punishment.

The purposes of punishment emerge from the social environment in which criminal activity operates. As a general rule, the proscribed activity involves the offender, his victim, the police and the larger community. In addition, there are usually the accompanying phenomena of injury, loss or damage. In theory, the penal sanction is said to comprehend a concern for all of these components. As a practical matter, the penal sanction can never completely fulfill its mandate since the ideals which it seeks to serve are contradictory.

The Ouimet Committee reporting on the state of Canadian corrections in 1969 asserted that the proper function of the penal system is "to protect society from the effects of crime in a manner commanding public respect and support while at the same time avoiding needless injury to the offender".<sup>1</sup> It seems clear that this can only be achieved through compromise, which involves some diminution of the ideal. The most complete public protection might well be achieved through indiscriminate preventive detention of suspected prospective felons, but this clearly entails the infliction of needless injury and is unlikely to engender public support. An acceptable penal theory must seek to balance the competing demands of the criminal law system in a manner which will serve the long-term interests of society.

It is beyond dispute that criminal punishment must serve a number of social goals: the rehabilitation of the offender, deterrence, retribution and the protection of society. No one of these is pre-eminent. To be just and effective, the sentencing judge must accommodate these competing demands.

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<sup>1</sup>Canada: Solicitor General, *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice & Corrections* (1969), 185 [hereinafter the *Ouimet Report*].

To be humane, he must insure the dignity and well-being of the individual. This is regarded by a study of the Law Reform Commission of Canada as a fundamental value, one that "commands that attention be paid not only to the interests and needs of the collectivity but to the offender and victim as well".<sup>2</sup> A more precise understanding of what is meant by the four traditional notions of retribution, deterrence, rehabilitation and protection is desirable at this juncture.

## I. Retribution

Retribution rests on the idea of just deserts, *i.e.*, it is right for the guilty to be punished. If men are indeed responsible for their actions then it is just for them to be punished for their wrongs. Bentham believed that the desire for retribution in no way derives from a motive for revenge, but resides in the community's desire "to express its repudiation of the crime committed, and to establish and assert the welfare of the community against the evil in its midst".<sup>3</sup>

Retribution stands on its firmest footing where crime and sin are considered equivalent, but in the modern criminal law this is usually not the case. Sir James Fitzjames Stephen, the Victorian architect of Canada's *Criminal Code*, was a strong exponent of retributive justice. He was of the view that

this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy and natural sentiment can justify and encourage it.<sup>4</sup>

While it is true that one of the stated functions of the sentencing judge is to express the condemnation of the community,<sup>5</sup> it is also important that the punishment be proportional to the severity of the offence. "Proportional" in this sense does not mean that punishment should be meted out to the offender "measure for measure". Such a narrow approach could detract from the important components of deterrence and rehabilitation. While the denunciation of crime by the community cannot always be ignored as a factor in sentencing, particularly in crimes of great violence or extreme viciousness, a truly proportionate sentence must involve more than pure retribution. Pure retribution involves the principle that proscribed conduct, commonly described by retributivists as "wicked" or "evil", calls for punishment even where its infliction is not necessary to prevent further

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<sup>2</sup>Law Reform Commission of Canada, *Studies on Sentencing* (1974), 7.

<sup>3</sup>J. Bentham, *Rationale of Punishment*, quoted by Morton, *infra*, note 25, 19.

<sup>4</sup>J.F. Stephen, *A History of the Criminal Law in England* (1883), Vol. 2, 81-2.

<sup>5</sup>See generally *R. v. Morrissette* (1970) 1 C.C.C. (2d) 307 (Sask. C.A.); C. Ruby, *Sentencing*, 2d ed. (1980), 1.

instances of the offending conduct. H.L.A. Hart, in criticizing this premise, states that

it appears to be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good ; to others the theory seems to be the abandonment of any serious attempt to provide a moral justification for punishment.<sup>6</sup>

Hart further points out that in its modern form

retributive theory has shifted the emphasis from the alleged justice or intrinsic goodness of the return of suffering for moral evil done, to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offence.<sup>7</sup>

This alteration points out the essentially dual nature of retribution. Retribution is a term employed to mean either vengeance or repudiation. The impulse for revenge has no place in twentieth century penology. The Quimet Committee puts the position as follows :

The satisfaction of a desire for vengeance is a very expensive, and in our view fruitless, luxury. The cost to the community of incarceration and the damage to and the subsequent danger from an individual punished for vengeance make the execution of vengeance totally unacceptable to any rationally motivated community. Repudiation is, however, a different matter. Repudiation relates to the solemn denunciation of certain behaviour. It is the view of the Committee that any sentence based on the principle of deterrence inevitably involves repudiation. Society says to the offender, "We repudiate this behaviour" and indicates the degree of repudiation by the degree of sentence imposed. Repudiation is thus inextricably interwoven with deterrence, whether general or particular.<sup>8</sup>

The Committee's comments thus lead to a consideration of the concept of deterrence. Before leaving the area of retribution it should be noted that the Committee's views seem to overlook the fact that under a theory of retribution the mechanism of prevention is what Hart calls "the reinforcement of moral inhibition",<sup>9</sup> while under deterrence theory the mechanism is fear.

## II. Deterrence

The term "deterrence" possesses two separate aspects, both of which involve the belief that the imposition of the penal sanction helps prevent the repetition of the forbidden act.<sup>10</sup> The first of these aspects is individual or particular deterrence. The other is referred to as general, group or collective deterrence.

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<sup>6</sup> H.L.A. Hart, *Punishment and Responsibility* [.] *Essays in the Philosophy of Law* (1968), 234.

<sup>7</sup> *Ibid.*, 235.

<sup>8</sup> *Quimet Report*, *supra*, note 1, 12.

<sup>9</sup> *Supra*, note 6, 236.

<sup>10</sup> *Ibid.*, 128.

Individual deterrence is based on the assumption that the imposition of sufficiently severe punishment will deter the particular offender from repeating the same kind of offence, or from committing any other offence whatsoever. In order to deter an individual from continuing in a life of crime it is not always necessary that a long, harsh prison sentence be imposed. Indeed, sometimes the mere fact of detection and apprehension followed by a stern encounter with the court and its processes may have a sufficiently chastening effect upon an individual offender. This kind of effect is more likely to occur where the offender is young and has had a minimum of exposure to legal and correctional processes. By contrast, severe treatment of this type of offender may confirm his anti-social tendencies. Prisons are often spoken of as "schools for crime" since they bring together in close and often violent proximity hardened criminals and impressionable, vulnerable individuals for extended periods of time.<sup>11</sup>

The normative forces and peer group pressures prevalent in the prison environment may to some degree mirror those found in the larger society, but in other important respects they represent gross distortions of community values.

General deterrence involves the attempt, through a sentence handed out to a particular offender, to deter others from engaging in similar conduct. It looms importantly where a particular kind of crime is prevalent in the community and is causing public alarm, *e.g.*, armed robberies of convenience stores or taxi cab drivers, rape, or muggings involving elderly victims. In such instances it may appear that the particular offender before the court might be deterred from further illegal conduct even though dealt with leniently. His age, family background, motivation in committing the offence, absence of premeditation, *etc.*, would be important in this regard. None the less the sentencing tribunal may decide that an exemplary punishment is justified in order to allay community fears and thus presumably deter others who may be tempted to commit similar acts.

To some degree these attempts at general deterrence, particularly in chaotic urban centres, are misguided and unlikely to achieve any real measure of success. Often a deterrent sentence will have no effect at all because it is not brought to the attention of the community. It may simply be lost in the undifferentiated mass of prosecutions which are daily processed through our courts. The sentence may suffer from unfortunate juxtaposition with a disposition which strikes the public as ludicrously lenient. Or it may strike the public as an overly harsh disposition having regard to the personal characteristics of the offender.

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<sup>11</sup> The literature on the social organization of the prison and its effect on the inmate is plentiful. A general description is contained in C. Griffiths, J. Klein & S. Verdun-Jones, *Criminal Justice in Canada* (1980), 214 *et seq.*

General deterrence has been criticized by Paul Weiler for propagating an unrealistic Benthamite "image of economic man, calculating the gains and losses of complying at least with this part of the law".<sup>12</sup> The Law Reform Commission of Canada in its working paper entitled *The Principles of Sentencing and Dispositions* raises these additional criticisms of deterrence :

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.<sup>13</sup>

Critics have indicated that deterrence is only effective if the threatened punishment is perceived by the potential offender as consequent upon commission of the crime: *i.e.*, deterrence demands near certainty of apprehension and conviction.<sup>14</sup> The offender must perceive the likelihood of his detection and arrest. He must also have an expectation that the punishment consequent upon his conviction will be inevitable, real and unpleasant. In other words, deterrence depends upon the overall efficiency of the criminal justice system. According to the Law Reform Commission, studies show that deterrence is more likely to result from increased certainty of apprehension than from increased severity of sentence.<sup>15</sup> It is trite, but nevertheless worth noting, that detection and apprehension are by no means inevitable consequences of the commission of a criminal act. In fact, in many of the more prevalent crimes the charge and conviction rates are distressingly low. Since this is the case "there is a limit to what sentencing can do to increase the deterrent effect of crime".<sup>16</sup>

Despite its known defects, the philosophy of deterrence still holds sway over the thinking of most "legislators, jurists [and] law enforcement officers".<sup>17</sup> W. Friedmann notes that while we are still concerned with preventing the individual offender from the repetition of crime and the members of society from the emulation of criminal conduct, it is no longer certain that the harshest punishment is the best way of achieving that aim.<sup>18</sup>

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<sup>12</sup> Weiler, "The Reform of Punishment" in *Studies on Sentencing, supra*, note 2, 129.

<sup>13</sup> *Supra*, note 2, 8.

<sup>14</sup> See Law Reform Commission of Canada, *Fear of Punishment* (1976), *esp.* Fattah, "Deterrence: A Review of the Literature" 1, 26-33; *R. v. Harrison and Garrison* [1978] 1 W.W.R. 162, 164 (B.C.C.A.) *per* Farris, J.

<sup>15</sup> *Supra*, note 2, 31.

<sup>16</sup> *Ibid.*, 9-10.

<sup>17</sup> Fattah, *supra*, note 14, 21.

<sup>18</sup> W. Friedmann, *Law in a Changing Society*, 2d ed. (1972), 224.

### III. Rehabilitation

The recent history of penology and criminology has revealed an increased concentration on the social, economic and psychological forces involved in the genesis of crime. This has led to a greater emphasis on rehabilitation as the best way to protect the individual criminal from himself, and to protect society from the incidence of crime.<sup>19</sup>

The idea that it is possible to rehabilitate or reform the offender, to set him right and correct his aberrant impulses, is a noble one. Were it possible to translate this ideal into practice the benefits for society would be immense. Unfortunately, it has not been demonstrated to anyone's satisfaction that we know how to rehabilitate offenders. Packer states that one problem with the rehabilitative ideal is that it makes the criminal law a vehicle for tasks far beyond its competence. In his view

the point does not require labouring that a general amelioration of the conditions of social living is not a task that can be very well advanced in the context of the institutions and processes that we devote to apprehending, trying and dealing with persons who commit offences.<sup>20</sup>

The roots of crime are embedded in a complex array of phenomena — economic, social and psychic in nature — only some of which are comprehensible in terms of, let alone by, the individual himself. The task of remaking the individual may prove to be no less than the task of restructuring and improving society itself.

At present we are left to struggle with the dubious goal of rehabilitation after the fact. Packer, in answering critics of the rehabilitative ideal, quite rightly points to the fact that even our best efforts to date suffer from a lack of appropriate means :

The measures that we can take are so dubiously connected with the goal that it is hard to justify their employment. We can use our prisons to educate the illiterate, to teach men a useful trade, and to accomplish similar benevolent purposes. The plain disheartening fact is that we have very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behaviour. What is involved is primarily a leap of faith, by which we suppose that people who have certain social advantages will be less likely to commit certain kinds of crimes.<sup>21</sup>

Given our crude abilities to pursue this ideal there appears to be little justification for imprisonment in the name of rehabilitation. Allowing authorities to keep an inmate incarcerated in prison until he is "rehabilitated" is both unrealistic and actually cruel.

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<sup>19</sup> H. Packer, *The Limits of the Criminal Sanction* (1968), 52.

<sup>20</sup> *Ibid.*, 55.

<sup>21</sup> *Ibid.*, 56.

On the other hand, it should not be thought that the currently fashionable phrase “the death of rehabilitation”,<sup>22</sup> with its self-satisfied implication that rigorous experimentation with the concept has failed, is in any way grounded in reality. It is true that studies, conducted primarily in the United States,<sup>23</sup> have demonstrated that past penological efforts which attempted to emphasize rehabilitation were found to have no appreciable effect on rates of recidivism. But these efforts can more readily be interpreted as failures of means than as evidence of the death of the concept. Nevertheless, these observations made by Morton in 1962 hold true for the 1980s as well :

The high percentage of repeaters in our prisons indicates that it would be optimistic in the extreme to create or perpetuate the complex criminal process purely for the purpose of reform.<sup>25</sup>

#### IV. Protection of the community

In some way each of the purposes of sentencing discussed thus far augments the more general function of the safeguarding of society. Retribution aids this process because it is a tangible expression of the enforcement of law and a vindication of the legal order. Deterrence, both on the particular and the general plane, plays an important protective role through its concern with the prevention of crime. Rehabilitation in its ideal sense advances the long-term interests of society by reforming the individual and turning him away from illegal pursuits.

According to its traditional meaning, “the protection of the community” means the safeguarding of society through the removal of the offender, either temporarily or permanently. Society is only truly protected when there is near certainty of apprehension and conviction upon the commission of an offence, but that has never been the ease.

The goal of full enforcement and certain, inevitable punishment is a practical impossibility. It is also not a particularly desirable ideal for which to strive. The reasons for this initially puzzling proposition are manifold.

To begin with, the criminal justice system comprises only a small, albeit important portion of the socio-political order. While it is true that problems of crime and justice have a significance extending beyond purely parochial concerns, the commitment of human and financial resources to the system must be weighed in the balance. Somehow cost and benefit must be assessed. At present the resources allocated to the criminal justice system are strained

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<sup>22</sup> The phrase seems to be creeping into popular articles on the subject, e.g., *The Myth of Rehabilitation*, *The Humanist* (Sept.-Oct. 1978), Vol. XXXVIII, no. 5.

<sup>23</sup> See J.Q. Wilson, *Thinking About Crime* (1977).

<sup>24</sup> *Supra*, note 2, 8.

<sup>25</sup> J. Morton, *The Function of Criminal Law in 1962* (1962), 24.

to the limit. Prisons are overloaded and court dockets are burdened with excessive caseloads.<sup>26</sup> In terms of the economic climate of the day we simply cannot afford to pursue a policy of full enforcement.

Secondly, the blind application of law can occasion injustices which are potentially greater than the crime being policed. Our system survives in part because we have entrusted our police and prosecuting forces with a wide discretion not to invoke the criminal process. The *Ouimet Report* says :

[T]he element of the exercise of police discretion cannot be separated from law enforcement and... its complete elimination would not advance the ends of justice. We think that a decision not to prosecute and merely to give a warning may best advance the ends of justice in some circumstances. Where the offence is minor or marginal, especially where the offender is young and unsophisticated, or undergoing mental treatment, a warning may be more appropriate than invoking the massive machinery of the criminal law.

Arrest, even when followed by early dismissal of the charge, may ruin an innocent member of the community. Where there is no real likelihood of sufficient evidence being available to substantiate the suspicion that an offence has been committed, an arrest should not be made.<sup>27</sup>

There is a common belief afoot that the criminal justice system is bent upon the apprehension and conviction of all offenders of all criminal statutes. Plainly, the system does not in fact operate in this way.<sup>28</sup> Our system is structured to insure, at least in theoretical terms, that we do not by inadvertence or overzealousness convict the innocent. Morton puts the situation in somewhat hyperbolic terms when he asserts :

That some of the guilty do escape is attributed to the necessity for making absolutely sure that the innocent are acquitted : it is better that 9 or 99 or 999 guilty men escape than that one innocent man be convicted !<sup>29</sup>

This statement was undoubtedly well received when delivered during the height of "the liberal hour" in 1962, but one suspects a reluctance to accept it wholeheartedly in these more conservative times.

In any event, full enforcement is only meaningful in this analysis to the degree that it furthers the purported aim of safeguarding society. Morton believes that this purpose can only be seriously regarded where there is a sufficiently high proportion of felons caught, convicted and punished in relation to the total incidence of the particular crime.<sup>30</sup> He adds the corollary that it is necessary, when stressing the protection of the community, that "the

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<sup>26</sup> The excessive use of prisons in Canada has come in for criticism on numerous occasions. See, e.g., the *Ouimet Report*, *supra*, note 1, 309 ; *Report to Parliament by the Subcommittee on the Penal System in Canada* (1977), [ hereinafter the *MacGuigan Report* ] ; Law Reform Commission of Ontario, *Report on Administration of Ontario Courts* (1973).

<sup>27</sup> *Ouimet Report*, *supra*, note 1, 45-6.

<sup>28</sup> *Supra*, note 25, 25.

<sup>29</sup> *Ibid.*, 24-5.

<sup>30</sup> *Ibid.*, 24.



convicted offender be detained until it is safe to release him".<sup>31</sup> This conflicts with the idea that the punishment imposed should be proportionate to the seriousness of the crime. The persistent petty thief may not be deterred, if he is to be deterred at all, until he has spent an especially extended term in a penitentiary. But the maximum sentence available to the sentencing judge under existing law does not even approach such levels.

## V. Traditional sentencing practices

This brief survey of the traditional justifications of punishment should indicate that no one theory is free from defect or is capable of holding sway in all cases. The present day sentencing authority theoretically seeks to balance the competing interests and attempts to fashion a creative compromise in the imposition of sentence. The task remains one of the most difficult confronted by a judge. As presently structured, however well-intentioned the exercise may be, it seems destined to frustration. The Ouimet Committee offers this portrait of present practices :

Contemporary approaches to sentencing might well be described as of a compromise nature. A judge is said to be required to take the three measures of deterrence, rehabilitation and segregation into account when deciding how to best ensure the protection of the community. These approaches require him not to select one technique to the exclusion of others, but rather to blend all three into an appropriate disposition. In order to determine the degree and extent of control which is appropriate in a particular case, the judge must first decide which is the predominant consideration.

The Committee agrees with the proposition that one approach must be predominant or paramount. It appears to us that when all approaches are given equal measure in the so-called blending process then the result may serve none rather than all the aims of sentencing. No paramount approach aimed at the protection of society will obliterate all secondary effects of the subordinate approaches.

Any blending process involves an acceptance of the propositions that control protects society from the particular offender for the period of control ; that whatever control is imposed is unwelcome and operates as a deterrent ; that some degree of control is involved in any known technique of rehabilitation.<sup>32</sup>

These views represent the traditional liberal approach to sentencing policy. A wide discretion is entrusted to the sentencing officer, who is expected to carry out this complex task in a sensitive and creative manner. The approach relies on the belief that the correctional system is sophisticated and responsive enough to give accurate expression to the particular sentence that has been imposed. However, the reality of our present practices is summed up in a single word — disparity.

Disparity inevitably arises as an inevitable by-product of the exercise of discretion by the sentencing judge. The need to "individualize" sentences in order that they may reflect a concern for the character and attributes of the

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<sup>31</sup> *Ibid.*, 24.

<sup>32</sup> *Ouimet Report*, *supra*, note 1, 188.

offender and the nature of the offence, invariably leads to some disparity in dispositions. Different judges naturally possess differing capabilities, personal histories and biases which lead them to approach the same factual situation in distinctly different manners. Also, our present system is unencumbered by rigid formulas and tariffs. The less flexible the system is, the more likely the achievement of the goal of uniformity becomes.

Under a tariff system of punishment the sanctions imposed are predetermined according to the offence committed. The penalty under such a system is fixed and unyielding. Mewett and Common note that this type of system

presupposes an objective gravity of the offence so that its seriousness, and hence the appropriate penalty, may be determined merely by a consideration of the offence itself without regard either to the circumstances under which it was committed or to the background and condition of the offender himself.<sup>33</sup>

Under this approach, it is simple to maintain uniformity of sentences, and to eliminate disparities but at the same time the sacrifice of competing values such as compassion is readily apparent.

The task of assisting judges to exercise discretion over sentences in an informed and consistent manner is a daunting one. The present legislative framework is such that the sentencing judge in Canada receives little guidance in carrying out the task assigned to him.<sup>34</sup> Typically, all that is provided by the *Code* is the maximum sentence<sup>35</sup> available to the tribunal. In sentencing, the court usually has recourse to a variety of dispositions ranging from an absolute discharge, suspended sentence or fine, through to any period of incarceration provided for by law. In addition, the court has the power, in certain circumstances to order supervised probation, and/or to require the offender to make some restitution for the loss occasioned by his acts. Judges are not required to explain their reasons for sentencing. Consequently the process of enunciating the applicable principles with clarity and precision has been underdeveloped and fragmented. However, provincial appellate courts<sup>36</sup> have spoken with greater clarity in recent years and the case reporting of sentencing decisions has improved.

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<sup>33</sup> A. Mewett & W. Common, *The Philosophy of Sentencing and Disparity of Sentences* (1969), 4.

<sup>34</sup> *E.g.*, at present robbery is punishable by a range of sanctions running from a suspended sentence to life imprisonment, *Criminal Code*, R.S.C. 1970, c. C-34, s. 303; am. 1972, S.C. c. 13, s. 70. See also Law Reform Commission of Canada, *Imprisonment and Release, Working Paper No. 11* (1975), 41.

<sup>35</sup> Only rarely does a Canadian statute stipulate a mandatory minimum penalty for a given offence. Exceptions do exist; *e.g.*, murder carries a mandatory term of life imprisonment, *Criminal Code*, R.S.C. 1970, c. C-34, s. 218; am. S.C. 1974-75-76, c. 105, s. 5. Importing narcotics provides a much criticized minimum penalty of seven years, *Narcotic Control Act*, R.S.C. 1970, c. N-1, subs. 5 (2).

<sup>36</sup> The Supreme Court of Canada has jurisdiction to hear appeals under s. 41(1) of the *Supreme Court Act*, R.S.C. 1970, c. S-19, repealed and re-enacted by S.C. 1974, c. 18, s. 5,

Hogarth, in his important study of sentencing in Canada, detailed a wide variance in sentencing not only among provinces but also among courts in the same province. In one year, for example, an Ontario court employed probation in nearly one half of its dispositions, while a parallel court did not resort to it at all.<sup>37</sup>

## VI. Reform of sentencing practices

There is an unquestioned need for reform of present Canadian sentencing practices. The subject of sentencing and dispositions has come in for close study by the Law Reform Commission of Canada.<sup>38</sup> A primary prescription for the present ills of the system put forward by the Commission is the development and adoption of sentencing guidelines.<sup>39</sup> This proposal is augmented by others such as: (1) a mandatory requirement that the judge provide reasons for his sentence,<sup>40</sup> (2) the creation of sentencing councils to accommodate the belief that it is better for more than one person to make the sentencing determination,<sup>41</sup> and, (3) the utilization of sentencing conferences as an educational device to enhance the quality and consistency of sentencing decisions and to assist in the formulation and criteria for sentencing.<sup>42</sup>

Vining, in a recent examination of the Commission's proposals, argues that other jurisdictions — most notably in the United States — have already implemented, without notable success, these reforms which are only now being proposed for use in Canada.<sup>43</sup>

Nevertheless, the defects detailed in Vining's study concerning these reform proposals do not suggest that if implemented they would actually further impair the sentencing process. Some marginal benefits do appear to flow from each of the proposals. The danger lies in viewing them, either individually or together, as a panacea. Vining says as much in his analysis.

One vehicle for offering greater assistance to sentencing tribunals lies in a more realistic statutory formulation of maximum penalties. The Law Reform Commission rightly concludes that many of the maximum terms provided for in the *Code* are disproportionately high.<sup>44</sup> Clearly, a judge

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against sentences imposed by the courts below for indictable offences. However, the Court has adopted a rule whereby appeals on the "fitness of sentence" will not be entertained. *Hill v. The Queen* [1977] 1 S.C.R. 827, 851, *per* Pigeon, J. See R. Salhany, *Canadian Criminal Procedure* 3d ed. (1978), 338.

<sup>37</sup> J. Hogarth, *Sentencing as a Human Process* (1971), 358.

<sup>38</sup> *Supra*, note 2.

<sup>39</sup> *Ibid.*, 17; see also Vining, *Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons* (1979) 17 Osgoode Hall L.J. 355, 365.

<sup>40</sup> *Studies on Sentencing, supra*, note 2, 26.

<sup>41</sup> *Ibid.*, 25.

<sup>42</sup> *Ibid.*

<sup>43</sup> Vining, *supra*, note 39, 364.

<sup>44</sup> *Imprisonment and Release, supra*, note 34, 21.

would be assisted by the inclusion in the governing statute of sentencing ranges which reflect more accurately prevailing practices. The maxima which are presently utilized in the *Code* have some marginal utility but it is evident that the present mechanism requires fine tuning. Our *Code* has a rough system of classification of offences by reference to maximum terms. Offences are also classified in a more complex fashion on the basis of whether they are summary ("minor") or indictable ("serious") and in terms of the procedure and forum employed for trying the offence. The scheme used distinguishes offences according to whether their worst manifestation, in terms of both the offence, and the offender, would merit two, five, ten, fourteen years or life imprisonment.

Maximum penalties can only provide a relatively unsophisticated guide for the sentencing authority. The Law Reform Commission contends that a more precise, explicit exposition of principles and guidelines is necessary.<sup>45</sup> Their views derive from earlier work of the American Law Institute reflected in the much admired *Model Penal Code*.<sup>46</sup> The Ouimet Committee,<sup>47</sup> reporting some half dozen years prior to the Law Reform Commission, also recommended that the *Criminal Code* be amended to provide Canadian courts with statutory direction on their approach to sentencing and that this legislation ought to be framed to encompass the principles contained in the *Model Penal Code*. Article seven of the A.L.I. *Code* provides :

- 7 (1) The court shall deal with a person who has been convicted of a crime without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the crime and history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because :
- a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime ;
  - or,
  - b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution ;
  - or,
  - c) a lesser sentence will depreciate the seriousness of the defendant's crime.

It merits more than passing interest that the *Model Penal Code* endorses the use of imprisonment only as a last resort. Canadian studies made during the last twenty-five years have noted the lavish overuse of imprisonment in Canada.<sup>48</sup> Studies have shown that Canadian judges not only imprison too often but also for too long.<sup>49</sup>

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<sup>45</sup> *Ibid.*, 41.

<sup>46</sup> American Law Institute, *Model Penal Code* (1962).

<sup>47</sup> *Supra*, note 1, 209.

<sup>48</sup> See, generally, the *Ouimet Report*, *supra*, note 1, and the *MacGuigan Report*, *supra*, note 26.

<sup>49</sup> See Fattah, *supra*, note 14, 13, and Mandel, *Rethinking Parole* (1975) 13 Osgoode Hall L.J. 501, 512 *et seq.*

Whether one endorses the American proposals for sentencing guidelines or their Canadian variants, certain defects remain. One problem, stated by Vining, resides in the fact that “the suggested criteria are often so vague and elastic that, in practice, they would not assist judges in differentiating amongst offenders”.<sup>50</sup> Vining also mentions that the predictive elements which must compromise the core of realistic guidelines, are unproven, and even if statistically valid, might be impossible to implement as a practical matter.<sup>51</sup>

Wilkins, a leading proponent of structured guidelines, makes the point that “guidelines” is a term which “excludes methods which merely enhance the information available to the judge without proposing an indicated sentence for the individual case”.<sup>52</sup> This is not to suggest that the term “guidelines” comprehends a system of completely determinate sentencing whereby the judge has no discretion whatsoever in the imposition of sentence once the issue of guilt has been determined. The defects of such a system are quite apparent and are well stated by Howard in the following extract :

As a general principle it is unwise for the legislature to specify a mandatory, fixed sentence for any serious (indictable) crime. It is impossible at the legislative level to foresee and provide in adequate detail for the multitudinous variety of circumstances under which serious crimes are committed or for the sometimes considered differences of personality, background and intelligence between people who commit them. For serious offences the fixed sentence implies a certain primitiveness of thought which confuses the offender with the offence, and by doing so diminishes the effectiveness of the correctional system in promoting the ultimate interests of society. It is simply not the case that society is damaged or threatened to exactly the same extent every time a given offence is committed, or that every offender who commits that offence will respond in the same way to the same penalty, or that the effect on public opinion will in all cases be the same. What is virtually certain is that legislatively imposed fixed penalties for serious crimes will require the frequent intervention of executive clemency. Such a result means that discretion is being exercised by government instead of by the courts, which are in the great majority of cases better equipped to do so.<sup>53</sup>

Two other possible systems exist at the opposite end of the spectrum from the determinate sentencing scheme. Indeterminate detention is based on the proposition that incarceration is to be open-ended, subject to no maximum, with the offender submitting to “treatment” until he is deemed “cured”. Indefinite incarceration is such that the sentence has a maximum limit but is variable up to that limit by subordinate authorities. Its virtue is that discretion is conferred on the sentencing authority while the offender is protected by setting a limit on the maximum term available. Our present system is basically “hybrid” with the judge pronouncing the original sentence

<sup>50</sup> Vining, *supra*, note 39, 369.

<sup>51</sup> *Ibid.*, 369.

<sup>52</sup> Wilkins, *Sentencing Guidelines to Reduce Disparity* [1980] Crim. L.R. 201, 205.

<sup>53</sup> Howard, “An Analysis of Sentencing Authority” in P. Glazebrook, *Reshaping the Criminal Law* (1978), 404, 406.

while at the same time the Parole Board is accorded a wide latitude in determining the time to be served.<sup>54</sup>

A new theory and mechanism known as "presumptive sentencing" has emerged along with the newfound belief in the efficacy of guidelines as a means for checking unbridled sentencing discretion. Generally, it involves the establishment of base sanctions which will operate as the presumptive penalty for a given crime unless certain factors are demonstrated either in mitigation of the offence, in which case the sentence is reduced in accordance with set limiting guidelines, or in aggravation, wherein the presumptive sentence may be increased along predetermined lines.

Presumptive sentencing is premised upon the existence of a highly sophisticated mechanism for ascertaining applicable presumptive sanctions. Controversy, raging most strongly in the United States, surrounds the present debate concerning methodology.<sup>55</sup> Some of the questions bound up in the current American imbroglio are these :

Should the penalty system derive from and be based upon existing practice of the courts ?

Should a sentencing commission be established in order to set policy and state presumptive sentences (irrespective of whether these penalties conform with actual present practices as discerned by empirical studies) ?

Should the sentencing policy that is developed seek to remove most overt discretion from the court and place the real sentencing power in the hands of the prosecutor ?

Tonry and Morris, in an analysis of sentencing reform in America,<sup>56</sup> describe how California's *Uniform Determinate Sentencing Act*<sup>57</sup> has served to concentrate power in the hands of state prosecutors and how this will inevitably lead to the creation of new forms of disparity :

Some state sentencing reform proposals would give the prosecutor even greater sentencing power. California's Uniform Determinate Sentencing Act of 1976 requires imposition of significant prison sentence increases for defined aggravating circumstances (*e.g.*, use of a weapon, use of a firearm, infliction of great bodily injury, prior incarcerations, substantial property loss or damage) which have been charged and proven. Prosecutorial decisions to charge and prove aggravating circumstances requiring imposition of additional years of imprisonment could in many cases determine whether a convicted defendant will receive a prison sentence of two years or 10 or something in between. The sentencing court can refuse to impose additional years imprisonment for aggravating circumstances if it determines that there are circumstances in mitigation and states reasons for that decision on the record. There is no reason to expect that widely disparate sentences will not result when hundreds of prosecutors interact with hundreds of trial judges in determining sentences.<sup>58</sup>

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<sup>54</sup> P. Carrière & P. Silverstone, *The Parole Process: A Study of the National Parole Board*, (1976), 25.

<sup>55</sup> See Wilkins, *supra*, note 52; Tonry & Morris, "Sentencing Reform in America" in *Reshaping the Criminal Law*, *supra*, note 53, 434.

<sup>56</sup> Tonry & Morris, *ibid.*, 434.

<sup>57</sup> California Penal Code § 1170 (West 1981).

<sup>58</sup> Tonry & Morris, *supra*, note 55, 442.

There is a fear that in this type of scheme the prosecutor would have the ability, through the selection of charge and the ability to pursue higher penalties by proving or declining to prove the existence of aggravating factors, *etc.* to control sentence length. In contrast, the judge would be restricted to the presumptive band.

Some proposals add to the controversy by forbidding resort to non-incarceration sentences for persons convicted of certain specified offences, in effect declaring mandatory minimum periods of incarceration irrespective of mitigating factors.

Other American proposals seek to have the presumptive standards as exemplary guidelines only, leaving it to the judge to justify his decision through the use of written reasons which could be reviewed by way of appeal.<sup>59</sup> Such a scheme would shift the emphasis from the prosecutor's to the judge's discretion, presumably in the belief that reviewable structured judicial discretion in the matter of sentencing is preferable.

## VII. Parole and remission

As noted, Canada's sentencing system possesses hybrid features. Landreville and Carrière, in their study for the Law Reform Commission, point out that although there is an illusion that judges are imposing "fixed" sentences of imprisonment, the operation of clemency, remission and parole in effect transform these dispositions into indefinite sentences.<sup>60</sup> Thus even if the judicial imposition of sentence were free of disparity the operation of these institutional processes could produce disparity and potential inequity.

The Ouimet Committee defines parole as the

procedure whereby an inmate of a prison who is considered suitable may be released, at a time considered appropriate by a parole board, before the expiration of his sentence so he may serve the balance of his sentence at large in society but subject to stated conditions, under supervision, and subject to return to prison if he fails to comply with the conditions governing his release.<sup>61</sup>

The grant of discretionary power to the Parole Board under existing legislation is truly enormous. The Board under the *Parole Act*<sup>62</sup> has exclusive jurisdiction and absolute discretion to grant, refuse to grant or revoke parole. The most recent study of the parole process in Canada details

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<sup>59</sup> Canada already has appellate review of genuinely aberrant sentences. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 618. The section does not require that the judge provide written reasons for the sentence he imposes, or that he be guided by presumptive standards, either exemplary or mandatory.

<sup>60</sup> P. Landreville & P. Carrière, "Release Measures in Canada" in *Studies on Imprisonment* (1976), 79, 83.

<sup>61</sup> *Ouimet Report*, *supra*, note 1, 329.

<sup>62</sup> R.S.C. 1970, c. P-2, s. 6.

a situation which can only be described as vague, arbitrary, capricious, slipshod and inequitable.<sup>63</sup>

Mandel claims that "like the seasons, justifications for parole come and go with reassuring regularity".<sup>64</sup> He lists five comprehensive "catch-phrases": (1) rehabilitation, (2) maintenance of prison discipline, (3) clemency, (4) protection of society and (5) public relations (the need to placate public opinion).

The rehabilitative efficacy of Canada's parole system has been strongly questioned on many occasions. Mandel notes that "the maintenance of prison discipline usually only figures in official justifications of parole in order to be denounced".<sup>65</sup> Clemency has for some time been out of favour as a justification for parole.<sup>66</sup> It suggests that the parole system engages in sentence-tampering, and although this may be the working reality of the process, it is unsatisfactory as an official justification. The protection of society is an all-embracing phrase capturing both rehabilitation and removal within the swing of its compass. It indulges in the fiction that parole determinations are posited on some notion of predictive accuracy while the reality, Mandel asserts, is that parole prediction is largely a matter of guesswork.<sup>67</sup> He also queries how much protection is actually being purchased here :

We must conclude that it is unlikely in the extreme that the quality and quantity of protection make it worth all the bother and expense of the selection process. In fact, to all that has just been said, we might add the observation that whatever useful protection function is now served by the National Parole Board could just as usefully be served by the sentence, because the passage of time does not improve the ability to predict what a prisoner is likely to do when released.

But we ought to go further and question the whole idea of parole as public protest. Presumably it is based on a conception of the sentence of imprisonment as a device for incapacitating or at least segregating the offender. However, this must play a very minor part in most sentences of imprisonment because most sentences of imprisonment are so short, and the costs of imprisonment so vastly outweigh the "harm" which incapacitation prevents in most cases. Certainly, there are some dangerous offenders from whom total protection at the costs of prison is necessary. But they are far too few to justify the erection of a sentencing or parole system.<sup>68</sup>

The justification of parole as "public relations" involves the idea that the public should be led, on utilitarian grounds, to believe that our penal and correctional system is doing something other than that which it actually does. Professor I. Waller expresses the point well :

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<sup>63</sup> *Supra*, note 54.

<sup>64</sup> See Mandel, *supra*, note 49, 527.

<sup>65</sup> *Ibid.*, 531.

<sup>66</sup> *Ibid.*, 533-4.

<sup>67</sup> *Ibid.*, 536.

<sup>68</sup> *Ibid.*, 538.



We have attempted to be realistic in assessing the effectiveness of parole in changing behaviour. This is not necessarily to challenge its "raison d'être", for while it may fail in one area, it has other valuable functions : avoidance of the construction costs of new prisons, the relief of overcrowding, humanitarian considerations, and the need to placate public opinion with the claim that justice is being done and protection being given, even though criminals are being set free.<sup>69</sup>

Mandel cogently attacks this argument on the basis that it is deceitful and elitist. He is clearly correct in his argument that the best public opinion is informed public opinion.<sup>70</sup>

Intertwined with parole in the correctional process is yet another system — remission. An inmate may be released from prison before the expiry of the term set by the court when sentence was originally pronounced in three ways :

1. by an act of clemency ;
2. by an administrative decision of the Parole Board which has the power to release an inmate any time after he has served part of the prison term ;
3. by application of legislation which prescribes the automatic remission of one quarter of an inmate's sentence, or because the inmate has earned a remission through industrious participation in the activities (authorized or required) comprising an approved program of inmate training.

Remission is thus either statutory or earned. Statutory remission takes the form of a credit, of one quarter of the term imposed, which is made at the outset of the sentence. It is subject to forfeiture either partial or total, if the inmate is found guilty of a serious or flagrant offence during his detention. Forfeited periods of remission may be restored at the discretion of the Commissioner of the Parole Board. Carrière and Landreville offer this mild critique of statutory remission :

It is not an overstatement to conclude that the opportunities to forfeit statutory remission are many and that the director of the institution has wide discretion in applying this measure. Furthermore, although the remission procedure may seem to reduce strictness, in practice, it is certainly difficult for inmates who are inclined to defy regulations to meet remission conditions.<sup>71</sup>

Earned remission quite clearly has an aspect of sentence tampering associated with it. In theory, it is granted each month to inmates who apply themselves industriously to their work and by their attitude demonstrate good prospects for rehabilitation. Vining, Landreville and Carrière, and others have noted that the practices concerning the granting of earned

<sup>69</sup> I. Waller, *Men Released from Prison* (1974), 16.

<sup>70</sup> Mandel, *supra*, note 49, 539.

<sup>71</sup> *Supra*, note 60, 96.

remission vary greatly from one locale to another.<sup>72</sup> A survey of the literature reveals a strong measure of unanimity concerning the dysfunctional nature of remission and frequent calls for its abolition. It was once believed that remission might motivate and encourage inmates and thus speed their rehabilitation, but it is now recognized that it does not meet these objectives and that other facets of the system provide better means for an attempt to improve them.

Parole and remission undeniably alter the conceptual unity, such as it is, of the Canadian sentencing system. Defects within these processes redound to the detriment of the overall system. There is, in Vining's words, a marked "disagreement as to whether the parole process is inherently unsound given its present orientation, objectives and structures".<sup>73</sup> The task of constructing a fairer, more efficient and humane system involves in large measure the resolution of the disputes concerning the institutional adequacy of such structures as remission and parole. It also involves answering the questions concerning standards, guidelines and the limitation of discretion.

### Conclusion

The question of how to construct a fairer, more efficient and just system to perform the task of sentencing convicted offenders is only partially addressed by examining proposals for structuring and limiting discretion. It has been recognized for some time that existing sentencing options are not sufficiently broad to carry out the disparate tasks of the system, and that it is necessary to pursue the known, creative and accessible alternatives.

Improvements in existing legislation concerning restitution<sup>74</sup> and compensation<sup>75</sup> for victims of crimes are necessary and would serve the larger goal of effecting a reconciliation between the offender and his victim.

The victim, long decried as the forgotten figure in crime, is the focus of an emerging field of study known as victimology.<sup>76</sup> A greater recognition of the plight of the victim, once seen as peripheral, is now viewed as a more central concern of the criminal justice system.

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<sup>72</sup> Vining, *supra*, note 39, 364; Landreville & Carrière, *supra*, note 60, 97.

<sup>73</sup> Vining, *supra*, note 39, 358.

<sup>74</sup> "Restitution" means an obligation imposed by the state upon the offender for the benefit of his victim. It includes compensation for injury *paid by the offender* to victims of crime.

<sup>75</sup> "Compensation" means a payment made *by the state* to the victim of a crime for the damage or injury caused by the crime. It differs from restitution in that it allocates responsibility for compensating victims to society and is victim-oriented. Restitution allocates responsibility for compensation to the offender, is part of the penal sanction and is thought to serve a correctional goal as well.

<sup>76</sup> See *Symposium on Victimization and Victimology* (1981) 72 J. of Law and Criminology 704.

Diversion<sup>77</sup> of the offender from the ordinary channels of the system into non-judicial, quasi-probationary programmes is regarded as a cost-effective way of imposing sanctions which at the same time keep the offender within society, in order to hasten the process of his possible rehabilitation and reintegration into society.

Each of these areas of reform have attendant difficulties. How does an impoverished offender make restitution or pay compensation? If the state underwrites the effort, how great a cost is society prepared to absorb? How realistic is it to expect the victim to meet with his assailant let alone allow him to perform work or service for him (the victim) or on his property?

If we divert a person from the system before he has been found guilty or admitted his guilt, what assurance do we have that only the truly guilty are so treated? It is possible that fear of the courts and trials or embarrassment over a public airing of a charge may motivate an individual to opt for diversion. What if the divertee fails to fulfill his obligation? Can and should the state bring him back to face his original charge? Should he be guilty of another separate offence of failing to live up to his bargain? If we choose to divert an individual into paid work in the community how can we ensure in an age of high unemployment that such jobs will be available? If we divert him into unpaid work, how will he be supported?

This discussion of restitution, compensation and diversion is but a bare tracing of subjects which are capable of receiving and meriting extensive sustained analysis. They indicate that our present casts of thought are too rigid and inflexible. Imaginative alternatives to the *status quo* exist and these three by no means represent the last word on the subject of alternatives.

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<sup>77</sup>“Diversion” means formally acknowledged and organized efforts to utilize alternatives to initial or continued processing into the justice system. To qualify as diversion such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred.