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## *Sentencing Scholarship and Sentencing Reform in Canada*

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A. Manson, *The Law of Sentencing*. Toronto: Irwin Law, 2001.  
Pp. 412. [Softcover \$39.95 (Cdn.)].

A. Manson, P. Healy & G. Trotter, *Sentencing and Penal Policy in Canada:  
Cases, Materials, and Commentary*. Toronto: Emond Montgomery, 2000.  
Pp. 801. [Hardcover \$120.00 (Cdn.)].

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### **Introduction**

The appearance (within months of each other) of these two volumes, a new text and a casebook on sentencing, is cause for celebration, and justifies some reflection on the state of sentencing scholarship and training in this country. The volumes share a common author—Professor Allan Manson, for many years Canada’s leading sentencing scholar—and a common goal: to offer students of law and other interested parties an up-to-date and succinct summary of the law of sentencing, and sentencing materials, published in a casebook for the first time. His co-authors on the casebook are Professor Patrick Healy from the Faculty of Law, McGill University, and Professor Gary Trotter from the Queen’s University Faculty of Law. Together these works provide law professors with all that is necessary to teach a course on the subject. They also fill a long-standing void, by providing a text and companion casebook that incorporate not just a summary of the law of sentencing, but also related topics in the area of penology.

A decade ago there was little point and less need to write a review essay on the moribund state of sentencing scholarship; there was simply too little happening. By

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1990 the reports of the Canadian Sentencing Commission<sup>1</sup> and the House of Commons Standing Committee on Justice and Solicitor General<sup>2</sup>—both landmark documents in different ways—were languishing on library shelves. The criminal justice system was awaiting the federal government's response to these two reports. Legal scholars had little to write about, while sentencing scholars in the sociological tradition were hampered by the total absence, believe it or not, of even the most basic sentencing statistics.<sup>3</sup> Articles on sentencing in legal periodicals were conspicuous by their absence, and few, if any, law schools offered sentencing courses.

## I. Recent Developments in Sentencing

All this has changed with the inception of statutory sentencing reforms in 1995 and 1996. In 1995 Parliament approved Bill C-68,<sup>4</sup> which created a series of mandatory minimum sentences of imprisonment for a number of offences. For ten offences (including robbery, which alone accounts for a significant number of cases<sup>5</sup>) the mandatory minimum punishment is at least four years in prison if the offence was committed with a firearm.

The mandatory minimum sentences of imprisonment sit uneasily within the statutory framework of sentencing created by Bill C-41,<sup>6</sup> which was proclaimed on 3 September 1996. Sections 718 to 718.2 of the *Criminal Code*<sup>7</sup> now specify the purpose and principles of sentencing. The principle of proportionality in sentencing has been designated as "fundamental" by Parliament. In addition, Bill C-41 recognizes the importance of a restorative element in sentencing by two provisions. First, the statement of purpose includes restorative considerations in the codified objectives of sentencing.<sup>8</sup> Second, the bill created a new sanction, the conditional sentence of im-

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<sup>1</sup> Canada, *Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission* (Ottawa: Supply and Services Canada, 1986) (Chairperson: J.R. Omer Archambault).

<sup>2</sup> Canada, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Supply and Services Canada, 1988) (Chairperson: D. Daubney).

<sup>3</sup> Now Statistics Canada publishes sentencing statistics annually, although they are far from comprehensive, as they lack important information such as the criminal history information, and are derived exclusively from provincial courts; for the most recent trends see J.V. Roberts & C. Grimes, "Adult Criminal Court Statistics, 1998/99" (2000) 20:1 Juristat 1.

<sup>4</sup> *Firearms Act*, 1st Sess., 35th Parl., 1994 (assented to 5 December 1995, S.C. 1995, c. 39).

<sup>5</sup> In 1999 police across Canada recorded 5,124 cases of robbery with a firearm. See S. Tremblay, "Crime Statistics in Canada, 1999" (2000) 20:5 Juristat 1 at 16.

<sup>6</sup> *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess., 35th Parl., 1994 (assented to 13 July 1995, S.C. 1995, c. 22).

<sup>7</sup> R.S.C. 1985, c. C-46.

<sup>8</sup> See *supra* note 6. The objectives of sentencing include

prisonment, a term of custody served in the community that has an important restorative component, as was recognized by Chief Justice Lamer in the Supreme Court of Canada's decision in *R. v. Proulx*.<sup>9</sup>

Finally, although the Supreme Court has historically been reluctant to intervene in the area of sentencing, recent years have seen a flurry of judgments,<sup>10</sup> several of which were provoked by appeals with respect to the conditional sentence of imprisonment. These judgments follow those from the mid-1990s when the Supreme Court began to take greater interest in the question of appellate review of sentences, beginning with *R. v. Shropshire*,<sup>11</sup> and more importantly, *R. v. C.A.M.*<sup>12</sup>

## II. Sentencing Scholarship

With the notable exception of the *Criminal Reports* (which has continually published commentaries on sentencing), there has been a dearth of sentencing scholarship published in recent years. The recent statutory reforms and Supreme Court judgments have, however, triggered a considerable volume of scholarship. The conditional sentence alone has generated many articles. Certain publications stand out, and several legal periodicals have led the way. A 1997 conference of the Canadian Institute for the Administration of Justice explored the evolving world of sentencing, and a volume of papers presented at the conference was compiled by Patrick Healy and H el ene Dumont.<sup>13</sup> As well, within its four brief years of existence, the *Canadian Criminal Law Review* (edited by Anne-Marie Boisvert, Patrick Healy, Guy Courmoyer, and

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- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

<sup>9</sup> [2000] 1 S.C.R. 61, 182 D.L.R. (4th) 1 [hereinafter *Proulx*].

<sup>10</sup> *R. v. Morrissey*, [2000] 2 S.C.R. 90, 191 D.L.R. (4th) 86; *R. v. Wust*, [2000] 1 S.C.R. 455, 184 D.L.R. (4th) 385; *R. v. Knoblauch*, [2000] 2 S.C.R. 780, 192 D.L.R. (4th) 193 [hereinafter *Knoblauch*].

<sup>11</sup> [1995] 4 S.C.R. 227, 129 D.L.R. (4th) 657.

<sup>12</sup> [1996] 1 S.C.R. 500, 194 N.R. 321.

<sup>13</sup> Canadian Institute for the Administration of Justice, *Dawn or Dusk in Sentencing*, ed. by P. Healy & H. Dumont (Montreal: Th emis, 1997).

James O'Reilly) has published twelve articles<sup>14</sup> on the issue of sentencing, including a special issue in September 1999.<sup>15</sup>

In May 1999 the *Criminal Law Quarterly*, edited by Kent Roach from the Faculty of Law, University of Toronto, published an entire issue upon sentencing. This was followed two years later with a second special issue on the topic, containing articles on mandatory minimum penalties,<sup>16</sup> conditional sentencing,<sup>17</sup> and the statutory aggravating sentencing factor relating to hate or bias motivation.<sup>18</sup> If this attention to sentencing seems excessive, it simply redresses the neglect of this topic in previous years. In fact, in the first forty volumes of the *Criminal Law Quarterly*, containing almost three hundred articles, fewer than twenty articles were devoted to some aspect of the sentencing process.

These special issues should prove particularly useful for the topic of conditional sentencing, as they both precede and follow the Supreme Court's guideline judgment in *Proulx*.<sup>19</sup> Also in 2000, Shereen Benzvy Miller and Kent Roach edited a special issue of the *Canadian Journal of Criminology*<sup>20</sup> devoted to "Changing Punishment at the Turn of the Century: Finding the Common Ground". In 2001 the *Osgoode Hall Law Journal* will publish a special issue edited by Professor Liz Sheehy (University of Ottawa) devoted to the pressing topic of mandatory sentencing.

As for the training in the area, the scant attention paid by law schools to the issue of sentencing has always been a puzzle. The simple reality is that the outcome of most

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<sup>14</sup> See e.g. I. Grant, "Legislating Public Safety: The Business of Risk" (1998) 3 Can. Crim. L.R. 177; T. Quigley, "New Horizons in Sentencing?" (1996) 1 Can. Crim. L.R. 277; H. Dumont, "Avoir ou ne pas avoir la condamnation à l'emprisonnement avec sursis: voilà la question" (1999) 4 Can. Crim. L.R. 197; W.J. Vancise, "To Change or Not to Change—That Is the Issue" (1996) 1 Can. Crim. L.R. 263.

<sup>15</sup> (1999) 4:2 Can. Crim. L.R.

<sup>16</sup> N. Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44 Crim. L.Q. 279.

<sup>17</sup> D. North, "The 'Catch 22' of Conditional Sentencing" (2001) 44 Crim. L.Q. 342; A. Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform, Or Doing the Time Warp Again" (2001) 44 Crim. L.Q. 375; J. Roberts & P. Healy, "The Future of Conditional Sentencing" (2001) 44 Crim. L.Q. 309.

<sup>18</sup> M. Carter, "Addressing Discrimination through the Sentencing Process: Criminal Code s. 718.2(a)(i) in Historical and Theoretical Context" (2001) 44 Crim. L.Q. 399.

<sup>19</sup> See also Canada, Department of Justice Canada, *The Changing Face of Conditional Sentencing: Symposium Proceedings* (Ottawa: Department of Justice Canada, 2000).

<sup>20</sup> (2000) 42:3 Can. J. Crim.

criminal charges is a conviction,<sup>21</sup> and the vast majority of convictions are the result of a guilty plea entered following negotiations with the Crown. This makes the training of legal practitioners somewhat misplaced; more emphasis should surely be devoted to the sentencing process, on developing the skills of making a successful submission to sentence.

A constant refrain from provincial court judges that I encounter at judicial training sessions is that the quality of sentencing submissions is poor.<sup>22</sup> The paucity of training in law school must be one explanation. Another is the rapid evolution of the field of sentencing. For example, a central focus of sentencing submissions today—from the Crown or the defence perspective—is on the question of whether a conditional sentence is appropriate, and if so, the nature of the optional conditions that should be imposed on the offender. The importance of conditional sentencing has been enhanced by the unanimous decision in *Proulx*, in which the former chief justice made it clear that, so long as the statutory criteria had been met, no offender was ineligible for a conditional sentence of imprisonment.<sup>23</sup> This direction has surely opened the door to creative submissions regarding sentencing.

In order to “sell” a conditional sentence to a skeptical judge, defence counsel must be aware of the kinds of programs available, and must have some reasonable insight into the likelihood that their client will comply with court-imposed conditions. This means that counsel must inform themselves about available programs with a view to constructing a sentencing submission that is both realistic and consistent with the statutory statement of the purpose and principles of sentencing. In short, a lot more is being asked of counsel in their sentencing submissions; counsel are now required to do more than merely seek helpful precedents and deliver a perfunctory speech in mitigation. The last point about legal training with respect to this issue is that whatever is taught in law schools, sentencing is a core issue in many judicial training programs, such as those offered by the National Judicial Institute.

### III. *The Law of Sentencing*

Professor Manson’s text appears in the fast-growing Irwin Law series that offers concise yet comprehensive reviews of a wide range of topics. Although somewhat longer than others in the series, it is nevertheless a model of clarity and concision.

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<sup>21</sup> The overall conviction rate for selected provinces and territories in Canada in 1998-99 was 62 percent; the conviction rate was highest for federal statute offences, lowest for crimes against the person. See Roberts & Grimes, *supra* note 3 at 7.

<sup>22</sup> Some of this must simply reflect judicial “old fogeyism”—similar to the way that senior university professors tend to grumble about the quality of student papers.

<sup>23</sup> See *Proulx*, *supra* note 9 at para. 79.

Until now, the primary resource for students, practitioners, or scholars has been Clayton Ruby's *Sentencing*.<sup>24</sup> The most recent edition of the book, however, was published two years ago; since then, a number of important developments have taken place in the field of sentencing, particularly in the area of conditional sentencing. In addition, although Mr. Ruby's text is an excellent resource for practitioners, he devotes little space to the history of legal punishment and the origin of the justifications of punishment, many of which were codified in the sentencing reforms of 1996.<sup>25</sup> In fact, theories of punishment consume less than two pages, at which point the author launches into a description of the legislative regime. Practitioners may not find this a significant omission, but students need more information about the theories of sentencing, as useful submissions on sentencing require a basic understanding of the fundamental principles of sentencing.

The Manson text devotes two complete chapters to these topics, touching on all the principal justifications for the imposition of legal punishment, including the retributivist and utilitarian traditions that so often conflict with each other. He concludes the second chapter with an account of communicative theories of sentencing, including the less well-known but fascinating work of Antony Duff.<sup>26</sup>

From there the work proceeds to the issue of judicial discretion and the substantive principles of sentencing, the sources of aggravation and mitigation, and the sentencing hearing itself. It concludes with an examination of the sentencing arrangements for murder and manslaughter, the role of the appellate courts, and the future of sentencing. The only omission that struck this reviewer was an absence of much discussion of mandatory minimum sentences of imprisonment, particularly those introduced as part of the federal government's firearms strategy.<sup>27</sup> In light of the number of offenders affected by these mandatory penalties, and the harm that they inflict upon both the lives of individual offenders and the rationality and coherence of the principles of sentencing, it is disappointing that there is so little said about the problem in the text.<sup>28</sup> The timing of the volume permitted Professor Manson to conclude his work with some discussion of two important and recent Supreme Court judgments, *R. v.*

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<sup>24</sup> C.C. Ruby, *Sentencing*, 5th ed. (Toronto: Butterworths, 1999).

<sup>25</sup> For a brief account of the reforms contained in Bill C-41, *supra* note 6, see the account written by the architects of the bill: D. Daubney & G. Parry, "An Overview of Bill C-41 (The Sentencing Act)" in J.V. Roberts & D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31.

<sup>26</sup> See e.g. R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).

<sup>27</sup> See *supra* note 4.

<sup>28</sup> They are discussed in the context of the effect of time served on the minimum penalty imposed. See A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 112.

*Latimer*<sup>29</sup> and *Knoblauch*. Much journalistic ink has been spilt over the first case; Professor Manson weighs in with an interesting commentary on the Court's position.

*Knoblauch* is far less well-known, but in many respects carries wider implications, as it may influence a far larger number of cases. Mr. Knoblauch was a mentally disordered offender who, according to expert testimony, represented a threat to the community, having accumulated a considerable arsenal of explosives, and having evinced clear intention of detonating the material at some future time. His case presents a classic difficulty for the sentencing process (aside from the problem of responding to his mental disorder), for although he represented a threat, he had not actually *committed* any dangerous acts. The most harm that he had actually inflicted seems to have been blowing off his own fingertip while engaging in some rather sloppy bomb building in his home.

Does the sentencing judge have the authority to impose a severe sentence on the basis of predictions of dangerousness? Writing the judgment for the majority in a five-four decision, Arbour J. was keenly aware of this limitation of sentencing process to punish on the basis of predictions of dangerousness. She wrote: "There is no mechanism in criminal law to remove dangerous people from society merely in anticipation of the harm that they may cause. The limit of the reach of the criminal sanction is to address what offenders have done."<sup>30</sup> As well, the codified fundamental principle of sentencing discourages judges from risk-based sentencing.

At the end of the day, the majority upheld a community-based sanction (a conditional sentence) with the condition that the offender spend two years in a secure mental health facility. This provoked a vigorous dissent from Bastarache J., who argued that confinement in a locked mental institution could not possibly have been what Parliament envisaged when it created this alternative to imprisonment, namely a sentence served in the community.<sup>31</sup> The ambit of the conditional sentence of imprisonment, introduced in 1996 for the "less serious, first offenders" has, in a few short years, expanded almost beyond recognition. Yet the Court's position has found support among some commentators, including Professor Manson, who argues that "it is neither fair nor constructive to make the offender pay the price for our failure to provide sufficient resources to the sentencing system."<sup>32</sup> The issue is likely to provoke further commentary. I have already heard of counsel seeking what has been informally referred to as a "*Knoblauch* application", by which they hoped to attain a conditional sentence of imprisonment with a residential treatment requirement for a mentally disordered offender.

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<sup>29</sup> *R. v. Latimer*, [2001] 1 S.C.R. 3, 193 D.L.R. (4th) 577.

<sup>30</sup> *Knoblauch*, *supra* note 10 at para. 16.

<sup>31</sup> *Ibid.* at paras. 96ff.

<sup>32</sup> *Supra* note 28 at 389.

#### **IV. Sentencing and Penal Policy in Canada**

The casebook edited by Allan Manson, Patrick Healy, and Gary Trotter includes a comprehensive package of cases and materials pertaining to sentencing and parole. It offers more than most casebooks by providing the reader with additional materials relating to a diversity of issues that affect sentencing. These additional materials include statistics on the use of incarceration, writings on the philosophy of punishment, and research on the effects of imprisonment. A couple of decades ago this material would have been regarded as extraneous; now it is recognized as vital. Sentences of imprisonment, for example, cannot be understood—and nor should they be imposed—without some understanding of their effects on the specific offender (which are profound) and their impact on the crime rate (which is negligible).<sup>33</sup>

As noted in its preface, this casebook is the result of an attempt at Queen's University to integrate the disciplines of criminal law and criminology. In this sense it represents a growing degree of integration between the legal and sociological traditions. There has been clear evolution in the field towards a greater rapprochement between the law and the social sciences, but two separate worlds still exist. Most criminal lawyers have little familiarity with the empirical research on sentencing, while social scientists have an even more fragile grasp of the law of sentencing. One day sentencing courses will include a component on the social context of sentencing,<sup>34</sup> while students in the social sciences will be required to study the statutory framework and appellate jurisprudence. Until then this collection of materials will prove invaluable to legal and sociological communities alike.

In addition to the materials that most readers would expect to find, the casebook also includes newer material on sentencing circles under the heading "Challenging the Traditional Paradigm". And since sentences of imprisonment cannot be fully understood without knowing something about parole, the volume includes readings and statistical information pertaining to conditional release from prison.

#### **Conclusion**

This then is the context in which these two excellent volumes appear. They will be in considerable demand for some time to come, and Professors Manson, Healy, and Trotter are to be congratulated for having made a signal contribution to the sen-

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<sup>33</sup> In this context it is interesting to note that judges in England and Wales are being encouraged to follow the fate of sentenced offenders by regularly monitoring the offender's attempts at rehabilitation; this may include judicial visits to prisons.

<sup>34</sup> The curriculum of many judicial training seminars already reflects this trend, with courses on prediction, the social context of sentencing, and the empirical research of sentencing becoming more and more common.

tencing literature. Where is all this leading? Better courses and more texts and scholarly articles. And that, at the end of the day, can only mean more rational, equitable, and principled sentencing decisions.

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