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TOWARD A REVISED SENTENCING STRUCTURE FOR CANADA

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Canada's current sentencing laws and classification schemes are archaic and inadequate. In this article, we outline a number of the more serious flaws in our sentencing system. These flaws include the absence of a sentencing philosophy, a sentencing scheme which provides little or no direction to sentencing judges and results in serious sentencing disparities, and a sentencing system which is not sensitive to Charter guarantees of fundamental justice in areas such as mandatory punishment, parole, and dangerous offender provisions. In addition to describing the essential features of a new sentencing policy, we specifically recommend a major reclassification of current sentencing and offence structures, creation of "bench-mark" sentences, abolition of parole, and creation of a permanent Sentencing Commission.

Le droit qui s'applique aux peines et à leurs systèmes de classification sont archaïques tels qu'ils existent actuellement au Canada. Les auteurs de cet article soulignent certains des défauts les plus graves de notre système pénal, tels l'absence de philosophie, le manque de directives données aux juges sur les peines appropriées, ce qui a pour résultat la grande disparité des peines imposées, et l'incapacité du système à répondre aux garanties de justice fondamentale données par la Charte dans certains domaines comme l'imposition obligatoire d'une peine, la libération conditionnelle et les dispositions concernant les

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délinquants dangereux. Les auteurs esquissent à grands traits la description d'une nouvelle ligne à suivre dans l'imposition des peines et recommandent en particulier une reclassification majeure des peines actuelles et de la structure des infractions, la création de peines types, l'abolition de la libération conditionnelle et la mise sur pied d'une commission permanente sur les peines.

Introduction

On an average day, about one in every 670 Canadians is in prison.¹ Who are these people, and why are they there? What have they done to deserve the most drastic sanction available? Is it necessary that more than 25,000 adults be imprisoned on any given day at an estimated annual cost of one-half billion dollars² in order to make our society a better and safer place? What purposes do we seek to achieve through imprisonment, and at what risk and cost? Most people would agree that prison is the only realistic sentence for those who commit serious offences against the person, but is imprisonment necessary in less serious cases? If not, how are we to determine when imprisonment is necessary? What principles or factors of a legal, social or economic nature should influence the questions of who goes to prison and for how long?

Every society must eventually confront these difficult questions in a conscious, rational way. A point is reached where the available evidence begins to suggest that the old ways may not be the best or the only ways. Over the past ten years, the Law Reform Commission of Canada has produced various publications addressing the critical questions of the role of criminal law in our society and the place of imprisonment in our sentencing structure.³ This work and analysis have stimulated discussion and debate. The Department of Justice, for example, has released policy papers,⁴ and, building on the work of the Commission, introduced proposed amendments to the Criminal Code relating to sentencing policy and practice.⁵ Meanwhile, the Canadian Sentencing Commission was set up with a broad mandate to examine Canadian sentencing policies and practices and to make recommendations.⁶

¹ Correctional Services Canada, *Basic Facts About Corrections in Canada 1984* (Minister of Supply and Services Canada, 1984), pp. 7-8.

² *Ibid.*, p. 13.

³ See, for example, the following, all by the Law Reform Commission of Canada: Working Paper No. 3: *The Principles of Sentencing and Dispositions* (Information Canada, 1974); Working Paper No. 11: *Imprisonment and Release* (Information Canada, 1975); *A Report on Dispositions and Sentences in the Criminal Process: Guidelines* (Information Canada, 1976); *Report: Our Criminal Law* (Minister of Supply and Services Canada, 1977).

⁴ Government of Canada, *The Criminal Law in Canadian Society* (Ottawa, 1982); Government of Canada, *Sentencing* (Ottawa, 1984).

⁵ *Infra*, footnote 18.

⁶ The Commission was established pursuant to the Inquiries Act, R.S.C. 1970, c. I-13, by Order-in-Council P.C. 1984-1585 on May 10, 1984. Its mandate is to investi-

This mandate is especially relevant considering the potential impact the Canadian Charter of Rights and Freedoms⁷ may have on sentencing. Section 7 of the Charter guarantees the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Under section 1, limitations on this or other Charter rights are valid only if they are reasonable limits which are prescribed by law and can be justified in a free and democratic society. The guarantee under section 15 to equality before and under the law, and the recitation in the Preamble that our legal system is founded upon the rule of law, are also of obvious relevance to Canadian sentencing law.

Even prior to the Charter, the Supreme Court of Canada emphasized the importance of certain fundamental values in the administration of justice including a widely held revulsion against convicting or punishing the morally innocent.⁸ The court recently reaffirmed this principle, explaining that it is founded upon a belief in the dignity and worth of the human person and on the rule of law.⁹ In other recent Charter cases, the Supreme Court has referred to the principle of proportionality as a standard to be applied in assessing whether legislative provisions, in curtailing a protected liberty, have gone beyond what is necessary. The court noted that it is relevant to ask whether the state could achieve its legislative aim through less intrusive measures.¹⁰

gate current sentencing provisions and practices and to develop sentencing guidelines with particular attention to maximum penalties, categories of offences and offenders, the use of non-carceral sanctions, prosecutorial discretion and plea and charge negotiation, mandatory minimum sentences, and parole and remission. The Commission is also responsible for making recommendations concerning the implementation and updating of their guidelines.

⁷ Constitution Act, 1982, Schedule B.

⁸ *R. v. City of Sault St. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

⁹ *Reference Re s. 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289, at p. 310 (S.C.C.), where Lamer J. stated: "It has from time immemorial been part of our system of laws that the innocent not be punished."

¹⁰ *R. v. Big M Drug Mart* (1985), 18 C.C.C. (3d) 385 (S.C.C.). In *Reference Re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 9, Wilson J., in agreeing with the other members of the Supreme Court that section 7 contemplated that punishment should be proportional to the gravity of the offence and not excessive, again made reference to the principle of the least restrictive measure as a relevant criterion in assessing proportionality and reasonableness of punishment. Indeed, Wilson J. stated, at p. 325:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

While the majority of the court did not join with Wilson J. in these remarks it is likely that there will be substantial support on the court for this view of punishment. Its expression at this time lends further urgency to the on-going task of reforming our sentencing laws.

In light of these Charter considerations, it is our thesis that the relationship between proportionality, the restraint principle, and the retributive principle of "just deserts" is of critical importance and lends further urgency to the necessary task of reforming our sentencing laws. In this article we will briefly address the current problems with Canada's sentencing laws, focusing on the issue of imprisonment and its relationship to a fair and rational sentencing framework. We will then turn to a consideration of our proposals for reform, which include reclassification of offences, creation of "benchmark" sentences, abolition of parole and creation of a permanent Sentencing Commission.

Our approach proceeds on the assumption that Canadian sentencing policy should be rational and consistent with Canadian values.¹¹ Victim and community relationships to sentencing cannot be ignored. Moreover, sentencing reform cannot proceed in a legal vacuum, ignoring research results or failing to relate those results to principles and practice. Account must be taken of the reality that sentencing is but one part of a legal process that starts with the apprehension of offenders and the laying of charges, and continues through plea bargaining and trials, convictions and sentencing, and the supervision and administration of those sentences, including parole and remission. Finally, Canada's sentencing policies and practices should be understandable, clear, fair and equitable.

We believe that the flaws in our current sentencing and classification scheme are serious, requiring substantial change and reform. We do not counsel demolition; we do say that the current framework is somewhat like an old country inn, solid and well constructed over a century ago upon a blueprint drawn up for a different age with different values in a different country. The old house is in need of renovation. Over the years, as the house came into different hands, additions were made to the structure, not always consistent with the original architectural lines, producing a certain incoherence of layout and design. Indeed, this old house is decrepit, rundown, inconvenient and cramped by today's standards. We find that the staff have to some extent come to regard the place as their own domain, to be run according to their own self-defined goals and standards of service, to the extent that the public no longer clearly understands the scope of the inn's service nor do they feel particularly welcome within its doors. It is time to consider removing several ill-fitting additions that were constructed in times of crises over the years; the lighting needs modernizing through judicious use of windows and skylights; and a review must be made of the boiler room where the original furnace is currently fed on an insubstantial diet of twigs and

¹¹ This assumption is shared by the Law Reform Commission of Canada. See: A Report on Dispositions and Sentences in the Criminal Process: Guidelines, *op. cit.*, footnote 3, p. 8.

scraps while bigger fodder is left unprocessed. As the section below makes clear it is not a bad old house, but it is in need of careful renovation.

I. Overview of Recent Proposals

In its working paper, *Principles of Sentencing and Disposition*,¹² the Law Reform Commission of Canada asserted that a primary value in sentencing is respect for the dignity of persons. Presumably this value implies that sentencing policy ought not to use individuals only as a means to some identifiable public "good" but rather must treat them as autonomous ends, as persons capable of choice and accountable for their actions.

Sentencing, suggested the Commission, should be based on the "just deserts" principle of righting the wrong. This principle, however, was not to be relied on absolutely; thus, where it could be shown that punishment did not serve any useful end, condemnation and punishment should not be imposed. In this sense the Commission suggested a "just deserts" theory of punishment conditioned upon a preliminary premise that punishment serves to prevent or reduce crime.¹³

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. . .

Justice, on the other hand, in focusing 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.

For all practical purposes, then, the Commission suggested that in sentencing, "just deserts" be the operational principle with the gravity of the offence and the culpability of the offender determining the severity of punishment. It is a sentencing policy under which "just deserts" governs the quantum of punishment as well as its distribution.¹⁴ The imposition of imprisonment, then, was to be governed by some scale of punishment tied to the gravity of the offence and the culpability of the offender rather than to factors related to prevention or treatment. This "just deserts" philosophy is reflected in the Commission's Report on

¹² *Op. cit.*, footnote 3, pp. 3-4.

¹³ *Ibid.*

¹⁴ As recommended by Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985), p. 49.

Dispositions and Sentences.¹⁵ Sentences serve to stigmatize and denounce, said the Commission, and must be proportionate to the harm done.¹⁶ At the same time, within these parameters the Commission urged restraint, reconciliation, and repairing the harm done.¹⁷ Proportionality, it should be noted, derives from a retributive principle of "just deserts", but this principle is modified to some extent by the Commission's recommendation that in a limited number of cases sentencing power be used for protective purposes; and, specifically, to incapacitate the dangerous or to coerce obedience in cases of contempt of court. The principal purpose of imprisonment, said the Commission, was to denounce seriously grave conduct and, thus, to underline core values. Accordingly, it can be seen that the Commission recommended to Parliament a basically retributive position limited to some extent by a protective principle in a restricted class of cases.

The Commission's work was followed up by the Department of Justice as part of its criminal law review program. In its 1984 discussion paper, Sentencing,¹⁸ the Department stated that while the overall aim of sentencing is protection of the public, such protection could be achieved through a "just deserts" principle wherein the punishment fits the crime, or through incapacitation, deterrence, restitution or rehabilitation. In the end, the departmental paper did not choose between the competing retributivist (or "just deserts") philosophy and utilitarian counterparts. Some hint of preference for "just deserts" is indicated in the departmental paper, but in the end this principle is relegated to but one of a number of competing factors. This failure to set a priority among competing and disparate sentencing philosophies was reflected later in proposed sentencing amendments as set out in Bill C-19.¹⁹ Commendably, the Bill purported to include a statement of sentencing philosophy in the Criminal Code,²⁰ presumably in the interests of fair notice to the public and for the better guidance of courts. The Bill could be interpreted as espousing a limited "just deserts" philosophy. Thus, while the Bill proposed that the ultimate goal of sentencing be protection, it contemplated that such a goal could be achieved in a number of ways, namely through (1) imposing "just sentences", (2) incapacitation of offenders, (3) deterrence (both specific and general), (4) redress for victims, and (5) providing opportunities for offenders to become law abiding.

¹⁵ *Op. cit.*, footnote 3.

¹⁶ *Ibid.*, pp. 8-9.

¹⁷ *Ibid.*

¹⁸ *Op. cit.*, footnote 4, pp. 34-36.

¹⁹ Second Session, Thirty-second Parliament, 32-33 Elizabeth II, 1983-84. See, in particular, s.645. Bill C-19 received 1st Reading on February 7, 1984.

²⁰ R.S.C. 1970, c. C-34.

While such a statement, without more, might be regarded simply as an invitation to anarchy in sentencing purposes, this criticism was forestalled by the Bill imposing restrictions on discretion to pursue any or all of the above aims. In particular the Bill stated that any sentence had to be:

- (1) proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence and any other aggravating or mitigating circumstances;
- (2) similar to other sentences imposed on other offenders under like circumstances; and
- (3) the least onerous disposition appropriate under the circumstances.

By virtue of these limitations the operational sentencing policy was for all intents and purposes one of "just deserts". This effect was reinforced by other provisions of the Bill prohibiting imprisonment solely for purposes of rehabilitation.²¹ Lingering doubts about the overall philosophy were corroborated, however, by further statements in the Bill that imprisonment could be used either "to protect" society or to reflect the gravity of the offence. As it turned out Bill C-19 died on the order paper, but its very existence attested to the serious questioning of sentencing principles and practices in Canada.

Sentencing reforms in the United States in recent years have also generated substantial debate over the re-emergence of "just deserts" as the primary goal of sentencing. At the core of legislative reforms in Minnesota,²² Washington,²³ Illinois,²⁴ New Jersey,²⁵ and California²⁶ is the priority to be given to "just deserts" as opposed to rehabilitation. At the same time, Illinois has enacted a sentencing framework that ostensibly aims at "determinate" imprisonment, without parole. In other sentencing reforms, Maine has abolished parole,²⁷ and the United States federal criminal law reforms affirm the importance of "just punishment" and the need for the sentence to reflect the seriousness of the offence and promote respect for the law.²⁸ The United States Supreme Court,

²¹ For example, s. 645(3) (g).

²² Minn. Stats. Ann. 244.08 (West Supp. 1984).

²³ Wash. Rev. Code Ann. 9.94A.010 (West Supp. 1984-85).

²⁴ Ill. Rev. Stats. ch. 38, 1005 (1983).

²⁵ N.J. Stats. Ann. Section 2C:44-1(d), (e); *State v. Roth*, 471 A. 2d 370 (N.J.S.C., 1984), places the emphasis on the gravity of the offence; Note (1985), 15 Seton Hall L. Rev. 372.

²⁶ 1976 Cal. Stat., c. 1139 as amended; see also Cal. Penal Code, s. 1170 (West 1985).

²⁷ Me. Rev. Stat. Ann. tit. 17-A, 1252 (West Supp. 1983-84).

²⁸ The Sentencing Reform Act of 1984, 18 U.S.C., sections 3551 and following.

too, has said in the context of capital punishment cases that punishment serves retributive purposes.²⁹

II. *Current Sentencing Framework And Policy*

A. *Origins*

Our current sentencing scheme was not originally derived from the realities of modern life in Canadian society. It was adapted, with little alteration or discussion, from an English model during the colonial period: Stephen's English Draft Code of 1879.³⁰ Following that model, every offence, no matter how minor, may be dealt with by imprisonment. The maximum terms of life, fourteen, ten, five, two years and six months in prison, in the Criminal Code, can be traced to nineteenth century legislation and penal practices in England.³¹ There, during the first half of the last century, the death penalty was prescribed for a wide range of offences including some which were relatively trivial, such as theft of a sheep. The harshness of this regime was mitigated to some extent through administrative action. For example, in England in 1717, and later, in the Canadian colonies, officials could arrange the commutation of death sentences, on condition that the person consent to be transported for fourteen years, or such other term as specified, to penal work in various English colonies.³² Over time the most common terms to which the offender could be transported to work in penal servitude were life, twenty-one, fourteen or seven years. This administrative practice was later reflected in legislation permitting judicial sentences of transportation.³³ Still later, in England in the 1840s, after transportation was abolished, sentences of

²⁹ *Enmund v. Florida*, 458 U.S. 782 (1982).

³⁰ Sir James Fitzjames Stephen authored a Draft Code in 1878 which was introduced into Parliament by the then Attorney-General, Sir John Holkden. A Royal Commission consisting of Stephen, Lord Blackburn, Mr. Justice Barry, and Lord Justice Lush was established to report on the Draft Code. They did so on June 12, 1879. However, the Code was never enacted: Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), Vol. I, pp.vi-vii. For one account of the interest in draft codes in England at the time see M. Friedland, R.S. Wrights' Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law (1981), 1 Oxford Jo. Leg. Studies 307. See also G. Parker, *The Origins of the Canadian Criminal Code*, in D.H. Flaherty (ed.) *Essays on the History of Canadian Law* (1981), c. 7.

³¹ See a comparison of the terms of imprisonment set forth in Stats. Prov. Can. (1841), cc. 24, 25, 26 and 27 with the terms of transportation set out Stats. Eng., 4 Geo. 1 (1717), c. 11 (transportation) and the length of transportation and prison terms in, for example, 9 and 10 Vic. (1846), c. 24. The English draftsman's preference for terms of life, fourteen, ten, seven, or two years is reflected again in 16 and 17 Vic., (1853) c. 99.

³² 4 Geo. 1 (1717), c. 11, s. 1; compare Stats. N.S. (1851), c. 162 and Stats. U.C. (1854-55), c. 92 and Stats. U.C. (1837), c. 4, 6 and Stats. U.C. (1833), c. 4.

³³ 18 Geo. 2 (1745), c. 27, s. 2.

imprisonment (penal servitude) were introduced with terms of fourteen or seven years.³⁴ Preference for penal terms of life, fourteen, ten and seven years was reflected in colonial legislation and in the current Code.³⁵

The Canadian colonies also retained the English distinction of imprisonment for less than two years in a local prison and sentences of more than two years in "penal servitude" in a penitentiary. The reason for the distinction was that conditions in local prisons, in England, as documented by John Howard, were thought to be so bad that it was considered inhumane to keep people in them for longer than two years.³⁶ As a result, those serving longer sentences were sent to a "penitentiary", where it was believed that conditions were more humane. By the 1830s, English legislation authorizing penal servitude (imprisonment in excess of three years) was being copied into Canadian colonial statute books.³⁷ With Confederation, in 1867, criminal law became a federal matter, along with penitentiaries, but terms of less than two years were to be served in provincially controlled prisons.

The first real break from English legislation, but not English values and ideas, came in 1892, when Sir John Thompson presented the Canadian Parliament with a Code of Criminal Law. This Code was based closely on the English Draft Code of 1879 which drew heavily on the existing statutory law of England at the time. Stephen's Draft Code, however, abolished the common law classification of offences as felonies and misdemeanors and replaced it with a classification of indictable and summary conviction offences. The terms of imprisonment in Sir John Thompson's Code of 1892 drew on English and pre-Confederation Canadian colonial statutes.³⁸ The sentencing provisions of the Code were adopted by the Canadian Parliament with little discussion or debate.³⁹ Over the years sentencing provisions have been amended to provide for

³⁴ Transportation was abolished between 1853 and 1864, under such statutes as 16 & 17 Vic. (1853), c. 99 and 27 & 28 Vic. (1864), c. 47.

³⁵ Several Criminal Code offences still bear maximum penalties of 14 years imprisonment. For example: some forms of treason (s. 47(2)(c)); Inciting to Mutiny (s. 53); Perjury (s. 121(1)); Incest (s. 150(2)); Arson (s. 389(1)).

³⁶ The conditions in the new prisons and penitentiaries during the 1840s and 50s were appalling, notwithstanding the good intentions of reformers: British Parliamentary Papers, Vol. 14 Prisons: Reports of the Surveyor-General of Prisons, Appendix H.

³⁷ For example, Stats. U.C. 3 Wm. 4 (1833), c. 4.

³⁸ Compare Stats. U.C. (1854-55) c. 92; Stats. Can. (1865) c. 13, 14. By comparison, pre confederation Nova Scotia statutes reflected a more humane and lenient scale of punishment (see Stats. N.S. (1851) c. 162), an early indication perhaps of the influence of Upper Canada in the new confederation.

³⁹ Two of the only sentencing provisions discussed were those for smuggling and sedition. In both cases, the Canadian Parliamentarians recognized that Canada's criminal sentencing needs were not identical to England's: House of Commons (Canada) Debates, 2nd Session, 7th Parliament, 55-56 Victoria, 1892, pp. 2826-30.

probation and conditional discharges; parole was added on. Still, the 1892 Code remains basically unchanged today in its classification and sentencing structure.

B. *Characteristic Features*

The current sentencing structure, including classification of offences, is scattered in legislation, case law, and administrative regulation and practice. The Criminal Code, as indicated, provides the basic framework by allocating the more severe punishments to the more serious offences according to a scale of proportionality. Appeals against sentence by both Crown and defence have been provided for since 1925. Such appeals are based on whether or not the sentence imposed is "fit", a retributivist principle.⁴⁰ The Code sets out a maximum punishment for each offence based on the worst imaginable case; thus, robbery is punishable by life imprisonment. The very high maximum punishments provide no real guidance for judges in dealing with the average case. In a few selected offences the Code or other federal statutes set out mandatory minimum punishments. No guidelines or factors are included in the Code to indicate when imprisonment as opposed to a non-carceral sentence is appropriate, nor is there guidance as to an appropriate range of sentence in the "average" or "normal" case.

While the 1892 Code could be recognized for its unmistakably retributivist and deterrent features, legislative changes in 1921,⁴¹ authorizing probation as a sentence for first offenders, added a rehabilitative element and this was strengthened by enactment of the Parole Act⁴² in 1958. Under the Act, in the interest of rehabilitation and protection of society, all sentences of imprisonment were eligible for modification by possibility of early release on parole supervision. Thus, the original architecture of the sentencing framework was modified at the federal level by rehabilitative assumptions, just as it had been modified at the provincial level in earlier years by rehabilitative correctional programs facilitated by the provisions of the Prisons and Reformatories Act.⁴³ It is characteristic that the Code does not contain an express statement of sentencing philosophy. Apart from an express reference to "rehabilitation" and "public protection" in the Parole Act and reformist principles in the Prison and Reformatories Act, sentencing policy under the Code is implicitly retributivist, but express policy has been left to the discretion of the judges and the enunciation of principles on a case by case basis.

⁴⁰ S. 614(1) of the Criminal Code requires that courts of appeal consider the "fitness" of the sentence appealed against.

⁴¹ An Act to amend the Criminal Code, S.C. 1921, c. 25, s. 19.

⁴² S.C. 1958, c. 38; see now R.S.C. 1970, c. P-2.

⁴³ See now R.S.C. 1970, c. 217, as amended.

Case law states that sentencing principles include protection of society through rehabilitation, deterrence, incapacitation, denunciation and retribution.⁴⁴ This eclectic approach, endorsing a range of philosophies and principles, has gained the support of all ten courts of appeal in the various provinces, at different times and to different degrees. How helpful is such a broadly based approach in giving guidance to the sentencing judge? Various courts of appeal have said that no single principle is overriding and that the sentencing court must balance the principles and related factors in any given case.⁴⁵ Notwithstanding the direction that the principles are to be "balanced" in any given case, it is also clear from the cases that rehabilitation and factors relevant to it are basically used only to mitigate punishment in appropriate cases; rehabilitation is not used as a principle to override proportionality. Support for rehabilitation as a sentencing principle has been strongest in Ontario, and was probably influenced by the growth of rehabilitative assumptions in prisons and "corrections" in the 1950s and 1960s in that province and elsewhere. As an illustration of the thinking of the times, the prestigious Ouimet Committee,⁴⁶ reporting in 1969, rejected "just deserts" (or retribution as it was referred to then) as a sentencing principle in these words:

The primary purpose of sentencing is the protection of society. Deterrence, both general and particular, through knowledge of penalties consequent upon prohibited acts; rehabilitation of the individual offender into a law abiding citizen; confinement of the dangerous offender as long as he is dangerous, are a major means of accomplishing this purpose. Use of these means should, however, be devoid of any connotation of vengeance or retribution.

In the years following the Ouimet report, however, the rehabilitative ideal and other utilitarian assumptions began to crumble in the light of social science research showing limited human capacity to reform,

⁴⁴ "The fundamental purpose of any sentence of whatever kind is the protection of society:" per McLennan J.A. in *R. v. Wilmott*, [1967] 1 C.C.C. 171, at p. 177 (Ont. C.A.). Rehabilitation was emphasized as a sentencing objective in *R. v. Willaert* (1953), 105 C.C.C. (2d) 172, at p. 176 (Ont. C.A.). Deterrence and retribution were stressed in *R. v. Morrisette* (1971), 1 C.C.C. (2d) 307 (Sask. C.A.). In *R. v. Wood* (1975), 26 C.C.C. (2d) 100, the Alberta Supreme Court, Appellate Division, stated that denunciation was a major goal in sentencing (at p. 106).

⁴⁵ For example, see: Gale C.J.O. in *R. v. McKimm*, [1970] 1 C.C.C. 340, at p. 341 (Ont. C.A.); MacDonald J.A., in *R. v. Wilson* (1977), 10 N.S.R. (2d) 629, at p. 635 (N.S. App.Div.); Nicholson C.J.P.E.I. in *R. v. Doughty* (1978), 40 C.C.C. (2d) 224, at p. 224 (P.E.I.C.A.); McKay J.A. in *Willaert supra*, footnote 44, at p. 176. See generally P. Nadin-Davis, *Sentencing in Canada* (1982); C. Ruby, *Sentencing* (2nd ed., 1980); Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook* (Ministry of Supply and Services, Ottawa, 1983).

⁴⁶ Report of the Canadian Committee on Corrections: *Toward Unity: Criminal Justice and Corrections* (Information Canada, 1969), p. 194.

rehabilitate or deter, and the destructive and costly effects of prisons.⁴⁷ In this context of changing perceptions and increased awareness of the immorality of punishing persons not because they deserved it, but because they served as convenient examples to others, the Law Reform Commission of Canada affirmed the role of the criminal court as an instrument of "doing justice" rather than "social engineering".

More recently, some courts of appeal have frankly and expressly announced that the governing principle in sentencing is now to be seen as retributive: let the punishment fit the crime. Thus, some courts at least have affirmed a priority for the principle that punishment cannot be excessive,⁴⁸ and that it must be proportionate to the gravity of the offence and the culpability of the offender.⁴⁹ There is, then, an observable cycle from retributivist principles to rehabilitative and incapacitative assumptions back to retribution.

The current framework, characterized by uneven offence descriptions, ranks offences according to a scale of seriousness, with very high statutory maxima. Thus punishment is left to the broad discretion of the judge, guided by such direction as offered through the case law. Sentencing practices are also affected by broad prosecutorial discretion to select charges and broad parole discretion to release on supervision. As can be expected, in the absence of a clearly articulated sentencing policy, the current framework has given rise to various criticisms. It is said that the high statutory maxima are productive of inequity and disparity in sentencing and are misleading.

A further feature of current sentencing policy is that, for all practical purposes, sentencing law is inaccessible and unknowable to the ordinary person except through the help of experienced lawyers. Should sentencing policy make it possible for the ordinary person to know what the average or "normal" sentences in given offences are, as opposed to the statutory maxima sentences? From the reported cases one would hope to be able to determine the "normal" range of punishments in the more common cases taken on appeal such as robbery, but, unfortunately, only a limited number of sentencing decisions are taken on appeal and few are reported. In some provinces a more extensive publication of sentencing decisions from the courts of appeal is available through a report series providing a short summary of the outcome.⁵⁰ The most

⁴⁷ A good summary of this research can be found in Alfred Blumstein *et al.* (ed.), *Research on Sentencing: The Search for Reform* (1983).

⁴⁸ Wilson J. stated this expressly in her judgment in *Reference Re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 9, at pp. 324-325.

⁴⁹ *Ibid.*, at pp. 318-321. See also, *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 (Alta. C.A.) for a similar statement.

⁵⁰ For example, *British Columbia Decisions: Criminal Sentence Cases*, Western Legal Publications (1982) Ltd.

reliable information on what are the "normal" or "usual" sentences in any given offence is picked up by lawyers practising before the courts; such information is not accessible in any printed form to the general public. Indeed, the "usual" sentence will vary from one part of the province to another and from one part of the country to another. A new judge in a particular county or district will want to inquire beforehand how much a moose is worth and whether it is worth more than two pheasants; that is, what are the outer limits of punishment in typical cases and how do they relate to other offences, proportionately.⁵¹ As already indicated, the normal range of punishments is very much lower than the maximum punishments set out in the Code.

A further characteristic of the present sentencing framework is the degree to which prosecutorial discretion affects sentencing outcomes. For example, police and crown prosecutors in laying or reviewing the charge will sometimes have an option between laying a charge which carries a mandatory sentence of imprisonment upon conviction and one which does not. Should the offender be charged, for example, with importing a narcotic or simply with possession for the purpose of trafficking, the former carrying a minimum seven year term, the latter providing for discretionary imprisonment or even a suspended sentence? Similarly, an offence may be "hybrid", one which allows the charging official to choose between charging by way of a summary conviction (with a maximum of six months imprisonment), or proceeding upon indictment where the maximum term will be two, five, ten or fourteen years as provided in the particular offence. For example, everyone who commits mischief in relation to public property can be charged on summary conviction (maximum punishment being up to a \$2,000 fine or six months imprisonment, or both) or charged with an indictable offence (maximum punishment being fourteen years).⁵² Thus the Crown prosecutors have a large discretion to affect sentencing through the power conferred upon them by these "hybrid" offences. Since such discretion is not reviewable and may not even be subject to internal administrative guidelines, any future sentencing and classification scheme should seriously consider whether these "hybrid" offences should be continued.

III. Current Problems

Given that there is no clear statement of policy and a want of accessible guidelines and precedents in Canadian sentencing law, that the judiciary and prosecution are obliged to exercise the broad discretion which that law confers on them in the absence of a coherent philosophical basis,³ and that we still rely for the most part on a system of crime

⁵¹ We are indebted to Judge Denroche of the British Columbia Provincial Court for this illustration.

⁵² Criminal Code, *supra*, footnote 20, s. 387 (3).

classification that dates back to Colonial days, it is not surprising that a number of serious problems plague the present Canadian sentencing process. With the adoption of the Charter as part of the supreme law of the land, Canada has entered an era where charges of arbitrariness, disparity, inequity and vagueness will receive strict scrutiny. The various aspects of this nation's sentencing law which contribute to its present unsatisfactory state have been analyzed by us extensively elsewhere.⁵³ Hence, these problems will here be given only such brief mention as is required to lay the foundations for the central focus of this paper: our discussion of reform proposals.

A. *Mandatory Punishment*

A number of statutory provisions in Canadian law compel our courts to impose a prescribed minimum punishment in the event of conviction of certain offences. Whether they manifest themselves in absolute liability offences, where the accused is denied an opportunity to justify his or her breach of the law, or are of the nature such as section 5(2) of the Narcotic Control Act,⁵⁴ where on conviction of the charge the court must impose seven years of imprisonment, such provisions raise serious issues on both a constitutional and a practical level.

(1) *Constitutional Issues*

Prior to the Charter, the constitutionality of a provision which prescribed a mandatory punishment was virtually immune from challenge. The general principle that Parliament was supreme and hence could legislate any punishment it deemed appropriate was subject only to the unlikely finding that a prescribed penalty contravened the Canadian Bill of Rights⁵⁵ by constituting cruel and unusual punishment. Under the Charter, however, mandatory punishment may violate the section 12 prohibition against cruel and unusual punishment, the section 9 protection against arbitrary detention or imprisonment, or the section 7 guarantee of the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Indeed, the extent to which the Charter will play a role in determining the legality of mandatory punishment provisions can already be anticipated. If the values that were enunciated by the Supreme Court of Canada in *Reference Re s. 94(2) of the Motor Vehicle Act*⁵⁶ are applied to mandatory sentencing laws, repeal or significant modification will likely be required. Admittedly, the *Reference* case involved a chal-

⁵³ K. Jobson and G. Ferguson, *Current Problems in Canadian Sentencing Law*, to be published.

⁵⁴ Narcotic Control Act, R.S.C. 1970, c. N-1.

⁵⁵ Canadian Bill of Rights, R.S.C. 1970, App. II, s. 2(b).

⁵⁶ *Supra*, footnote 9.

lenge to an absolute liability provision, but the broadness of the language used by both Lamer J. and Wilson J. in expounding the principles which governed their decision to strike down section 94(2) of the British Columbia Motor Vehicle Act⁵⁷ is likely to compel the application of those principles in all future cases, regardless of the form of the impugned legislation. Whether Lamer J.'s reasoning that the morally innocent should not be punished and that the least intrusive means should be used to achieve state objectives, or Wilson J.'s principle that punishment must not be disproportionate is applied, the *Reference* case opens the path to Charter attacks on the various mandatory punishment provisions.⁵⁸

An alternate illustration of judicial reaction to mandatory sentencing provisions like section 5(2) of the Narcotic Control Act can be found in Lambert J.A.'s dissent in *R. v. Smith*.⁵⁹ There, he held that section 5(2), in requiring the court to impose a minimum seven year term of imprisonment upon conviction of the accused for importing a narcotic without regard to mitigating circumstances and without a reasoned application of the legal principles of sentencing, violated section 9 of the Charter.⁶⁰ *R. v. Smith* has been argued before the Supreme Court of

⁵⁷ Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94, as amended by Motor Vehicle Act Amendment Act, S.B.C. 1982, c. 36, s. 19.

⁵⁸ Following the *Reference Re s. 94(2)*, *supra*, footnote 9, these provisions will be open to attack on two bases. According to Lamer J., who wrote for the majority of the court, a law which is contrary to the principles of fundamental justice in its infringement on the section 7 right to life, liberty and security of the person is open to challenge. Section 94(2) was such a law; by requiring imprisonment for seven days on proof that the accused drove a motor vehicle while his licence was suspended it breached the principle of fundamental justice that the innocent not be punished. Lamer J. further pointed out that section 1 of the Charter could not save the provision. Because a means less intrusive than absolute liability could have been employed to attain the state's legitimate objective of reducing the extent of impaired driving, its use was not justifiable in a free and democratic society. Had a standard of strict liability been used, that is, one which permitted the accused an opportunity to establish that he had no knowledge that his licence was suspended and that he could not reasonably have been expected to have such knowledge, it would apparently have survived the Charter attack. Wilson J., in her concurring judgment, took a different approach. She held that it is a basic tenet of any system of justice that punishment bear a "fit" relationship to the offence and not be disproportionate or excessive. Only if a punishment is "deserved", says Wilson J., can the accused or the public have confidence in its fairness and rationality. The mandatory imposition of seven days imprisonment on conviction for an offence that could be committed unknowingly is clearly a disproportionate punishment.

⁵⁹ (1984), 11 C.C.C. (3d) 411 (B.C.C.A.).

⁶⁰ Lambert J.A. was of the opinion that the proper approach to be taken in a Charter challenge was to look at the effect of the impugned legislation: consideration of legislative purpose alone was not enough. This emphasis on effects has since been approved as the proper approach by the Supreme Court in *R. v. Big M Drug Mart*, *supra*, footnote 10. By focusing on effects, Lambert J.A. avoided using the pre-Charter logic applied by the majority: having found a valid legislative purpose, namely suppression of the drug trade, the majority then fell back on the supremacy of Parliament as the final

Canada, but a decision has not yet been handed down. However, if the principles enunciated in the *Reference* case are liberally applied, we can rest assured that the *Smith* decision will also lead to a call for the judicial scrutiny of the legality of other mandatory minimum provisions like section 239(1) (a) (ii) of the Criminal Code, which imposes fourteen days imprisonment for a second impaired driving offence, and sections 669 and 670 of the Code, where upon conviction for first degree murder, life imprisonment without eligibility for parole for twenty-five years must be ordered.

(2) *Practical Limitations*

In addition to the unresolved Charter issues concerning mandatory punishments, these provisions also raise practical problems. First, mandatory penalties are apparently premised on the assumption that stiff punishments reduce crime and protect the public. Deterrence and public safety are admirable motives for imposing strict sanctions, but experience shows that the imposition of minimum penalties does not serve these ends in many cases.⁶¹ Second, mandatory minimum punishments have a distorting effect at all phases of the sentencing process. Police and Crown prosecutors, it is said, are more likely to lay a charge involving a mandatory penalty when faced with a choice between one which carries a mandatory punishment and one which does not. In so doing, the prosecution is armed with a powerful bargaining tool with which to seek

rebuttal of the challenge. Lambert J.A., however, presented a very different view. By requiring judges to impose a minimum term of seven years imprisonment, Parliament had acted arbitrarily, he said, pointing out that if a particular judge had decided he or she would always impose a certain term for a particular offence without regard to the individual circumstances of each case it would not be tolerated. The fact that it was Parliament and not a member of the judiciary which foreclosed consideration of individual differences under s. 5(2) made the arbitrariness of the provision no more acceptable.

Is Lambert J.A.'s implicit argument for individualization of justice compelling with respect to s. 5(2) of the Narcotic Control Act, *supra*, footnote 54? That section, after all, does not prohibit individualization. All it does is set a floor of seven years. Above that floor, any term up to life imprisonment may be imposed. Thus, a better approach might be found in the application of Wilson J.'s "proportionality" test. Given that Parliament has the constitutional authority to choose to enact minimum punishments if it sees fit to do so, the only question that needs to be asked on a challenge of the constitutionality of such a provision is whether, considering the gravity of the offence, the penalty imposed is so disproportionate as to render it "arbitrary" or "cruel and unusual" punishment. Another appealing approach can be found in Lamer J.'s "least intrusive means" formula. Under this test, the seven year minimum term under section 5(2) might well amount to a punishment that is too severe to survive a Charter challenge.

⁶¹ See, for example, National Research Council, *Deterrence and Incapacitation: Estimate the Effects of Criminal Sanctions on Crime Rates* (Washington: Nat'l Academy of Sciences, 1978), pp. 6-7, 95 ff.; H.L. Ross, *Deterrence of the Drinking Driver: An International Survey*, Law and Economics Workshop series #WS111-5, Faculty of Law, U. Toronto, 1980, pp. 90-91.

concessions from the accused.⁶² Mandatory punishment provisions also affect jury decisions. If the prescribed penalty offends their sense of justice, the jury may return an unwarranted acquittal. Likewise, judges may be prepared to acquit on spurious technical defences if conviction would result in a punishment that is unjust in their view. Finally, quite apart from deterrence and public safety concerns and issues of injustice, there is the problem of cost. When faced with a mandatory punishment, accused will be more likely to fight the Crown's case than they would be in other circumstances. The voluminous case law dealing with drinking driving cases substantiates the concern that prescribed minimum penalties lead to a greater utilization of court time.⁶³

B. *Excessive Punishment*

Several factors contribute to the problem of excessive punishment. First, many of the maximum penalties set by statute are historically high. In various offences, in practice, the actual punishments imposed are so far from these maximum penalties that the latter are rendered useless as guidelines. Second, the present system of ranking punishments in terms of such maxima contributes to the problem. The need for review is apparent in many provisions. For example, do we agree that forgery of passports (punishable by up to fourteen years) is a more serious crime than assault causing bodily harm (punishable by no more than 10 years)?⁶⁴ Related to these issues is the matter of uneven offence descriptions. A number of offences are described in very broad terms. Take, for example, robbery. Is it realistic to leave open the possibility of a life sentence in all cases of robbery?⁶⁵ A better approach would be to categorize that crime into, perhaps, three offences, simple robbery, armed robbery and aggravated armed robbery, with different terms for each.⁶⁶

Finally, excessive punishment results from the judicial tendency to impose prison terms in many cases where imprisonment is inappropriate. Until such time as statutory guidance is provided to assist the judiciary in determining what types of cases warrant imprisonment as opposed

⁶² W.L. Gourlie, *Role of the Prosecutor: Fair Minister of Justice with Firm Convictions* (1982), 46 Sask. L. Rev. 292 and (1982), 16 U.B.C. L. Rev. 295; A. Branigan and J.C. Levy, *The Legal Framework of Plea Bargaining* (1983), 25 Can. J. Crim. 399.

⁶³ The Law Reform Commission of Canada has recommended the abolition of minimum prison sentences in the context of these practical effects; see Working Paper No. 11: *Imprisonment and Release* (Ottawa: Supply and Services Canada, 1975), pp. 24-26.

⁶⁴ See Criminal Code, *supra*, footnote 20, s. 58 (passport forgery), s.245.1 (assault causing bodily harm).

⁶⁵ *Ibid.*, s. 303.

⁶⁶ However, caution must be taken not to particularize to the extent that has occurred with respect to theft-related offences in the Criminal Code. The twelve different offences of theft unnecessarily confine prosecutorial discretion and present difficulties in attempts to amend the charge to conform to the evidence.

to probation, fines and other less intrusive penalties, the unnecessary over-crowding of Canadian jails will no doubt continue. Of course, some would argue that the imposition of guidelines would unduly fetter the courts' present ability to individualize punishment. But as it stands today, the Code does more than permit the individualization of treatment of offenders; it encourages sentencing anarchy. Since some appellate courts generally defer to the sentence prescribed by a court of first instance unless the sentence is illegal, the offender who has been subjected to individualized punishment that is apparently excessive may be without remedy. This is particularly the case given the underfunding of legal aid and the very conservative approach by legal aid societies to the funding of sentence appeals.

C. *Disparity*

Quite apart from ethical concerns relating to the justice of individualized sentencing, sections 7 and 15 of the Charter call into question the constitutionality of excessive disparity. Although it may be argued that no two cases are alike, wide disparity in the sentences given to offenders who commit virtually the same offence cannot be supported solely on the basis of "individualized" justice. Indeed, the typical factors taken into account in "individualizing the sentence", namely, the personality of the offender, the likelihood of recidivism and the circumstances of the offence, may have little to do with the harshness of the sentence. Instead, the skill of the defence counsel in negotiating a plea bargain or in representing an accused in a sentencing hearing, or whether counsel are involved at all, are believed to be far more weighty factors in obtaining lenient sentences.

D. *Lack of Fair Notice*

In *R. v. Robson*⁶⁷ the British Columbia Court of Appeal proposed the following test of what constitutes fair notice: does the law serve to give a person of ordinary intelligence fair notice of what is forbidden? It is suggested here that fair notice extends even further; that it should include notice not only of the conduct that is forbidden, but also the consequences of conviction for such conduct. The wide discretion and high statutory maximum terms which prevail in present offence provisions do not fulfil this latter requirement. In light of the wide disparity of sanctions which are imposed for many crimes, can it be said that the law is accessible and capable of being understood by ordinary persons in the criminal courts; or are the law and the outcome too frequently inaccessible to them — another institutional mystery?

⁶⁷ (1984), 19 C.C.C. (3d) 137, at p. 141. (B.C.C.A.).

E. Parole

It is our conclusion that parole and remission laws are complex, inaccessible and unknowable. In fact, since parole and remission laws do not set firm standards for release, revocation or suspension, it might even be said that parole is not governed by law at all in many cases. Briefly, the parole-remission system may be explained as follows.

In practice, while remission is to be "earned", offenders are credited by law with "good time" to a maximum of one-third of the term of imprisonment, subject to its being taken away for various reasons.⁶⁸ Originally, at the two-thirds mark of the sentence, with full credit for good behaviour, the prisoner was discharged and the sentence legally ended. This is still the case for prisoners serving sentences of less than two years in those provinces which do not have a provincial parole board,⁶⁹ and for all prisoners serving less than three months regardless of what province they are in. Inmates of federal institutions (sentences of two years or more) and those serving more than three months in Ontario, Quebec and British Columbia, however, are subject to a more complex arrangement because of the parole system.

Generally, inmates are eligible for consideration for parole at the one-third mark of their sentences. Exceptions exist where minimum parole eligibility is prescribed by statute (for example, twenty-five years in first degree murder), or where parole regulations state otherwise (one half of sentence or seven years, whichever is the lesser, must be served for certain violent offences). The Parole Act provides that where parole is not granted before the expiry of two-thirds of the sentence the prisoner shall be released under mandatory supervision.⁷⁰ The result is that what is legally prescribed as remitted time⁷¹ may be required to be spent under the watchful eyes of parole authorities. Further, these authorities are given the power to revoke or suspend parole or mandatory supervision for a wide number of reasons. If this is done, offenders frequently lose the benefit of what good time they have earned. The problem of calculating the correct release date in some cases is so complex that even the prison sentence administrator may be unsure and the courts are bewildered by the complexity. Such uncertainty and, arguably, arbitrary processes offend the principles of fundamental fairness.

⁶⁸ Penitentiary Act, R.S.C. 1970, c. P-6, s. 24.

⁶⁹ Only Ontario, Quebec and British Columbia have their own parole boards.

⁷⁰ As a result of recent amendments to the Parole Act, *supra*, footnote 42, prisoners who are eligible for mandatory release but are found by the Board to be dangerous, may be kept in penitentiary until the expiration of their sentence: An Act to amend the Parole Act and the Penitentiary Act, S.C. 1986, c. 42.

⁷¹ *Ibid.*

F. *Dangerous Offenders*

Sections 687 and following of the Criminal Code permit the Crown prosecutor to seek a special hearing following the conviction of a person of a "serious personal injury offence". At that hearing, a determination of whether the person is a dangerous offender may be made. If the court concludes that the person is dangerous as defined by the Code, it may impose an order of preventive detention for life. Recent challenges to these provisions as contrary to the Charter guarantee against arbitrary detention or imprisonment (section 9) have been unsuccessful.⁷² However, the Supreme Court of Canada has yet to rule on their constitutionality.

We are of the opinion that sentencing provisions must address the incarceration of particularly dangerous individuals. However, the present Code provisions and the application of those provisions raise serious concerns. It must be noted that the reliability of predictions of dangerousness is far from accurate,⁷³ and, further, that the provisions are presently applied in a very inconsistent fashion. Webster and Dickens point out that of the thirty-two dangerous offenders who had been sentenced to preventive detention at the date of their study,⁷⁴ eighteen were in Ontario. The apparent reluctance of courts in some provinces to use the provisions, the excessive length of the indeterminate term, and the need for a periodic judicial review of such sentences require a re-examination of the Code provisions. A preferable approach, in our view, is to be found by turning to the Netherlands. There, a five year term, reviewable and renewable every five years, was used for several years, apparently with satisfactory results. A system similar to that appears far more desirable than the current system which imposes a life sentence subject only to uncertain parole release authorized under vague criteria.⁷⁵

G. *Role of the Victim*

Another problematic aspect of the Canadian sentencing process is its failure to address the role of the victim. Historically, victims played a

⁷² *R. v. Simon* (No.3) (1982), 69 C.C.C. (2d) 557 (N.W.T.S.C.); *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.).

⁷³ See C. Webster and B. Dickens, *Deciding Dangerousness: Policy Alternatives for Dangerous Offenders* (Department of Justice, Ottawa, 1983).

⁷⁴ *Ibid.*, p. 109.

⁷⁵ Consideration of parole release of persons under indeterminate sentences as dangerous offenders must first be made within three years of the detention order. The Parole Board requires that such consideration include two psychiatric reports and one psychologist's report, a consideration of the sentencing judge's reasons, remarks and impressions, the institutional report, and the community assessment report respecting public perceptions and attitudes. In addition, since conviction of an offence of violence will generally be the precipitating event leading to the life sentence, parole release of dangerous offenders must have regard to the delayed parole eligibility date for "violent offenders" as defined in section 8 of the Parole Regulations. In addition the ordinary factors as listed in the Parole Board Policy and Procedures Manual, section 4, apply.

large part in the system. They brought a charge and reparation orders were a common sentencing feature. Today, however, criminal charges are generally a prosecutorial concern, and punishments are comprised primarily of imprisonment, fines and probation orders. Some movement has been made toward giving victims some recognition in pilot projects where victim impact statements are heard at the time of sentencing as well as in the conditions judges attach to probation orders. Still, the majority of victims remain a peripheral concern of the system. The extant sentencing structure does little to address the injury suffered by those against whose person and property crimes are committed. It is an inherent feature of our proposed "just deserts" model for punishment that attempts be made through sentencing to repair the harm done by offenders.

IV. A Sentencing Policy: Purposes and Essential Features

Having identified the major problems within the existing sentencing structure, we will now suggest what we believe ought to be the essential features of a new sentencing policy. In this section, we argue that Canada's sentencing policy ought to be based upon principles of fundamental justice and that these principles of fundamental justice include respect for the dignity and autonomy of each person as well as respect for community interest and social values. More specifically, we suggest that principles of fundamental justice include a requirement of fair notice of the law's proscriptions and sanctions. This principle in turn means that sentencing policy must be reasonably clear, intelligible and ascertainable. Another principle of fundamental justice is that the law must be equitable and fair both substantively and procedurally. This principle means that sentencing policy must be based on "just deserts" — what is deserved — which in turn requires proportionality and restraint in sanctions. Finally, both procedural and substantive justice mandate a sentencing policy which is coherent, rational and capable of being administered and monitored efficiently. We will expand upon these ideas in this section and the next.

Given the importance of the Charter, it is clear that a sentencing policy must be well grounded in those principles of fundamental justice that have informed the common law and infused the hearts of our people in building a free and democratic society founded upon the rule of law. Among these principles, as already indicated, is that of respect for the dignity and autonomy of persons as moral agents living under the regime of law that assumes and encourages individual responsibility for making choices.⁷⁶ In addition, equal respect and equal liberty are ideals towards

⁷⁶ In *R. v. Sault Ste. Marie*, *supra*, footnote 8, the Supreme Court of Canada stated that it was wrong to punish the morally innocent. The morally innocent were those accused persons who did not knowingly commit the unlawful act and who were blameless in the sense that they had exercised due diligence to avoid the laws' proscrip-

which we strive individually and collectively through social, political, and legal institutions. Indeed, the guarantee of liberty as referred to in the Charter is not to be taken narrowly, connoting only absence of imprisonment; rather it is a grand concept evoking "the ancient liberties of Englishmen" and, according to Esson J.A. in *R. v. Robson*,⁷⁷ quoting *Meyer v. Nebraska*,⁷⁸ includes:

... not merely freedom from bodily restraint, but also the right of the individual... to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

In *Reference Re S.94(2) of the Motor Vehicle Act*⁷⁹ the Supreme Court of Canada, in considering the legitimacy of mandatory imprisonment as imposed by section 94(2) of the Motor Vehicle Act,⁸⁰ affirmed the central importance of the right to life, liberty and security of person under section 7 of the Charter and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Principles of fundamental justice, said Lamer J., reflect a substantive as well as a procedural aspect.⁸¹ It is clear that section 7 would prohibit cruel and unusual punishment even if section 12 did not already explicitly prohibit it. The exact parameters of section 7 will only be revealed with time, but the significance of the section for sentencing is apparent.⁸²

Before identifying specific sentencing principles or conditions that may be derived from "the principles of fundamental justice", it is worth noting that there is another set of values of fundamental importance in a free and democratic society, a set of values not rooted in individualism but in the collective spirit and organic substance of the community. These values call for a wider perspective in sentencing so that the focus is not simply on "Her Majesty v. The Accused", but a focus acknowledging

tions. Later in a case arising under the Charter, Lamer J. emphasizes the widely held "revulsion against punishment of the morally innocent": *Reference Re Section 94(2) of the Motor Vehicle Act*, *supra*, footnote 9. The court's emphasis on blameworthiness in the context of a system of justice "founded upon a belief in the dignity and worth of the human person and on the rule of law" raises Kantian images. David A. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law* (1978-79), 13 *Georgia L. Rev.* 1395, underlines the Kantian view of man as a rational creature capable of choice.

⁷⁷ *Supra*, footnote 67, at pp. 144-145.

⁷⁸ 262 U.S. 390, at p. 399 (1923).

⁷⁹ *Supra*, footnote 9.

⁸⁰ R.S.B.C. 1979, c. 288.

⁸¹ *Supra*, footnote 9, at pp. 309-310.

⁸² To date section 7 has had greatest influence on procedural fairness in post-sentencing hearings relating to prison and parole: F. O'Connor, *The Impact of the Charter of Rights and Freedoms on Parole in Canada* (1986), 10 *Queen's L.J.* 336.

that justice requires taking into account the expectations of the victim and of the community. That view, as indicated above, sees the individual not simply as an autonomous person worthy of respect but as a member of a community, sharing its values, observing reciprocal relations out of a mutuality of interest and sense of solidarity (not simply out of threat of punishment by law) and participating in informal processes of mediation or reparation.⁸³ Elementary and unofficial codes of human interaction continue to guide reciprocal human relations on a daily basis in many aspects of life despite the overlay of a refined and elaborate legal system.⁸⁴ Official law, indeed, draws on this substratum of social reciprocity and many penal laws are but a reflection of these customary and conventional modes of behaviour. Such official rules are observed not so much out of terror should they be breached but because individuals, as a part of the group, share the values underlying the rules; their breach calls as much for application of the principle of reparation as it does for punishment. If the criminal law is to continue to be based on shared values it is important to recognize the substrata of custom, convention and social reciprocity from which those values spring. Treating a crime as though it were solely an offence against the state ignores the fact that crime is also a breach of social reciprocity: not only an injury to an individual but to the relationships which enable group life to flourish on a social basis.⁸⁵

From this point of view, the victim or community is of importance not simply as an object of convenience in getting evidence before the judge, or as a focal point for sympathy, but as a directing factor at the time of sentencing, calling for the repair of an injury to that mutuality or social reciprocity which underlies official law. The offender, too, becomes not simply an object of punishment but a citizen with an obligation to help restore and repair the injury to reciprocal group expectations occasioned by his or her act. Reparation, thus, becomes an important factor in sentencing and corrections.⁸⁶ Given a society with our traditions respect-

⁸³ Church Council on Justice and Corrections, *The Objective of Reconciliation: Implications for Correctional Review* (Ottawa, 1985).

⁸⁴ Consensus theory as articulated by Durkheim and others is commonly rejected in favour of a conflict model. Among others who have reviewed these approaches see G. Nettler, *Explaining Crime* (2nd ed., 1978), c. 17; Lynn McDonald, *The Sociology of Law and Order* (1976).

⁸⁵ Lon Fuller, *Some Presumptions Shaping the Concept of Socialization*, in J.L. Tapp and F.J. Levine (eds.), *Law, Justice and the Individual in Society* (1977), c.3. Reciprocity is also at the core of John Rawls, *A Theory of Justice* (1971). Rawls feels society is based on reciprocity and the principle of mutual benefit (pp. 14, 102, 290, 511).

⁸⁶ Reparation has been recognized as an important element in sentencing by the Law Reform Commission of Canada in its working paper, *Restitution and Compensation* (1974).

ing not only the dignity of the individual but also the importance of social values and interests, what specific factors or principles can be identified as necessary to a rational and fair sentencing framework?

One such principle is fair notice. A sentencing policy should serve to enable people of ordinary intelligence to know the law's commands and punishments. If the criminal law assumes, as it does, that competent adults are responsible for their choices, the law must be set out clearly so as to meet the conditions pre-requisite to a knowing choice. The law should not be discoverable only after the event, hidden away in inaccessible tomes, or written in terms so vague as to defy common understanding.⁸⁷ A corollary of fair notice is truth in sentencing and absence of undue complexity in laws governing the administration of sentencing and parole. These requirements are frequently not met. For example, the Criminal Code currently provides that breaking and entering is punishable by life imprisonment where the premise entered is a house, or by fourteen years where the place entered is an office. Other provisions of the Code give the court a wide discretion to impose a fine or probation instead of imprisonment. In actual practice, little more than fifty per cent of breaking and entering cases receive imprisonment of any kind and of those that do, few cases exceed three years.⁸⁸ Thus there is a wide, hidden gap between what the law says in the Code and what the law is at the court level. Nor is the public likely to know of the provisions in the Penitentiary Act⁸⁹ and the Prisons and Reformatories Act⁹⁰ permitting any sentence of imprisonment to be reduced by one-third for good behaviour. Even if the ordinary person is aware of these provisions he or she may not be aware of the mandatory supervision provisions under the Parole Act⁹¹ that have the effect of nullifying the "good time" laws and requiring that any such "good time" must be served under supervision on the street. In addition, the prison sentence may be ameliorated by release on parole supervision, as outlined earlier, at any time after the first third of the sentence is served. Even if the ordinary person knew how to relate the Parole Act to the Code's sentencing laws, he or she

⁸⁷ See Berend Hovis, *The Limitation Clauses of the European Convention on Human Rights: A Guide for Application of Section 1 of the Charter* (1985), 17 *Ottawa L. Rev.* 213.

⁸⁸ *Statistics of Criminal and Other Offences* (Statistics Canada, Ottawa, 1973), Catalogue No. 85-201, Table 6A. See also Irwin Waller and N. Okihito, *Burglary: The Victim and the Public* (1978).

⁸⁹ *Penitentiary Act*, R.S.C. 1970, c. P-6, s. 22(1), as am. by *Criminal Law Amendment Act*, 1977, S.C. 1976-77, c. 53, s. 24.2.

⁹⁰ *Prisons and Reformatories Act*, *supra*, footnote 43, s. 17(1), as am. by *Criminal Law Amendment Act*, 1977, S.C. 1976-77, c. 53, s. 45.

⁹¹ *Parole Act*, *supra*, footnote 42, s. 15, as am. by *Criminal Law Amendment Act*, 1977, S.C. 1976-77, c. 53, s. 28.

would not be likely to know that in practice parole laws are not generally applied to sentences of three months or less.⁹²

Sentencing laws are scattered in various statutes and cases and they do not mean what one would think they mean on first reading. Breaking and entering is in fact (as opposed to theory) not punishable by life imprisonment; a three year imprisonment sentence does not mean that the person will be in prison for three years since other laws permit release from prison any time after one year. Such releases are based upon a complex set of factors and considerations at the parole and prison level, and include regulations whereby released prisoners may be brought back to prison if they are considered an undue risk, but they can again be considered for a second release under supervision. Indeed, the bureaucracy of prison and parole decision-making as it affects sentencing is mind-boggling in its complexity.⁹³ An introductory lecture on how to calculate an inmate's release date under current law is incomprehensible even to third year law students. Undue complexity and lack of truth in sentencing are incompatible with fair notice and treating persons with respect.

The principle of fair notice serves institutional as well as constitutional values. A sentencing framework expressly setting out principles, factors, policies and guidelines with a reasonable degree of clarity and certainty provides judges, prosecutors, prison and other officials with fair guidance in decision-making. Failure to provide specificity and undue reliance on discretion leaves decision-makers without much direction and encourages diversity, disparity and inequity.

A second essential feature of a sentencing framework or policy is a concern for equity and fairness in results. From the earliest of times western legal thought has recognized the two aspects of justice: (1) taking account of individual circumstances (individualization), and (2) treating roughly similar cases in like fashion (proportionality as between cases).⁹⁴ A sentencing policy that fails to take adequate account of fairness and proportionality in this latter sense would not be consistent with the principles of fundamental justice.

In addition, as a third principle, sentencing policy should insist on fair procedures. Section 7 of the Charter requires sentencing laws to

⁹² S. Silverstone and P. Carriere, *The Parole Process* (Law Reform Commission of Canada, 1976), p. 2.

⁹³ *Maxie v. N.P. Board* (1985), 47 C.R. (3d) 22, at p. 30 (F.C.T.D.): "... the computations of the terms and duration of imprisonment which they generate are of mind-reeling complexity." (Muldoon J.).

⁹⁴ Aristotle speaks of equity as a kind of justice in so far as it individualizes the general rule to particular circumstances: *Ethics* (Penguin Classics, 1983), p. 199; and of justice as proportional treatment, as opposed to excess or deficiency: *ibid.*, p. 187.

respect the "principles of fundamental justice". Included in these principles, which are essential to the administration of justice in a free and democratic society, is the popular and legal notion of "fundamental fairness" with its connotation of procedural fairness.

Wilson J. gave expression to a feeling, deeply embedded in the conscience of our society, that people should be treated fairly in the sense that they should be punished according to what they deserve and no more.⁹⁵ In this sense there is a common belief that punishment should "fit" the crime, should be proportionate to the gravity of the offence and the culpability of the offender, but not be excessive or more than is necessary. "Just deserts", proportionality and restraint in punishment are essential to a rational and fair sentencing policy based upon principles of fundamental justice. Proportionality in sentencing, as recent cases indicate,⁹⁶ requires that sentencing policy establish a rational and fair relationship between offence and punishment, and rank offences and punishments according to a scale of seriousness (ordinal proportionality). A second aspect of proportionality raises the principle of overall proportionality, that is, fairness and restraint in setting the upper and lower limits of the scale (cardinal proportionality). Where the upper limits are so high as to shock the conscience or to be lacking in reasonable restraint, punishment may be seen to be cruel or unusual, or otherwise disproportionate and contrary to principles of fundamental justice.⁹⁷ Observance of principles of "just deserts", proportionality and restraint in sentencing provides a rational link between justice and public confidence in the administration of justice. As outlined below, these principles are already recognized, albeit somewhat incoherently, in existing sentencing policy. Furthermore, as will also become evident below, implicit in "just-deserts", proportionality, and restraint are the requirements that sentencing policy set forth a proper scale of offences ranked according to seriousness of punishment, and that due recognition be given to appropriate mitigating factors and the deeply held conviction that in appropriate circumstances

⁹⁵ *Reference Re Section 94(2) of the Motor Vehicle Act*, *supra*, footnote 9, at p. 325:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

See also W. Sadurski, *Giving Desert Its Due* (1985).

⁹⁶ For example: *R. v. Sandercock* (1985), 62 A.R. 382 (Alta C.A.); the judgment of Wilson, J. in *Reference Re Section 94(2) of the Motor Vehicle Act*, *supra*, footnote 9; dissenting judgment of Lambert J.A. in *R. v. Smith*, *supra*, footnote 59, at pp. 421-432.

⁹⁷ For different views of proportionality as a component of fundamental justice see the judgment of Craig J.A. in *R. v. Smith*, *ibid.*, at pp. 416-421; and *Reference Re Section 94(2) of the Motor Vehicle Act*, *ibid.*

punishment be ameliorated and individuals be given an opportunity to make redress and amends.

From an institutional point of view further essential features of a sentencing policy can be identified, namely coherence of purpose and clarity in allocation of sentencing powers between judges, prosecutors and prison and parole officials. One of the features of the current sentencing framework is its implicit retributive base overlaid with subsequent legislative, judicial and administrative policies emphasizing policy goals and assumptions in conflict with the original goals. It is not surprising that incoherence of purpose between courts and parole, or between one official and another, become apparent in the absence of a coherent prioritizing of penological objectives. As is evident from some jurisdictions in the United States, sentencing reform can be frustrated or nullified by failure to take careful account of the need for coherence in sentencing policy and for clarity in allocation of sentencing powers.⁹⁸

Finally, a sentencing framework should reflect policies or structures enabling efficient, rational and relatively simple administration. This will necessarily require policy choices among models giving more or less decision-making power to courts, prosecutors, Parliament, commissions or administrative officials. Guided by these relatively few principles, it is suggested that an outline can be drawn up of a revised sentencing structure for Canada.

V. Proposals for Reform

Given its problems, we believe that our current classification and sentencing structure is in need of a basic overhaul keeping in mind the essential characteristics of an equitable sentencing structure outlined in the previous section. We suggest that the best means for proceeding with the necessary repairs is through a Sentencing Commission reporting back to Parliament after wide consultation with all interested parties. Moreover, such a Commission ought to be retained after the proposed changes have been made in order to monitor sentencing policies and practices, and to provide feedback and necessary liaison among the courts and others. Based on the premises set out in this paper, what might a new classification and sentencing structure look like?

A. Principles

In designing a new sentencing framework it will be necessary to give focus and direction with respect to purpose and principle. Incoherence, inequality and disparity, as outlined earlier, are the result of the

⁹⁸ R. Schuwerk, *Illinois Determinate Sentencing* (1984), 33 DePaul L. Rev. 631; (1985), 34 DePaul L. Rev. 241.

present practice where any one of several objectives may be given priority by individual judges. Given the importance of the Charter, the tradition of "fitness", proportionality, and "just deserts" in the common law, sentencing policy should be based on "just deserts", requiring sentences to be proportionate to the gravity of the offence and the culpability of the offender. This approach builds on tradition, is understood by ordinary Canadians, and conforms to the approach suggested by the requirements of fundamental justice under section 7 of the Charter as outlined by Wilson J.⁹⁹

It might be argued that to create a priority in sentencing principles for "just deserts" is too rigid and monolithic an approach. The answer is that "just deserts", in setting the boundaries and foundations of punishment, does not preclude the use of probation or other supportive sanctions or programs, providing they fit within a just and proportionate sentence. Moreover, sentences of imprisonment can still be served under conditions that provide opportunities for prisoners to improve themselves through work or education, or to make restitution to the victim or the community in a variety of ways. To the extent that serious crimes call for denunciatory sentences of imprisonment as a "fit" and proportionate response to the crime, general or specific deterrence, and even incapacitation, may be ancillary social benefits. Securing such benefits, however, should not be the starting point in determining the sentence. H.L.A. Hart, in considering the question of punishment, recognizes that retributive principles are properly regarded as important in determining how much punishment should be imposed. He would insist that the general over-all aim of punishment is utilitarian in the sense that if punishment serves no good it has no justification.¹⁰⁰ Other academic writers take the view that the general over-all aim should be based on retributive purposes.¹⁰¹ For our part we are of the view that punishment is assumed to do some good, primarily through vindication of rules or underlining core values.¹⁰² Upon this assumption it would appear that sentencing's primary mission is the doing of justice through affirmation of values; its primary focus should not be social reconstruction. Accordingly, the sentencing framework and law should be guided by retributivist and justice-oriented principles of "just deserts", proportionality and restrained denunciation.

In the past some writers have scoffed at retributivist principles on the supposition that they were necessarily tied to the Kantian argument

⁹⁹ *Re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 9.

¹⁰⁰ H.L.A. Hart, *Prolegomenon to the Principles of Punishment, in Punishment and Responsibility* (1968), c.1.

¹⁰¹ von Hirsch adopted this view in *Doing Justice* (1976), but has modified his position in *Past or Future Crimes*, *op. cit.*, footnote 14, c. 5.

¹⁰² This is consistent with the position taken by the Law Reform Commission, *Our Criminal Law*, *op. cit.*, footnote 3, p. 16.

that punishment was required in order to restore some metaphysical equilibrium or balance between victim and offender, the offender having "benefited" by taking unfair advantage of the mutual promises to respect each other's rights. Righting such a metaphysical imbalance was said to be impossible.¹⁰³ The alternative is to embrace instead the equally abstract utilitarian calculus of pleasures and pains, under which punishment is to be carefully calculated as to the exact amount needed for deterrent purposes.¹⁰⁴ In our view, courts in Canada and England have resorted to a rough measure of "just deserts" for hundreds of years. The charge that the retributivist principle of "just deserts" cannot be applied in practice ignores this reality.

Another objection to giving priority to retributivist principles may be that it will preclude taking individual differences into account, thus sacrificing "individualized" sentencing and its perceived link to principles of rehabilitation or specific deterrence. Again the charge is misplaced. By definition a fit and proportionate sentence under a "just deserts" model requires paying attention not only to the gravity of the offence but to the culpability of the offender. Aggravating and mitigating factors are relevant and individual differences of a legitimate kind, that is differences relevant to culpability and gravity, must be taken into account. Nevertheless it is true, as we point out below, that "just deserts" would rule out some individual differences as irrelevant. In this way, disparity as between roughly similar offences would tend to be less than is the case now where a wide range of disparate factors may be referred to and weighed differently by different judges and Crown prosecutors. Moreover, "just deserts" tends to encourage respect for the principle that roughly similar cases ought to be treated alike, a respect that is frequently by-passed under the current scheme where individual differences are eagerly sought out in an exaggerated pursuit of "Khaddi-type justice" and defended, unpersuasively, on the supposed principle that no two cases can ever be alike.

This tendency to give greater weight to the principle of equal treatment of roughly equal cases leads critics to announce that "just deserts" tends to harshness and severity. The charge may also be traceable to the mistaken supposition that retribution means vengeance. Not only is such a charge misinformed, it overlooks the important principle of restraint. Restraint is implicit in the very concept of proportionality. A punishment under "just deserts", by definition, is not permitted to be exces-

¹⁰³ Reference is made to this point of view in Law Reform Commission of Canada, Working Paper No. 2: The Meaning of Guilt: Strict Liability (1974), p. 5. For a more thorough analysis of the retributivist position see Ted Henderich, *Punishment: The Supposed Justification* (1969).

¹⁰⁴ H.L. Parker, *The Limits of the Criminal Sanction* (1968) favours a utilitarian approach, as did the Ouimet Report, *op. cit.*, footnote 46.

sive or undue; furthermore, proportionality, and the related principle of restraint—using the least intrusive punishment necessary to achieve penological objectives—forbids excessive punishment. “Just deserts” in this perspective is fair and just punishment, neither severe nor unduly lenient.

Moreover, in setting a sentencing framework, in settling the outer limits of a scale of proportional punishment, society’s deeply felt underlying values of decency and humanity will be at work to ensure that the scale reflects a just and humanitarian approach rather than a draconian approach foundering on the rocks of arbitrary punishment. As already indicated, “just deserts” recognizes the existence of mitigating or aggravating factors which increase or decrease the severity of the penalty.

B. Ranking and Classification

Given a sentencing framework premised on a principle of “just deserts”, it becomes necessary to rank offences, not according to a protective principle of rehabilitation or public defence, but according to the seriousness or gravity of the offence. This in fact appears to be the approach in the present Code. The ranking, however, needs to be updated, as indicated earlier, to reflect current Canadian values. We suggest five or six categories of offence seriousness with individual offences allocated to appropriate categories. The categories have the advantage that over time offences can be added or deleted from the category without altering the framework or leaving the impression that individual dispositions for each new offence are ad hoc. There must be enough categories to avoid making them overly broad, since overly broad categories would require wide sentencing ranges which in turn would result in wide discretion in the court to pick and choose a proper term. The epitome of such overly broad categorization is the Young Offenders Act,¹⁰⁵ imposing a general power to imprison in respect to any offence for up to three years (to be increased to six years) with no statutory guidelines as to when it would be appropriate to use imprisonment, or how long terms might be. On the other hand, having too many offence categories leads to drawing distinctions without a difference and thus to unnecessary complexity. For all practical purposes, under the current Code the classification scheme is determined by the following categories of punishment, namely six months, two years, five years, ten years, fourteen years, and life. In some other federal statutes terms of three years or seven years may be found no matter how many categories of offences are used; however, there is a need to consider the issue of proportionality both as to the upper limits of punishment as reflected in the maximum terms (cardinal proportionality) and in relation to the problem of how severely to punish a given offence in relation to other offences

¹⁰⁵ S.C. 1980-81-82-83, c. 110.

(ordinal proportionality).¹⁰⁶ Both problems require an assessment and ranking of offences in relation to their perceived gravity according to current values.

Ranking and classification raise problems of how ranking is to be done, what criteria or principles govern, and who is to do it. Assuming that offences are described with a reasonable degree of specificity rather than left overly broad, as robbery is now, it is a rather modest job to rank offences in order of seriousness. The conventional ranking may remain unchanged for many offences; in other cases adjustments may be necessary in the face of changing priorities in values relating to life, health, and privacy as opposed to the importance of religion and honour, or property, for example, in pre-Confederation times. One technique used in assisting such ranking is the use of cards listing the different offences and shuffling the cards according to a felt sense of seriousness. Reports indicate that the technique results in a high degree of agreement among various persons. Scales of offence seriousness as tested on university students are also available for use, although a scale based on a wider range of the general population would be more useful.¹⁰⁷

The ranking, as already indicated, should not be clouded by improper considerations of incapacitation or deterrence; rather the question is one of offence seriousness in terms not simply of the harm done but of values infringed by the commission of the offence. The more serious the offence the greater the required censuring quality of criminal punishment.

As noted above, a distinction should be drawn between determining matters of proportional punishment between offences and determining absolute levels of punishment. Presumably, the higher the absolute level upon which the scale is grounded, the more severe the penalties all the way through the ranking. Does "just deserts" help in determining absolute levels of punishment (cardinal proportionality)? Only negative factors assist in setting such limits. As already indicated, proportionality and "just deserts" forbid torture, cruel and unusual punishment, and excessive or arbitrary punishment. The well-springs for these standards, however, are outside the realm of law and legal philosophy and find their sources in the deeply felt and traditional sense of decency in our society. Such standards are not static nor should they be confused with passing fads and moods. It is doubtful whether they should be assessed through use of polls. Rather, the articulation of the nation's profoundly

¹⁰⁶ von Hirsch, *op. cit.*, footnote 14, p. 43.

¹⁰⁷ D. Akman and A. Normandeau, *A Manual for Constructing a Crime Delinquency Index in Canada* (Department of Criminology, University of Montreal, Montreal, 1966). This index relies on the earlier work of T. Sellin and M. Wolfgang, *The Measurement of Delinquency* (1964); see also: *The Index of Crime*, 7 *Collected Studies in Criminological Research* (Council of Europe, 1970); and reviews in (1975), 7 *Crime and Delinquency Literature* 460-465.

felt moral standards, suitable for guidance as social policy, requires time for thoughtful reflection informed by wisdom and experience. Judges and parliamentarians have traditionally been allocated this responsibility in our society, assisted by informed commentary and observation through the church, the press and professional organizations.

While certain negative criteria, such as a prohibition against cruel punishment, may assist in determining the upper and lower limits of a scale of punishments, one positive factor may also be of assistance. This is the restraint principle, implicit in proportionality: what is the least intrusive (restrictive) punishment necessary? This principle lends itself to rational analysis and application. As already indicated, the Supreme Court of Canada in *Reference Re Section 94(2) of the Motor Vehicle Act*¹⁰⁸ has already read the least restrictive principle into section 1 of the Charter.

Who should do the ranking and classification: the judiciary, Parliament or a Parliamentary Commission? The legitimacy of sentencing law traditionally has rested in the trust and respect people give to the pronouncements of courts and legislatures. While a guru or a thoughtful labourer might be as well equipped as many judges to impose a fair and just sentence, their sentence would probably lack the credibility that comes from legitimacy. There is nothing particularly "legal" about setting up a sentencing structure. Indeed, just the opposite: sentencing "law" is an amalgam of morality, politics and tradition. By "politics" we simply mean the operative assumptions about how power should be shared in society, who and what is deserving and undeserving, and what values more than others require the denunciatory support of the criminal law.

Both judges and legislatures by tradition and training are well equipped to make sentencing laws and the courts alone have always been looked to as the vehicle for imposing sentences. In a democracy governed by the rule of law, however, public policy ought to be set by Parliament; the courts are best fitted, not to legislate, but to apply sentencing policy in discrete cases. By its very nature Parliament has wider access to the range of information, policies and data relevant to the formation of sentencing policy that is quite beyond the capacity of the courts to obtain through the narrow bottleneck of the adversary process in individual cases. Notwithstanding this theoretical Parliamentary capacity, the reality of the Parliamentary process in Canada shows law-making to be highly controlled by the executive and particularly by government departments.¹⁰⁹ The process is an executive style of law-making rather than a broadly democratic process.

¹⁰⁸ *Supra*, footnote 9; see also *Big M Drug Mart*, *supra*, footnote 10.

¹⁰⁹ W.A. Neilson and J.C. MacPherson (eds.), *The Legislative Process in Canada: The Need for Reform* (1978).

Framing a sentencing policy is not necessarily a partisan matter, as the free-votes on capital punishment resolutions in the House of Commons attest to. Indeed there is every reason for drawing broadly upon the values and interests of all segments of society. Moreover, given the impact of sentencing policy on prison population and prison building programs, there is every reason to develop sentencing policy by rationally and empirically assessing proposals in terms of their impact on all aspects of the sentencing process, from selection of charge through to imprisonment and release. The parliamentary process is capable of providing this broad based approach through the use of commissions reporting back to Parliament. The advantage of the administrative commission is its capacity to approach issues outside the pressure of Parliamentary politics, yet to be responsive to ministerial concerns and bring to the task not only thorough research and analysis but a broadly based community outreach. Such an approach has been used in other jurisdictions and does hold promise of success.¹¹⁰

C. Benchmarks

Once offences are ranked by severity or seriousness so that, for example, petty theft is in a lower category than armed robbery, then a "benchmark" punishment or disposition should be assigned to each category as an indication of the "average" or "normal" sentence to be expected in the "average" or "run-of-the-mill" case. In order to allow for necessary flexibility having regard to mitigating and aggravating factors, a court should have the power to depart from the benchmark, but in order to maintain a rough equality among cases of roughly equal seriousness, such departure should be limited to variation of up to ten per cent either way from the norm or benchmark.

Where the range of discretion within a given category is narrow there may be need for additional discretion to sentence outside of the benchmark plus or minus ten per cent, for example, in exceptional cases. In order to accommodate this possibility an appeal against sentence should be possible by either party, with power in the Court of Appeal, under clearly compelling circumstances, to impose a sentence either above or below the guidelines, having due regard to sentencing policy and principles. Should there be a legislative guideline on the upper limit on sentences imposed outside the benchmark guidelines? Such a guideline would obviously be desirable, and in all fairness should not exceed the benchmark limit in the next most serious offence category. If experience shows a large number of cases being sentenced outside the guidelines, clearly

¹¹⁰ Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (1980); and *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines* (1982). For a comment on the effect of the guidelines see K. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices* (1982), 5 *Hamline L. Rev.* 237.

the classification or the ranges should be reviewed with a view to assessing the need for changes.

The benchmark sentence already exists in practice in some offences where a so-called "tariff sentence" is imposed in common offences such as petty theft or driving while impaired. Legislatively, at present, the benchmark approach is not used. Instead each individual offence carries with it a maximum term of imprisonment, as already indicated, which is meant to tell the court how to deal with the "worst possible" case of this type. The "worst possible case" model, however, gives neither the courts nor the public any real guidance on sentencing matters. A "benchmark" approach would help the public to understand the policy of the law and provide courts and counsel with a more focused direction.

In some jurisdictions, such as Minnesota,¹¹¹ Pennsylvania¹¹² and Washington,¹¹³ a sentencing "grid" has been worked out to achieve the purposes under discussion here. Such devices have much merit, the problem always being to find the proper balance in giving guidelines for the exercise of discretion. The Pennsylvania approach is an example where discretion appears to have been too widely conferred; likewise Illinois' reform¹¹⁴ is said to be ineffectual in addressing the problem of excessive disparity. A more rigid approach to structuring and confining discretion is to give the judge a choice of three terms, with the middle term to be imposed in the absence of mitigating or aggravating factors,¹¹⁵ and the lower or upper terms to be imposed depending upon the presence or absence of mitigating or aggravating factors.

D. *How to Determine Appropriate Benchmarks*

How much punishment is deserved is fundamentally a moral-political question, the answer having legitimacy as law when given by judges or

¹¹¹ Minnesota Sentencing Guidelines Commission, *ibid.*

¹¹² Pa. Code, title 204 (1984); A. Reis, *Sentencing and Policies in the U.S.A.*, a paper delivered to Seminar On Sentencing, Canadian Institute for the Administration of Justice, Toronto, 1985.

¹¹³ Washington Revised Code, s. 9.94A, 1981.

¹¹⁴ Schuwerk, *loc. cit.*, footnote 98. See also L. Goodstein and J. Hepburn, *Determinate Sentencing and Imprisonment: A Failure of Reform* (1985). In this study of determinate sentencing laws in the United States, the authors conclude (p. 141) that determinate rather than indeterminate sentences do result in more predictable release dates and reduction in existing levels of sentence disparity. However, many proponents of determinate sentencing laws have argued that certainty of release date and reduction in sentence inequities will have a secondary impact of improving prisoner attitudes and behaviours while in prison. The authors conclude (p. 157) that "there is no systematic support for the general hypothesis that determinate sentencing has an impact on prisoner attitudes and behaviour".

¹¹⁵ This is the approach which has been adopted in California. See Bureau of Justice Statistics Bulletin (Washington, D.C., August 1983).

by Parliament. Earlier, objection was taken to the scales of punishment as currently found in the Code. Do the sentences judges actually impose constitute a better starting point in determining a scale of just punishment for a modern sentencing structure?

While statistics as currently collated are imperfect, there is some evidence as to what are the conventional ranges of punishment in common offences in different parts of Canada today.¹¹⁶ These ranges could be used as starting points with regard being had to the impact of any proposed new scale on prison populations and on the principles of restraint and rationality. It is also agreed that sentences should not be out of touch with what men and women on the street might think is reasonable or fair, an input that is realizable if a Commission approach to classification is adopted. While it is commonplace to say that the public demands severe punishment, Canadian research and polls point to a sense of reasonable and fair punishment on the part of the public. A study based in Ontario¹¹⁷ shows that where the public are given the same facts that the court had to consider in sentencing, they tend to arrive at a sentence not too much different from what the court imposed. Similarly, a poll conducted by British Columbia Corrections shows that the public, far from demanding more imprisonment across the board, are supportive of work-oriented, community-based sentences in cases not involving violence against the person.

Moreover, although setting benchmark dispositions may start with an examination of conventional sentencing practices, it is necessary that these conventional sentencing practices be analyzed with a view to determining whether the conventional use of imprisonment roughly corresponds with notions of "just deserts" as outlined above. Are prison sentences used with restraint considering (1) the seriousness of the offence and culpability, (2) limited prison capacity, (3) the need to sentence with a view not only to denunciation but also, where appropriate, to repairing the harm done, restoring social solidarity and effecting reconciliation, and (4) the current state of knowledge as to the effectiveness of sentences and dispositions?

What then are the sentencing practices of the courts? The available data show that in the offence of breaking and entering, for example, approximately forty-five per cent of the cases are dealt with by way of non-custodial sentences. Of those imprisoned, less than ten per cent get terms over two years, the most common prison term being eighteen months (less time off for good behaviour).¹¹⁸ With respect to robbery, eighty-seven per cent of convictions result in imprisonment, with sixty

¹¹⁶ Department of Justice, *Selected Practices and Trends*, Volume 2 (Ottawa, 1983).

¹¹⁷ T. Doob and J.V. Roberts, *An Analysis of the Public's View of Sentencing* (Centre of Criminology, University of Toronto, Toronto, 1983).

¹¹⁸ Department of Justice, *op. cit.*, footnote 116.

per cent receiving sentences of two years or more. The most common sentences for the more serious robberies are in the range of twenty-five to twenty-nine months; less than seven per cent of all robbery sentences (about 225 cases) are in excess of five years¹¹⁹ No doubt this reflects the fact that robbery as presently classified includes not only an armed bank hold-up but a non-violent purse snatching on a busy street. Minor robberies are the most common; more serious robberies are relatively uncommon.

Admittedly, this type of sentencing data is somewhat rough, but it is suggestive of "benchmark" sentences such as that set out in the table below. For the purposes of illustration, we have decided upon five classes of offence seriousness. The number of classes or categories of offences is flexible and we do not foreclose modification of the categories. Likewise, the decision to place a particular offence in a particular category is not meant to be definitive, but suggestive only. Further study will be required before final allocation of each offence. The benchmark sentences set out below represent our best understanding of current sentencing practices as derived from available data. Further data on other offences obviously will be needed to complete the table or to assess its suggested "benchmark" dispositions.

It should be noted that certain of the "benchmark" sentences may be too high in light of the fact that the above sentences do not take into account the reduction of current sentences by one-third for "good time" as authorized by current law. Nevertheless, they do provide a legitimate starting point in designing a "made in Canada" classification and sentencing structure.

A note should also be made in regard to the offence of murder. We have suggested a term of fourteen years in lieu of the current sentence of life imprisonment and minimum parole eligibility of ten to twenty-five years. Our suggested lower minimum must be read in conjunction with the possibility of special terms for dangerous offenders and against the traditional release pattern. Until recently in Canada, convicted murderers were released conditionally in most cases after ten to fourteen years.¹²⁰ In addition, it is cause for concern that sentences of twenty years or more give rise to problems in the prisons.¹²¹ In those relatively limited number of cases where an offender might still be considered dangerous to society after the expiration of a fourteen year sentence of imprisonment,

¹¹⁹ *Ibid.*

¹²⁰ National Parole Board, *Canada's Parole System* (Ottawa, Revised 1966), p. 5; Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Parole in Canada* (Information Canada, Ottawa, 1974), p. 23.

¹²¹ The Vantour Report: Report of the Study Group on Murders and Assaults in the Ontario Region (Ministry of the Solicitor General, Ottawa, 1984).

Table 1
A Revised Classification and Sentencing Guideline

	Bench Mark Sentence (plus or minus 10%)*	Percentage of Cases which Result in Non-custodial Sentences
Class 1. Murder Treason	14 years	(For specific offences see Table 2, <i>infra</i> , p.)
Class 2. Highjacking Manslaughter Attempted murder Robbery — aggravated Sexual assault — aggravated Assault — aggravated	7 years	
Class 3. Breaking and Entering Robbery (other than class 2) Assaults and Sexual Assaults (other than classes 2 & 4) Thefts over \$1000 (and theft related) Frauds over \$1000 (and fraud related) Mischief over \$1000 (and mischief related)	2 years	
Class 4. Property offences (other than class 3) Common Assault	6 months**	
Class 5. Offences against morality Offences against public order	2 months**	

* A court could impose a sentence giving higher than the suggested range, upon giving reasons, but only in "compelling and exceptional" circumstances.

** The "normal" sentence would be non-custodial; imprisonment could be imposed up to the limit suggested upon "compelling and unusual" circumstances.

our framework would permit an application before a judge for continued detention under the heading "Special Terms", discussed below.

In its Report on Dispositions and Sentences in the Criminal Process,¹²² the Law Reform Commission of Canada made tentative suggestions as to length of prison terms based on data available to the Commission at that time. The Commission then recommended that terms imposed for "denunciatory" purposes should not exceed three years and terms imposed for incapacitation or public protection should not exceed twenty years. As already indicated, we believe it to be wrong in principle to base terms of imprisonment, in general, on incapacitation. Punishment or

¹²² *Op. cit.*, footnote 3.

denunciation as measured by standards of proportionality and restraint are preferred. In our view, the benchmark sentence should primarily reflect "just deserts". Whether such sentences should be subject to modification or parole will be addressed below as will the question to what extent, if any, previous convictions, or a classification as a dangerous offender, should modify the "just deserts" principle. Suffice it here to say that the sentence should be seen as a single denunciatory or "just deserts" sentence which will necessarily carry within its limits certain deterrent or incapacitative effects. We believe this approach will enhance justice, fairness, equity and clarity in sentencing.

E. Aggravating and Mitigating Factors

Under our recommendation, "benchmark" dispositions may be departed from, up or down by ten per cent, depending upon aggravating or mitigating factors. For a number of reasons a list of such factors should be available in legislative form. First, the law should be within the reach and understanding of the ordinary person. In general, case reports and rules of practice are not as easy to get to as statutes or other legislative statements. A statutory statement of factors may also be of some assistance to those offenders who are sentenced without benefit of counsel and who must speak for themselves at sentencing. A summary legislative statement of relevant sentencing factors should be helpful to convicted persons and assist them in bringing to the attention of the court such facts as are relevant in arriving at a proper sentence.

A second reason favours a legislative statement of sentencing factors. In sentencing, clarity and equal treatment of similar cases make it important that aggravating and mitigating factors be limited by the primary principle of dispositions, namely "just deserts" or proportionality. Within the allowable range set for each category of offence there must be room for taking account of matters going to gravity of the offence and to culpability. Under current practice judges are encouraged to seek as much information as possible, an approach justifiable only on the individualized model of sentencing with its focus either upon treatment or prevention of future harm. Under that model virtually no limit is placed on information gathering nor is direction given as to weight to be placed on different factors. The sole limit is that the end decision must result from a "balancing" of principles and factors; there is, however, no direction on priorities or weight. The result, as stated above, is disparate information and disparate sentencing. It goes without saying that this unstructured approach leaves each defence and Crown counsel, each probation officer and judge relatively free to follow his or her own particular proclivities in presenting, assessing and weighing various factors, with resultant differences in sentences among apparently similar cases.

In addition, some factors may be irrelevant to the sentencing decision in that they contribute to class, race or sexual discrimination or

bias. As such they are probably already prohibited under human rights legislation and the Charter. Nevertheless, equality and coherence in sentencing require a coherent statement of aggravating and mitigating factors rationally related to sentencing principles and priorities. Under current practice, for example, employment is frequently counted as a mitigating factor, with the result that the unemployed receive less lenient treatment than the employed. Is this type of bias appropriate?¹²³ In drawing up a list of appropriate aggravating and mitigating factors care should be taken that sentencing laws do not work unfairly against cultural or racial minorities such as Native Indians who currently make up a disproportionate segment of the prison population.¹²⁴

In a sentencing framework based on retributivist principles careful scrutiny must be made of rehabilitative-type factors. Bill C-19 prohibited reliance on rehabilitation as a reason for imposing prison terms; case law takes the same approach.¹²⁵ Rehabilitative factors are, however, commonly relied on as mitigation, moving the sentence down to the lower end of the appropriate sentencing range for the particular offence. In this sense rehabilitative factors often play the same role as humanitarian concerns such as ill health, dependent children, or extreme youth or old age.

In a "just deserts" model of sentencing concerned with doing justice, it becomes important, however, to distinguish between mitigation and mercy. In the examples above, illness and extreme age would not normally be thought of as relevant to culpability. Yet it is possible that such factors do reduce culpability and blameworthiness in particular circumstances. Usually, old age or illness are seen as making a humanitarian claim upon our conscience, a claim that society forego its due punishment and show mercy and forbearance instead. It goes without saying that in a "just deserts" sentencing model, aggravating and mitigating factors must relate either to the harm done (the gravity of the offence) or the culpability of the offender. If factors relevant to humanitarian forbearance are to be considered, strictly speaking, they are not factors in

¹²³ Apart from the differential that arises from the "chance" of employment in today's economic market, it is clear that "employment" as such is not relevant to culpability nor to seriousness of the offence. At most it appeals to the humanitarian sense. "Employment" can be related to the rehabilitative ideal and makes a claim in that context for mitigation of sentence. Perhaps the example helps us to understand that the unemployed cannot be treated more severely than the employed, where employment is the only variable at stake.

¹²⁴ In penitentiaries the offenders of native origin constitute 8% of the population, which is an over-representation by population of 2:1. In some provincial institutions native offenders constitute up to 62% of the sentenced population: Second Report of the Strategic Planning Committee (Ministry of the Solicitor General, Ottawa, 1982), pp. 22-34.

¹²⁵ *R. v. Heck* (1963), 40 C.R. 142 (B.C.C.A.); Canadian Sentencing Handbook, *supra*, footnote 45, p. 42.

mitigation but factors relevant to mercy. They are the sorts of factors that may take a sentence out of the guidelines to be dealt with as an exceptional case, subject to appeal. In some jurisdictions attempts to move toward a "just deserts" sentencing model appear to have foundered through failure of the sentencing guidelines to properly address the question of sentencing factors and how they are to be used.¹²⁶ Careful thought is urged, therefore, in drawing up guidelines relevant to sentencing factors.

Our suggested outline of factors in mitigation and aggravation are as follows:

(1) *Mitigating Factors*

- (a) The accused's criminal conduct neither caused nor threatened serious harm;
- (b) The accused did not contemplate that his or her criminal conduct would cause or threaten serious harm;
- (c) The victim of the offence induced or facilitated the commission of the crime;
- (d) The accused acted under duress, provocation, self-defence or necessity, or circumstances of entrapment, not sufficient to sustain a defence;
- (e) The accused played a minor or passive role in the crime;
- (f) Because of physical or mental impairment, the accused lacked substantial capacity to make a balanced judgment at the time of the crime; voluntary impairment by drugs or alcohol is not included;
- (g) The accused acted out of good motive;
- (h) The accused has made or offered to make restitution or compensation to the victim for the damage or losses sustained;
- (i) The accused has no prior criminal record or has led a law-abiding life for a substantial period of time prior to the commission of the offence;
- (j) Imprisonment of the accused would entail excessive hardship and punishment.

(2) *Aggravating Factors*

- (a) The accused knowingly or recklessly caused or threatened harm to multiple victims or in multiple incidents to a single victim;

¹²⁶ Schuwerk, *loc. cit.*, footnote 98.

- (b) The accused showed planning, deliberation, or guile going beyond that necessary to the offence as defined;
- (c) The accused knowingly or recklessly caused serious harm or loss going beyond that which was necessary to or implicit in the definition of the crime itself;
- (d) The accused knew or was reckless to the fact that the victim was particularly vulnerable due to age, infirmity or mental or physical impairment;
- (e) The accused acted with others to commit the offence;
- (f) The accused used his or her position or status, including a position of trust or confidence, to facilitate or conceal the offence;
- (g) The accused has a recent criminal record;
- (h) The accused was on bail, probation or other legal restraint at the time of the commission of the offence.

Upon monitoring the operation of sentencing under the proposed guidelines, a Sentencing Commission may find it necessary to recommend additions to or deletions from the list of factors. The sentencing guidelines should give clear direction against double counting of factors, so that, for example, if intentional harm is a definitional element of the offence, then intentional harm should not be counted as an aggravating factor since the sentencing scale already takes it into account. We further propose, in the interests of coherence, clarity, and providing a proper foundation for monitoring and for appeals, that the sentencing court identify such factors that were taken into account in arriving at the sentence in a particular case and that the court give reasons for the sentence. To a large extent this is already sentencing practice; giving reasons, it is suggested, is an element of fundamental fairness and justice. It is recognized that requiring findings of fact and the giving of reasons can be nullified where courts of appeal are content to accept from trial judges the most skeletal statement of fact or of reasons, cast in language of highest generality.¹²⁷ One hopes, given the requirements of the Charter, that courts of appeal will insist on a high level of accountability and fairness in this matter.

To assist further in determining the gravity of the offence and the culpability of the offender the guidelines should indicate that factors in mitigation are to be balanced against factors in aggravation. In this weighing process we suggest that the guidelines give some sense of priority or weighting. For example, where imprisonment has already been decided upon as the proper disposition and the only remaining decision is where

¹²⁷ In Minnesota this risk does not appear to have materialized, perhaps because judges had a hand, along with others, in designing sentencing policy.

to come down within the allowable range, an absence of aggravating circumstances should bring the sentence somewhere within the bottom half of the range, depending upon what factors in mitigation are found to exist. The guidelines should also indicate what combination of aggravating factors, any three for example, would serve as a sufficient foundation for moving the disposition to the top limit of the allowable range.¹²⁸

F. Principle of the Least Intrusive Measure

Because sentencing factors are relevant to the "in-out" decision (the decision whether to imprison or to impose a non-carceral sentence), it is important to assert the principle of restraint in any proposed new sentencing framework and to impose an obligation on the sentencing court to select within the limits set by the guidelines that disposition which is least restrictive of liberty and autonomy. Thus suspended sentences, probation, house arrest, work orders and fines would be the preferred dispositions, with imprisonment used only in the more serious cases.

Sentencing practices may be of some assistance in trying to determine the dividing line between jail and non-carceral sentences. It is suggested that the courts be provided with information, including the type of averages as indicated in Table 2, showing what proportion of cases in practice are dealt with by way of a non-carceral sentence. Indeed, with the assistance of computer technology such data may be available in the near future. The information in Table 2, below, is suggestive only, as existing offence descriptions are overly broad in some cases and the data base is limited.

Table 2
*Percentage of Non-Custodial Sentences**

<i>Offence</i>	<i>%</i>
(a) Theft over \$200 ¹²⁹	59
(b) Theft under \$200	83
(c) Possession Stolen Goods	61
(d) Fraud	56
(e) False Pretences	67
(f) Breaking and Entering	44
(g) Common Assault	91
(h) Assault Causing Bodily Harm	72
(i) Robbery	13

* Percentages derived from Sentencing Practices and Trends in Canada (Ottawa), 1983.

¹²⁸ For a general discussion of the California determinate sentencing law where aggravating factors are permitted to increase punishment within specified limits, see April Cassou and Brian Taugher, *Determinate Sentencing in California: The New Numbers Game* (1978), 9 Pacific Law J. 1, at p. 41.

¹²⁹ A 1985 amendment to the Criminal Code raises this sum to \$1000: S.C. 1985, c. 19, s. 44(1).

We do not suggest that such sentencing data be used in order to freeze discretion but merely to indicate in a general way the practice of the courts, thus providing the individual judge with some objective performance standard against which to assess his or her own practice.

A more structured approach to achieving consistency and predictability on the "in-out" issue is to apply the principle of restraint by creating a legislative presumption in favour of non-carceral dispositions at the lower levels of the offence classification. For example, having regard to Table 1,¹³⁰ the sentencing guidelines might well provide that with respect to class four and five offences there is a presumption in favour of non-carceral sentences and that special weight should be given to reconciliation, repairing the harm done to victim and community relationships, to social solidarity, and to parsimony and restraint in the use of correctional resources.

It should be noted that with respect to the lower categories in a classification scheme based on "just deserts", it would be rational to find greater punishment for violations to personal bodily interests than for violations to property interests. It would be reasonable, therefore, for lower-order offences to be punishable by lesser sentences and more amenable to reparation through money payment or community service.

Another way of dealing with the problem of where to fix the line on imprisonment is for Parliament simply to withdraw imprisonment as a disposition in lower level offences. England, for example, has used this approach in various offences.¹³¹ The disadvantage of this approach is its obvious inflexibility. There may be some room, nevertheless, for such legislative action in specific type-situations. Imprisonment in default of fines is enormously costly of social resources and should be prohibited¹³² in favour of alternatives such as fine-option or civil methods of fine collection. Driving-related offences not involving actual harm to persons are another enormous drain on provincial prison resources.¹³³ Is it feasible to consider less socially-expensive sanctions including forfeiture or impoundment of vehicles as an alternative?¹³⁴

¹³⁰ *Supra*, p. 37

¹³¹ Since 1967 the law provides for suspending the execution of a sentence of imprisonment. In addition, the Criminal Justice Act, 1983 continues provisions restraining judges from imposing imprisonment on young adults, and in some summary offences imprisonment is not available at all: Nigel Walker, *Sentencing: Theory, Law and Practice* (1985), pp. 130, 137, 309.

¹³² K. Jobson and A. Atkins, *Imprisonment in Default* (1986), 28 *Crim. L.Q.* 251.

¹³³ It is estimated that 40% of court time is taken up with drinking-driving related offences; persons convicted of drinking and driving commonly comprise from 12-30% of admissions to provincial institutions: *Correctional Services in Canada, 1980-81* (Solicitor General Canada, Ottawa), p. 32.

¹³⁴ Under narcotic control laws and statutes relating to fishing and hunting out of season, forfeiture of vehicles and equipment has long been part of the law. Bill C-19,

G. *Special Terms: Dangerous Offenders*

Sentencing policy that permits locking people away for long terms as dangerous offenders raises difficult issues of morality, justice and effectiveness. As indicated in the earlier discussion, inconsistencies in the application of the Criminal Code's preventive detention provisions and the unreliability of predictions of dangerousness are serious problems that plague the present systems. Further, imprisonment for preventive purposes is incompatible with a "just deserts" philosophy. Under a "just deserts" policy, incapacitation works its effects within the limits of a sentence proportionate to the gravity of the offence and the culpability of the offender; anticipated future acts play no part in the determination of a "just" punishment. In general, therefore, we oppose the use of the concept that underlies dangerous offender legislation in the sentencing process. However, we are also aware that unless sentencing policy allows for strongly felt public needs for protection, distortions in other parts of the sentencing process will likely result. Under our proposed classification scheme, therefore, a prior record, for example, would be a factor to be taken into account, although in one sense the accused, already having served his or her sentence for the prior offence, should not be punished again for that offence. One way of justifying a prior record as a relevant factor at sentencing under a "just deserts" model is to see the prior record as a reason for not foregoing the due punishment the law permits. From this point of view absence of a record is a reason for leniency but proof of a prior record may be a good reason for foregoing leniency.¹³⁵ We recognize as well that there are a limited number of cases where all the best evidence points to the likelihood of the person upon release committing a further crime of violence. In such cases there may be a compelling argument for further detention upon expiration of sentence. We propose, therefore, where an offender has been sentenced for a Class 1, 2 or 3 crime, as indicated in Table 1,¹³⁶ involving serious personal injury, that the Crown may apply, prior to expiration of the sentence, for a judicial determination of whether or not the offender is likely to commit upon release a further serious personal injury offence. If the court finds that the risk is made out, it would be authorized to impose a five year preventive detention term, reviewable, and subject to early termination or extension, by the court. The five year limit is defensible given the

supra, footnote 19, proposed extensive forfeiture powers: see sections 107 and 206. The United States' Racketeer Influenced and Corrupt Organizations Statute (R.I.C.O.), with extensive forfeiture provisions, is recommended as a guide for Canadian legislation. See: *The Business of Crime* (Ministry of the Attorney-General of B.C., 1980).

¹³⁵ A. Vining and C. Dean, *Towards Sentencing Uniformity: Integrating the Normative and the Empirical Orientation*, in J.M. Kress (ed.), *New Directions in Sentencing* (1980), pp. 138 ff.

¹³⁶ *Supra*, p. 37.

grave difficulties of predicting future events and keeping in mind public concern and protection.

We do not favour incapacitation, through mandatory imprisonment, of selected classes of offenders such as all persons convicted of robbery or other violent offences as recommended by Greenwood and others.¹³⁷ The predictive accuracy upon which such a policy is based is fundamentally flawed and we believe such a policy of mandatory imprisonment would be financially prohibitive in its cost. Indeed, the minimum parole eligibility term in murder in Canada is a type of such incapacitation by class of offence and, as already indicated, is already productive of substantial social, correctional, and legal problems.¹³⁸

We believe that the present dangerous offender law is cast in overly wide terms, is open to disparate and arbitrary application, and is indefensible rationally.¹³⁹

H. *Consecutive Sentences*

Consecutive sentences can be used as a means to enhance public protection through deterrence or incapacitation. Present sentencing policy imposes restraint in the use of such sentences¹⁴⁰ and subjects them to a test of proportionality¹⁴¹ or totality. Still, there remains a deep-felt concern that offenders should not be allowed to "piggy-back" one offence on another through the practice of concurrent sentencing. In keeping with the "just deserts" philosophy, there is a feeling that a debt is owed and should be paid on each offence. However, the imposition of concurrent prison terms need not necessarily conflict with that philosophy. As long as the punishment ordered by a court can be said to be proportionate to the crimes committed, restraint in the use of consecutive terms is not offensive. Thus, while we agree that consecutive sentences should be permitted, we suggest that sentencing guidelines explicitly subject the discretion to impose such sentences to the currently employed principle of restraint and test of proportionality.

¹³⁷ P.J. Greenwood, *Controlling the Crime Rate Through Imprisonment*, in Q. Wilson (ed.), *Crime and Public Policy* (1983), p. 251.

For a critical analysis of the research on incapacitation see J. Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in A. Blumstein *et al.* (ed), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978), pp. 187-239.

¹³⁸ Third Report of the Strategic Planning Committee, (Correctional Service of Canada, Ministry of the Solicitor General, Ottawa, 1983), pp. 44-59.

¹³⁹ The Law Reform Commission of Canada recommended abolition of the dangerous offender provisions; Working Paper No. 11, *Imprisonment and Release* (1975).

¹⁴⁰ Criminal Code, *supra*, footnote 20, s. 645 (4) provides that unless the judge states otherwise, sentences will be deemed to be concurrent.

¹⁴¹ Canadian Sentencing Handbook, *supra*, footnote 45, pp. 110-113.

I. *Remission and Parole*

Truth and simplicity in sentencing demand the abolition of parole, and were it not for risk of serious prison overcrowding, remission as well. From the description present in the earlier analysis it can be seen that these provisions give rise to arcane complexity and needless bureaucratic mystification of the sentencing process. Parole, particularly, fails to make any significant contribution to penological goals. Although it is meant to assist the offender to reintegrate into the community and to serve as a means of supervision in order to prevent crime, studies show that parole does little to achieve these ends.¹⁴² Neither parole nor remission are necessary to sentencing or even to prison administration; it is difficult to find any rational justification for retaining them in a revised sentencing structure. At the same time we believe that the power to grant temporary absences from prisons and penitentiaries should be allowable under supervision of the Warden, and in cases of Special Terms there should be power in the court to order release under supervision.

The impact of parole abolition on prison populations could be significant unless taken into account in other parts of the classification scheme. For example, the most common penitentiary terms for robbery and rape are about 3.3 and 3.6 years respectively, while the median time served in prison is 2.3 and 2.8 years.^{142a} This suggests that the abolition of early release, in these sentences at least, may add several months to the time actually served. Impact studies must be conducted by the Sentencing Commission to assess the consequences on prison population if parole is abolished. If abolition of parole will lead to overcrowding under current prison bed capacity, the Sentencing Commission can adjust the classification and sentencing structure so as to ensure that fewer prison beds are occupied by less serious offenders.

We recognize that remission has long historical roots with a strong claim on the humanitarian instincts of the nation. We recognize as well that it can be seen as offering a ray of hope and an incentive to good conduct for those under long sentence. It is our understanding, however, that while loss of remission continues to be used frequently as an internal disciplinary measure, its efficacy in this regard is overrated. In its earlier reports, the Law Reform Commission of Canada failed to make specific reference to "good time" laws, although the best information available from the prisons at the time showed that "remission" was no

¹⁴² A. Needham, *A Solicitor General's Study on Conditional Release* (Ministry of the Solicitor General, Ottawa, 1981), p. 74; K. Jobson, *The Parole Board: What Liability to Victims* (1983), 7 Dal. L. J. 528.

^{142a} *Sentencing Practices and Trends*, Volume 2, Department of Justice (Ottawa, 1983).

longer essential to the peaceful operation of prisons.¹⁴³ Wardens and staff have at their disposal a whole range of privileges that can be withdrawn and which act as incentives to good behaviour. Loss of visiting or canteen privileges in the prison, or of access to reading materials or television, or of temporary absence passes, can be used effectively as incentives to good prison discipline. Apart from the issue of promoting prison discipline, "good time" laws (1) add complexity to the classification and sentencing structure, (2) detract from truth in sentencing, (3) distort the denunciatory impact of sentencing, and (4) create an arbitrary and unfair influence on a prisoner's term of imprisonment. In principle we favour the abolition of "good time" laws, but would appreciate having the advantage of an "impact" assessment of such abolition on prison populations under varying conditions. If the impact were to increase the overcrowding in the penitentiaries, other avenues would need to be explored. The abolition of "good time" would almost certainly require some shortening of terms actually imposed now.

J. Sentence Supervision Board

We are also of the view that the serving of prison sentences should be monitored, as recommended by the Law Reform Commission, by a quasi-judicial Sentence Supervision Board¹⁴⁴ with power to review complaints, decisions affecting sentence and prison conditions, and to hear and determine disciplinary offences¹⁴⁵ within the institution. Given our view that parole should be abolished, such a Board should not be charged with the supervision of any offenders on release.

K. Sentencing Commission

As indicated earlier we are of the view that a wide range of sentencing reform issues should continue to receive the concentrated attention of a Sentencing Commission endowed with a broad mandate. The mandate should extend to the whole sentencing process, as explained above, and include in its process both research and implementation of sentencing reforms following widespread consultation with the public and interested groups. A Statutory Commission with a broader mandate to maintain liaison and dialogue with interest groups throughout Canada, supported by research staff and building on the work already done,

¹⁴³ Reluctance on the part of the Commission actually to recommend abolition of remission may have stemmed from a fear that to do so would simply result in increased time served behind walls.

¹⁴⁴ A Report on Dispositions and Sentences in the Criminal Process: Guidelines, *op. cit.*, footnote 3.

¹⁴⁵ It would appear that the Illinois Prison Review Board has a similar power to deal with prison offences and to review revocation of remission: Schuwerk, *loc. cit.*, (33 De Paul L. Rev.), footnote 98, at p. 719.

should be directed to draft a revised sentencing policy and framework and to report to the Minister. It is to be hoped that such a process, while respecting the principle of Ministerial responsibility, would maximize opportunities for consultation and reasoned analysis from a wide range of public and private interests and thereby avoid the perils of narrow legalism.¹⁴⁶ The process, under the direction of a Sentencing Commission, should also prove to be an efficient means of producing a sentencing policy and framework for enactment by Parliament. It is our view that any new sentencing policy must reserve an important continuing role for the Sentencing Commission in monitoring, in providing feedback and liaison with the courts and with responsible government departments, and in doing research as needed. Such a Commission could be of invaluable assistance to courts of appeal and play an on-going role in developing sentencing policies and practices that reflect contemporary Canadian values within a framework marked by justice, fairness and humanitarian restraint.

¹⁴⁶ We understand that the current Sentencing Commission has actively pursued a policy of public involvement and has received numerous submissions. We recommend that the consultative process be even more actively continued, as policy options are carried to the public.