

Sentencing Reform in Canada: Recent Developments

Julian V. Roberts et Andrew von Hirsch

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Résumé de l'article

Le processus de la détermination de la peine au Canada est en train de changer. Dans la dernière décennie, le système pénal a vu plusieurs rapports sur le sujet. En 1987, la Commission canadienne sur la détermination de la peine a publié son rapport *Réformer la sentence : une approche canadienne*. L'année suivante, le Comité permanent de la justice et du solliciteur général (le Comité Daubney) a fait une étude sur la détermination de la peine, la mise en liberté sous condition et d'autres aspects du système correctionnel. En 1990, le gouvernement fédéral a proposé des modifications à la détermination de la peine et aux services correctionnels fédéraux. En 1992, il y avait deux projets de loi, le C-36 et le C-90. Le premier a reçu l'approbation royale en juin, et le deuxième a subi sa première lecture en même temps. Dans cet article, les auteurs résument les événements les plus importants. En particulier, ils examinent quatre sujets critiques : i) la déclaration du but et des principes de la sentence; ii) les lignes directrices en matière de détermination des sentences; iii) la libération conditionnelle; iv) la création d'une commission permanente des sentences au Canada. Les auteurs concluent avec un court aperçu du projet de loi C-90 que le gouvernement fédéral vient de publier. Dans un autre article, ces auteurs proposent leurs propres réformes.

Sentencing Reform in Canada : Recent Developments*

JULIAN V. ROBERTS

Associate Professor, Department of Criminology
University of Ottawa

ANDREW VON HIRSCH

Professor, School of Criminal Justice, Rutgers University,
Newark and Research Fellow, Faculty of Law
Uppsala University

ABSTRACT

Changes to the sentencing process in Canada are finally imminent. A number of reports in recent years have called for reforms in the area of sentencing and parole. In 1987, the Canadian Sentencing Commission released its final report Sentencing Reform : A Canadian Approach. This was followed in 1988 by the report of the Daubney Committee following its investigation into sentencing and parole. In addition to these proposals, the now-defunct Law Reform Commission of Canada, the Department of Justice and the Ministry of the Solicitor General all published reports containing reform proposals. In this article, the authors review recent events in the area of sentencing since the publication of the report of the Canadian Sentencing Commission. After a brief introduction, four

RÉSUMÉ

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principal policy issues are examined: (i) statutory statements of sentencing purpose; (ii) sentencing guidelines; (iii) the future of release on parole; (iv) the creation of a permanent sentencing commission for Canada. For each issue, the article critically examines the position taken by major players in the area of criminal law reform. The article concludes with a brief examination of Bill C-90, which recently received first reading, and which will be the object of further parliamentary scrutiny in the fall of 1992. In a subsequent article, the authors offer their own proposals to reform the sentencing of offenders in Canada.

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INTRODUCTION

Events of the past few years have thrust sentencing and parole to a level of national prominence unknown in the history of the criminal justice system in Canada. As a result, two reform bills were introduced within the past year: Bill C-36 (passed by the House of Commons on May 14, 1992) dealing with conditional release and Bill C-90 (first reading in June 1992) which concerns sentencing. This article deals principally with developments relating to sentencing. Recent interest in sentencing and parole was aroused in 1987 when the Canadian Sentencing Commission released its report,¹ which was followed by a number of

1. CANADIAN SENTENCING COMMISSION, *Sentencing Reform: A Canadian Approach*, Ottawa, Ministry of Supply and Services Canada, 1987, pp. 1-592.

other reports, articles and commentaries.² In this article we aim to bring some order to the sometimes confusing array of proposals advanced in recent years. We present a concise chronicle of events since the publication of the report of the Canadian Sentencing Commission over five years ago.⁴ Decisions of the Supreme Court of Canada relating to sentencing (*e.g.*, *R. v. Smith*) are not examined here, since the court's recent activities in this area have been dealt with elsewhere.⁴

— Overview of the Paper

In Part I of the paper we describe the principal events in the area of sentencing and parole. In Part II we examine four major policy issues: (i) statutory statements of sentencing purpose; (ii) sentencing guidelines; (iii) the future of parole; (iv) the necessity for a permanent sentencing/parole commission. For each issue, we critically review the position taken by major players in the area of criminal law reform. Part III consists of some conclusions regarding sentencing reform. In a subsequent paper we shall offer our own detailed proposals for reform of the sentencing process in Canada.

PART I

A. THE CONTEXT

1. Public Awareness of the Issues

Public interest in sentencing and parole has been aroused by media coverage of a series of controversial cases. First, several homicides have been committed by individuals released on parole. In some cases the individuals had already been convicted of homicide.⁵ These cases resulted in Coroner's inquests

2. See for example K. JOBSON & G. FERGUSON, "Toward a Revised Sentencing Structure for Canada", (1987) *Can. Bar Rev.* 1-67; (1990) 32 *Can.J.Crim.*, pp. 381-551 and also (1987) 20 *Criminologie*, pp. 3-113, both issues of which were entirely devoted to sentencing reform in Canada. See also A. AUNGER, "Commentary: the Canadian Sentencing Commission Guidelines", (1988) 1 *Prov.Judges J.* 16; J. LAYCRAFT, "Winds of Change in the Sentencing Process", (1985-1986) 24 *Alta L.Rev.* 393; J.P. BRODEUR, "Truth in Sentencing", (1989) *Behav. Sciences and the Law* 7, pp. 25-50; J. ROBERTS, "Sentencing Reform: The lessons of Psychology", *Can. Psych.* 32, pp. 466-477. More recently, David COLE and Allan MANSON discuss aspects of sentencing and parole reform in *Release from Imprisonment*, Toronto, Carswell, 1990.

3. Discussion of events prior to 1985, as well as the problems confronting sentencing have been dealt with elsewhere: see K. JOBSON and G. FERGUSON, "Toward a Revised Sentencing Structure for Canada", (1987) 66 *Can.Bar Rev.* 1; CANADIAN SENTENCING COMMISSION, *op. cit.*, note 2; K. JOBSON, "Imprisonment", 4 *Ottawa Law Review*, pp. 421-457; A. VINING, "Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons", 17 *Osgoode Hall L.J.*, pp. 355-413.

4. See the excellent article by K. ROACH "Smith and the Supreme Court: Implications for Sentencing Policy and Reform", (1985) 11 *Supreme Court L.R.* 433.

5. Melvin Stanton was convicted in 1988 of first degree murder. He had previously been convicted of another homicide in British Columbia. In Ottawa, Allan Sweeney was convicted of the murder of Celia Ruygrok. Sweeney had been previously convicted of murder (See *The Ottawa Sun*, June 18, 1988, p. 5.)

that were highly critical of the criminal justice system.⁶ Small wonder then, as one grim newspaper headline gave way to another,⁷ that opinion polls revealed that two-thirds of the Canadian public oppose parole.⁸

But public concern is not restricted to parole and other forms of early release from prison. Sentencing decisions also attracted front-page headlines. In 1988, a judge in Toronto made news when he imposed a brief period of custody upon an offender convicted of sexual assault.⁹ This sentence — derisory in the opinion of many — led to greater denunciation of the sentencing judge than the crime for which it was imposed. Shortly thereafter, another offender was convicted of assault causing bodily harm against his wife and was sentenced to a period of probation.¹⁰ This decision — decried by the news media¹¹ and various advocacy groups working in the area of domestic assault — was interpreted as further evidence that the perceptions of the judiciary were at considerable variance with the views of society in general. It is not surprising then that sentencing generates an even more negative social reaction than parole: most Canadians feel sentences are inappropriately lenient.¹²

It is not just public perceptions of judicial leniency that have been aroused. The issue of proportionality in sentencing became a public concern when an offender in Quebec received a 29 month term of imprisonment for failing to pay outstanding parking tickets.¹³ Moreover, the offender was informed by the National Parole Board that he was not eligible for parole privileges because he

6. A federal inquiry into the Stanton case was critical of various components of the criminal justice system, including the Toronto police, the halfway house to which Stanton had been released as well as the Correctional Service of Canada. In Ottawa, the report of the Ruygrok Inquest was critical of the releasing procedures that enabled Sweeney to leave the institution in which he was housed.

7. The image of parole was further tarnished when a National Parole Board study released in 1987 found that over a decade, 100 murders had been committed by inmates released on parole or m.s. The report made headlines across the nation (see *The Ottawa Citizen*, September 14, 1987, p. 1).

8. See J.V. ROBERTS, "Public Opinion, Crime and Criminal Justice" in *Crime and Justice: An Annual Review of Research*, Chicago, University of Chicago Press, 1992 (volume 6 in press) and J.V. ROBERTS, "Early release from Prison: What do the Canadian Public really Think?", (1988) 30 *Can.J.Crim.* 231.

9. District Court Judge Anthony Vannini sentenced Bruce Glassford to serve 90 days on an intermittent basis for the crime of sexual assault. The sentence was subsequently increased by the Ontario Court of Appeal in April 1988 to two years less one day.

10. Kirby Inwood received a suspended sentence with probation for three years for a conviction of assault causing bodily harm against his wife, Tanya Sidorova. In 1989, the Ontario Court of Appeal dismissed an appeal by the Crown for a longer term.

11. See, for example the *Globe and Mail*, Toronto, September 21, 1988.

12. Canadians are not different in this regard than residents of other western nations. See J.V. ROBERTS and A.N. DOOB, "Sentencing and Public Opinion: Taking False Shadows for True Substances", (1989) 27 *Osgoode Hall L.J.* 491.

13. David Smith was sentenced to 29 months by a municipal court judge in Montreal for failing to pay \$12,529 in fines and court costs incurred as a result of 128 unpaid parking tickets. After serving six weeks, Smith appealed the sentence to the Quebec Superior Court. He was finally sentenced to 483 hours of community service (see *The Gazette*, Montreal, January 17, 1989, p. A.1).

had violated municipal and not federal statutes.¹⁴ The Solicitor General of Quebec issued a statement to the effect that intervention in the case was not possible.¹⁵ The news media were quick to draw to the attention of an already incredulous public that this sentence was substantially harsher than other dispositions imposed for far more serious crimes such as robbery, uttering death threats and burglary.¹⁶ And finally, the maximum penalties of the *Young Offenders Act* were called into question when it was reported that a young offender convicted of three murders would be released after serving three years.¹⁷

These and similar cases provide the public context for discussion of sentencing reform in Canada. Whether these incidents are seen as isolated events, the result of a few aberrant sentencing or releasing decisions, or as the inevitable sequelae to a system in crisis will determine which of two directions to reform is adopted. One approach asserts that the basic structure of sentencing is sound; we just need to improve the quality of individual decision-making. This *laissez-faire* view has its proponents. In fact, there has long been a minority tradition in Canada that the sentencing process needs little attention. Thus the influential Ontario Chief Justice McRuer noted some years ago that :

not much can be accomplished in the improvement in Canadian sentencing procedure by direct legislative action [...] the margin of sentencing error can best be reduced in this country by making better use of the agencies we now have.¹⁸

The alternative perspective *vis-à-vis* sentencing reform regards a complete overhaul of the system as the only way to address the problems of sentencing, of which these cases are but the most visible exemplars. This view clearly has a greater number of adherents.¹⁹

The dangers of implementing reform on an *ad hoc*, piecemeal basis are real enough. First there is the possibility that changes with salutary effects in one area (*e.g.*, parole) will have deleterious effects elsewhere in the system (*e.g.*, increasing prison populations). Analogies are never perfect, but the sentencing and releasing process can be likened to a spider-web : pressure at one point is transmitted throughout the whole system, hence the necessity for an integrated solution. Further evidence of the dangers of the incremental approach to reform comes from the current maximum penalty structure. The maxima in the present *Criminal Code* are historical accretions, the consequence of outdated perceptions

14. The *Parole Board Act* covers prisoners serving time for breaking the laws of the Parliament of Canada, accordingly Smith was not eligible to apply for release through the National Parole Board.

15. See the Minister's statement reported in *La Presse*, Montreal, October 13, 1988, p. 14.

16. The headline over the story describing this case in *The Gazette*, Montreal, November 5, 1988, p. 2, was, understandably perhaps, "Justice gone crazy".

17. The maximum sentence possible under the Act was three years imprisonment. Public apprehension was further inflamed in this particular case when the news media reported that a correctional officer told reporters that the young offender "could kill again, without a doubt" — see for example, *The Toronto Sun*, November 18, 1988.

18. The Honourable J.C. McRuer continues by suggesting that "We should start at the beginning by giving to the magisterial office the security, dignity and prestige that it deserves". See J.C. McRuer, "Sentencing", (1961) 3 *Can.J.Corr.* 221.

19. Keith Jobson and Gerry Ferguson provide an excellent discussion from this perspective. See K. JOBSON and G. FERGUSON, *loc. cit.*, note 4. This view is shared by most other commentators in the field, as well as the Canadian Sentencing Commission.

of crime seriousness and periodic tinkering with individual offences. The result is that our current maximum penalties reflect neither current sentencing practice nor contemporary perceptions of the seriousness of the offences for which they can be imposed. Anomalies demonstrating a departure from proportionality abound. For example, the first level of sexual assault (s. 272) carries a maximum penalty of 10 years, while break and enter (s. 348) carries a far more onerous maximum.²⁰ Revising a few maxima would only exacerbate the problem; nothing short of a systematic re-ranking of all offences would suffice.

Unfortunately, Canada has yet to see a great deal of legislative activity. The thorough overhaul of the sentencing system that has been recommended so often has yet to occur. In this respect Canada lags far behind several other western nations. Sentencing reforms have recently been implemented in the United States, England and Wales, and Sweden.²¹

2. Constraints upon the Reform Process

There are several reasons why there has been far less legislative activity in Canada than, for example, the United States or England and Wales. One obvious reason is that the federal government has responsibility for the creation of criminal statutes. It is therefore impossible for one province or territory to adopt substantial reform of sentencing within its jurisdiction. However, the administration of criminal justice falls within the purview of the provincial and territorial governments, so that the federal government also cannot take the initiative alone. Sentencing reform can realistically only proceed when co-operation exists between the federal and provincial governments.

Recent federal-provincial consultations on the issue of criminal justice have simply not achieved a level of co-operation that is necessary to facilitate the passage of reform legislation. Central to provincial concerns in the area of criminal justice is the fear that federally-initiated reforms to sentencing and parole will have adverse fiscal consequences for these governments, almost all of which are as impecunious as their federal counterpart. Some of this apprehension is well-founded. For example, since sentences of two years or longer are served in federal penitentiaries, a judge sentencing an offender to a period of imprisonment is deciding whether that individual will become a financial burden upon the federal or provincial governments. A reform which reduced sentences of imprisonment would probably have the effect of decreasing federal populations at the expense of provincial admissions. The consequences would be a transfer of correctional costs from the federal to provincial governments. Accordingly, provincial reaction to federal reform initiatives has been at best lukewarm.

A second barrier to expeditious criminal law reform in the area of sentencing has been the magnitude of the federal government deficit. The current Conservative government was elected in part to reduce the federal deficit, and this has led to cost-cutting throughout the system. One consequence for sentencing

20. Section 348(1)d holds a minimum of life imprisonment.

21. For details of the Swedish initiative, see A. VON HIRSCH and Nils JAREBORG, "Sweden's Sentencing Statute Enacted", (1989) *Crim.L.Rev.* 275; The reforms in England and Wales are thoroughly reviewed in a recent issue of *The Criminal Law Review* (April 1992, pp. 229-320) see also M. WASIK and A. VON HIRSCH, "Statutory Sentencing Principles: the 1990 White Paper", (1990) 53 *Mod.L.Rev.* 508.

reform is that appeals for reforms that have budgetary consequences have met with even firmer resistance than in the past. Opposition to the creation of a permanent sentencing commission, for example, has been founded in part on the argument that it would necessitate some capital expenditure.²²

One final impediment to law reform has been the rapid turnover of federal ministers of Justice, the member of cabinet with primary responsibility for criminal justice issues. In fact, five individuals have occupied the post since the creation, just a few years ago, of the Canadian Sentencing Commission. All these ministers have attempted, with, it must be said, varying degrees of failure, to advance the reform process. For each new minister there has been a period of review and consultation before proposals were advanced. The speed of the revolving door to the minister's office has lent a rather episodic quality to the reform initiative at the federal level.

B. RECENT DEVELOPMENTS

1. Law Reform Commission of Canada (1986-1992)²³

Since its creation 20 years earlier, the Law Reform Commission has produced a number of important publications in the area of sentencing, although it has been less active of late. After publishing several important reports in the 1970s,²⁴ the last official document dealing with sentencing was the Commission's brief submitted to the Daubney Committee in March 1988.

The Commission's silence is in part explained by its preoccupation with the revised *Criminal Code*, released in 1987.²⁵ Unlike the current code, the proposed document contains no maximum or minimum penalties; instead the Commission simply notes that revised maxima are available in the Sentencing Commission report. It was anticipated however, that within the next few years, the L.R.C.C. would revisit issues of sentencing, particularly as they pertain to the revised Code. It is unclear whether this task will now be taken over by the federal Department of Justice.

22. It is a curious objection since estimates for the cost of a permanent sentencing commission hover around one million dollars, which in terms of the total criminal justice budget of approximately eight billion dollars, is very little. Two criminologists who have written a great deal about the sentencing process in Canada estimate that the annual cost would be the equivalent of holding 20 people in a penitentiary for a year, or of having two police cruisers on the streets of Toronto for the same period of time. See A.N. DOOB and J.P. BRODEUR, *The Structure and Role of a Permanent Sentencing Commission*, paper prepared for the Conference on the Reform of Sentencing, Parole and Early Release, Ottawa, August 1988.

23. We begin our survey with this Commission even though it was abolished by the federal budget of February 1992, making Canada one of only three Commonwealth nations without an independent reform body of this kind (the other countries being Zimbabwe and Bangladesh).

24. See, for example, LAW REFORM COMMISSION OF CANADA, *Studies on Imprisonment*, Ottawa, Supply and Services Canada, 1976, pp. 5-270; *Fear of Punishment*, Ottawa, Ministry of Supply and Services Canada, 1976, pp. 1-150; *Community Participation in Sentencing*, Ottawa, Ministry of Supply and Services Canada, 1976, pp. 3-177.

25. LAW REFORM COMMISSION OF CANADA, Report 31, *Recodifying Criminal Law*, Ottawa, Law Reform Commission of Canada, 1987, pp. 1-213.

2. The Canadian Sentencing Commission (1984-1987)

The creation of the Sentencing Commission was first proposed in 1982 by the Sentencing Project, launched jointly by the Department of Justice and the Ministry of the Solicitor General. The Commission was actually created by Order in Council in May 1984. There were nine part-time commissioners working under the direction of Judge Omer Archambault, of the Provincial Court of Saskatchewan. The Commission's terms of reference were broad,²⁶ but particular emphasis was placed upon an examination of the advisability of sentencing guidelines. While several earlier commissions of inquiry have examined aspects of sentencing and parole,²⁷ this was the first time a commission had been established with exclusive focus upon these topics. The Commission received written briefs, conducted meetings with criminal justice professionals and different groups with a stake in the criminal justice process. As well, consultations were conducted with numerous experts in the field, both in Canada and elsewhere. Finally, an ambitious research program was undertaken, the results of which were published by the Department of Justice in 1988.²⁸ In 1987, the Commission released its report, entitled *Sentencing Reform: A Canadian Approach*. The document contains an integrated reform package which addresses all areas of sentencing in Canada.

3. Canadian Bar Association (1985-1988)

The Canadian Bar Association has played a significant role in reform of sentencing and parole in recent years. Through the Special Committee on Imprisonment and Release,²⁹ the C.B.A. has responded to various sentencing reform initiatives, including the report of the Canadian Sentencing Commission. As well, it has advanced proposals of its own.

4. House of Commons Committee on Justice and Solicitor General (1987-1988)

This Committee — headed by David Daubney — undertook a review of sentencing, conditional release and related aspects of the correctional system in the Spring of 1987, at the time that the Sentencing Commission's report was released. The study was undertaken in response to widespread public dissatisfaction with sentencing and parole in Canada (see Introduction). In the words of the Committee's report, published a year later (1988) :

26. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, Chapter 1.

27. See STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, *Parole in Canada*, Ottawa, Information Canada, 1974, pp. 1-295; CANADIAN COMMITTEE ON CORRECTIONS, *Toward Unity: Criminal Justice and Corrections*, Ottawa, Information Canada, 1969, pp. 1-505; *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice Canada*, Ottawa, Queen's Printer, 1956, pp. 1-162.

28. See the 24 research reports of the Canadian Sentencing Commission, published in 1988 by the Research and Development Directorate, Department of Justice Canada.

29. The members of the Committee that authored the 1985 report were John Conroy, David Cole, Roger Tassé, Chester Cunningham, Michael Jackson, Allan Manson, Alison MacPhail (*ex-officio*).

public confidence had been seriously eroded [...] many Canadians now feel that they are not being fully protected and that crime is out of control. The Committee believes that this public perception, whether well-founded or not, must be addressed and the issues raised by it must also be faced.³⁰

The House of Commons Committee is a ten-member, all-party body, composed at the time of seven members from the incumbent Conservative government (including the Chairman, Mr. Daubney), two liberal Members of Parliament and one member of the New Democratic Party. As part of its activities, the Committee encouraged written submissions from the public and criminal justice professionals. In addition, public as well as *in camera* hearings were held across the country.

The Daubney Committee report provides a good illustration of the costs and benefits of policy development by parliamentary committee. What is gained is a more populist approach: the public hearings provide a direct contact between the system and members of the public. This was absent in the work of the Sentencing Commission, which decided against holding public hearings. What is lost by the Committee approach is the clear vision and considerable research budget of an independent, three-year Royal commission, such as the Canadian Sentencing Commission. By attempting to reconcile conflicting (at times even irreconcilable) perspectives, the Daubney Committee put forth a reform document containing an eclectic collection of recommendations.

An example of the dangers of this approach to reform can be found in the Committee's recommendation number 10,³¹ which calls for a minimum penalty of at least 10 years imprisonment for all offenders convicted of sexual assault involving violence for the second or subsequent occasion. This penalty would also carry a parole exclusion; in short it would be a flat-time sentence of at least ten years duration. Since most offenders convicted of a more serious crime (second degree murder) spend 10 years in prison³² before obtaining release on parole (although they remain under warrant for life), a penalty of this nature would scramble the principle of proportionality. If mandatory penalties are to be introduced (and we see strong reasons for opposing their introduction), at the very least they have to be introduced through a thorough revamping of all penalties in the Code.

30. HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL, *Report of the Standing Committee on its Review of Sentencing, Conditional Release and Related Aspects of Corrections*, Ottawa, Ministry of Supply and Services Canada, 1988, p. 1.

31. *Id.*, pp. 71-72.

32. Persons convicted of second degree murder are sentenced to life imprisonment without parole for at least ten years, with the sentencing judge setting the first parole eligibility date. However, statistics show that in almost all cases of second degree murder the offender receives the minimum period of parole ineligibility, and almost all inmates serving life for second degree murder convictions obtain release on parole at the ten-year mark. See MINISTRY OF THE SOLICITOR GENERAL, *Long Term Imprisonment in Canada*, Ottawa, Ministry of the Solicitor General, 1985, p. 14.

5. The Federal Government

(a) *The Department of Justice (1987-1992)*

In 1987, the Department of Justice Canada headed an inter-departmental consultation team that toured the country. The Sentencing Commission report served as the basic consultation document for talks with provincial governments. As a result of this exercise, in 1988, the Minister of Justice, Ray Hnatyshyn, announced a series of sentencing-related initiatives at the annual Canadian Bar Association meeting. The principal initiatives included: creation of a permanent sentencing commission; the development of advisory guidelines and the promulgation of a legislated statement of the purpose and principles of sentencing. National consultations with organizations dealing with women in conflict with the law (e.g., Canadian Association of Elizabeth Fry Societies) and native groups were also undertaken.

As it turned out, most of the Minister's 1988 reform initiatives were derailed by the intervention of a general election later that year. One of the consequences of that election was a cabinet shuffle. Doug Lewis assumed the Justice portfolio, only to be replaced a short while afterwards by the present incumbent, Kim Campbell. A second consultation exercise was conducted in 1990-91, using the proposals contained in the federal government document entitled *Sentencing Corrections and Conditional Release: Directions for Reform*.³³ In 1992, a discussion document regarding the use of intermediate sanctions was circulated to all interested parties.³⁴

(b) *The Solicitor General of Canada (1987-1992)*

Early reaction to the report of the Canadian Sentencing Commission came from the Solicitor General of Canada, James Kelleher, who announced, at the 1988 conference in Ottawa, a series of proposals to reform conditional release in Canada. These proposals were modified in light of critical reaction, and eventually led to Bill C-36, the contents of which will be discussed later in this article.

6. Society for the Reform of the Criminal Law

One final event in the area of sentencing and parole is worth noting. In August, 1988, the Society for the Reform of the Criminal Law held an international conference in Ottawa devoted to sentencing and parole. The meetings attracted scholars, practitioners and policy-makers from across Canada and around the world. The key-note speech was delivered by the Chief Justice of Canada, the Right Honourable Brian Dickson. The conference raised awareness of the problems of sentencing, as well as the possibilities for reform in Canada.

33. GOVERNMENT OF CANADA, *Directions for Reform: A Framework for Sentencing, Corrections and Conditional Release*, Ottawa, Ministry of Supply and Services Canada, 1990, pp. 1-68.

34. SENTENCING TEAM, Department of Justice Canada, *Intermediate Sanctions*, Ottawa, Department of Justice Canada, 1992, pp. 1-15.

PART II. RECENT REFORM PROPOSALS

A. STATEMENT OF THE PURPOSE AND PRINCIPLES OF SENTENCING

— Background

Reforming sentencing begins with the creation of a statutory statement of purpose and principle. There are several reasons for this, the primary one being that the *Criminal Code* currently has no such statement, either for sentencing or for the criminal law. Without such a statement, promulgated by Parliament and accepted by the judiciary across Canada, it is hard to evolve national standards in the area of sentencing. This oversight has been noted: in 1984 the federal government published proposals for reform in the area of sentencing,³⁵ including a statement of purpose and principle. All major reform proposals since have started with such a statement. As well, reform initiatives in other jurisdictions have also paid particular attention to proclaiming, from the outset, the purpose of the sentencing process.

A statutory statement of purpose that has brevity and conceptual clarity is a *sine qua non* for reform. The temptation in writing such a statement is to be all-inclusive, to refer to every purpose that has ever been attributed to the sentencing process. This leads to a menu-style statement in which all possible purposes are laid out for the judge to consider. He or she can reflect on the list, and at length place an order. The exercise can be compared to asking the waiter which entrée is best. If the waiter's response is that they are all good, then this hardly helps decision-making. The result then is that statements that have many purposes provide no effective guidance at all.

Constructing an effective statement of purpose requires the drafters to lash themselves to the mast, metaphorically speaking, lest they heed the sirens of the many sentencing aims that have been advanced over the years. Several of these sirens will be promising a great deal more than they can deliver. For example, advocates of various utilitarian sentencing purposes claim that offenders can be deterred, rehabilitated or incapacitated, with positive consequences upon crime rates. These claims have been over-stated. The limitations of the deterrent power of the criminal law have been well-documented.³⁶ As for rehabilitation, it may work in some cases, but no one, (including the sentencing judge) knows which dispositions will promote rehabilitation in which offenders. It has a very restricted utility therefore, as a *general* sentencing purpose.³⁷ Finally, incapacitation in various incarnations has been shown to be a very expensive way of reducing crime. Minor reductions in crime rates are achieved at increases in prison populations that are far from trivial.³⁸ As scholars such as Andrew Ashworth have pointed out, substantial reductions in crime rates cannot be achieved through the sentencing

35. GOVERNMENT OF CANADA, *Sentencing*, Ottawa, Department of Justice Canada, 1984, pp. 1-72.

36. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, pp. 135-138.

37. See A. DOOB and J.P. BRODEUR, "Rehabilitating the Debate on Rehabilitation", (1989) 31 *Can.J.Crim.* 179.

38. See A. VON HIRSCH, *Past or Future Crimes*, New Brunswick, Rutgers University Press, 1987, pp. 115-123.

process.³⁹ The percentage of the total offender population that actually gets sentenced is simply too small to have any appreciable impact on the incidence of crime.⁴⁰

1. Law reform Commission of Canada

(a) *Brief to the Sentencing Commission*

Perhaps the Commission's most important contribution to the criminal law reform debate in general — and sentencing in particular — concerns the principle of restraint or moderation. According to this principle, the criminal law should only be invoked to the extent necessary to achieve its prescribed goals. In the context of sentencing, restraint usually refers to the minimal use of imprisonment, but it is not of course restricted to this: it has consequences for the existence of certain penalties (*e.g.*, mandatory minimum penalties of imprisonment)⁴¹ and even for the definition of offences. More than any other single issue, the principle of restraint best characterizes the L.R.C.C. position with regard to sentencing and early release from prison.

The Commission did not propose a specific statement of sentencing purpose. However, the report makes its underlying philosophy clear. Consistent with their previous work — and as it turned out also the position of the Sentencing Commission — the Law Reform Commissioners endorsed a modified just deserts sentencing rationale. This is reflected in their strong endorsement of the principle of proportionality between the seriousness of the crime (and to a lesser extent the degree of culpability of the offender) and the severity of the assigned penalty. The Commission appears to have come to this position after reviewing the empirical research revealing the limitations upon the utilitarian goals of sentencing. However, it is not a totally pure sentencing model: within the desert-based limits the Commission left some room for judges to pursue the goals of deterrence, incapacitation and rehabilitation.

(b) *Brief to the Daubney Committee*

A second brief submitted to the Daubney Committee departs somewhat from the original L.R.C.C. position, principally by widening the door to eclectic sentencing. Proportionality was clearly uppermost in the minds of the authors of the first Law Reform Commission brief. When imposing sentence, a judge is bound to impose a sentence the severity of which is proportional to the seriousness of the offence committed. In the subsequent document however, no such restriction is placed upon correctional authorities. They remain free to release inmates according to utilitarian criteria, such as whether the individual is likely to benefit

39. A. ASHWORTH, "Criminal Justice and Deserved Sentences", (1989) *Crim.L.Rev.* 340.

40. For example, one study found that of a sentence was imposed in only about 2% of crimes reported to the police. See R. HOOD and R. SPARKS, *Key Issues in Criminology*, Toronto, McGraw-Hill, 1978, p. 36.

41. By imposing imprisonment on all offenders convicted of the crime, regardless of the circumstances surrounding the commission of the offence, mandatory sentences of imprisonment violate the principle of restraint.

from early release, or whether he is likely to pose a threat to society unless detained. This bifurcation between the sentencing rationale and that of the releasing authorities is made clear in the testimony of the Chairman of the Law Reform Commission to the Daubney Committee, where he stated :

proportionality is terribly important when you are actually sentencing [...] [but] when you are administering the sentence it is less important.⁴²

The likely consequence would be a preservation of the *status quo* in terms of disparity of time served. Thus equally culpable offenders sentenced to approximately comparable sentences might spend very different periods of time in prison, if one inmate benefits from a favourable decision from paroling authorities. With an intrusive release system (as much as two-thirds of the sentence being served in the community if the inmate obtains release on parole at the earliest application),⁴³ the integrity of the original sentence is substantially undermined. Under these conditions, it is hard to see how the principle of proportionality can be preserved.

Moreover, the application of utilitarian principles by paroling authorities creates a discrepancy between public expectations of the meaning of a sentence of imprisonment, and the reality for the inmate. As parole authorities mitigate lengthy sentences by granting parole at the earliest opportunity, they are setting the system up for public criticism.

In terms of time served, the sentencing system is in reality less punitive than the public might think from reading about the sentences imposed in court. Data on time served in prison show that there is a substantial discrepancy between the sentence imposed in court and the sentence actually served by the inmate. For example, recent statistics supplied by the National Parole Board show that over one-third of inmates serving time for offences of violence and who were sentenced to *over* ten years spent *less* than five years in prison.⁴⁴ As one of us has noted elsewhere, this means that the sentencing system, has far more bark than bite, with a number of adverse consequences for the criminal justice system. One of the consequences is considerable public hostility towards the parole process.⁴⁵

As well, an informal and silent relationship develops : anticipating the decisions of parole boards, some judges augment sentence lengths. Thus in one landmark study, two-third of judges surveyed stated that they sometimes increased the lengths of sentences they imposed in light of the possibility that the inmate

42. HOUSE OF COMMONS, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General*, Issue number 29, Ottawa, Ministry of Supply and Services Canada, p. 10 (December 8, 1987).

43. If the inmate obtains release on day parole at the earliest opportunity, and is required only to spend nights in a half-way house located in the community, the custodial proportion of the total sentence is as little as one-sixth.

44. Federal admission data for the period 1977-1981, supplied by the National Parole Board to one of the authors of this paper in 1987.

45. The Julie Belmas case is an illustration of this. Belmas (one of the so-called "Squamish Five") participated in a number of serious terrorist crimes, was convicted of sabotage and was sentenced to serve 15 years in prison. After serving 45 months in prison she was released on day parole. Three months later she was arrested and subsequently convicted for shoplifting. The contrast between the sentence as pronounced by the trial judge, and the time Belmas actually served in prison was the subject of a great deal of public commentary.

might be paroled.⁴⁶ Parole boards then react (in some cases at least) by releasing inmates serving sentences that in their view are excessive, and the mirror in which sentence severity (as measured by time served in prison) reflects crime seriousness and offender culpability becomes ever more cloudy.⁴⁷

2. Canadian Sentencing Commission

It is important to note that within the scope of this paper we cannot review all the features of the reform documents (such as the report of the Canadian Sentencing Commission) which contain a complex and comprehensive package of reforms for sentencing and parole in Canada. In this article we simply touch upon some of the most important recommendations.⁴⁸

The Sentencing Commission spent a great deal of time on, and devoted an entire chapter of its report to, a statement of purpose. The result is a thoughtful document, but one cannot help feeling that the commissioners succumbed to the temptations of a multi-purpose statement that does not sufficiently clarify the inter-relationships between the purposes. This is ironic, for the Commission's report contains an eloquent summary of the restricted role that the utilitarian aims of sentencing can play in sentencing.⁴⁹

Consider what the Commission's statement⁵⁰ contains: an overall purpose for the criminal law; a primary purpose of sentencing; a series of sentencing principles (followed by a series of considerations for these principles); and finally what appear to be considerations for the considerations. The entire statement is over 650 words in length. It argues that the criminal law exists to contribute to the maintenance of a just, peaceful and safe society. By contrast, the fundamental purpose of sentencing is to preserve the authority of, and promote respect for the law through the imposition of just sanctions. These statements are followed by a preamble to the fundamental principle governing the determination of a sentence, which is that it should be proportionate to the gravity of the offence and the degree of responsibility of the offender for the crime. This is followed by the principle of restraint, or moderation, whereby the judge is enjoined to select the least onerous sanction appropriate in the circumstances. These principles are followed by the considerations, which include conditions to be fulfilled before a sentence of imprisonment is imposed.

In applying the principles already noted (of proportionality and moderation) the sentencing judge is invited to consider denunciation, deterrence (special and general), incapacitation, reparation (to the individual victim or to society in

46. J. HOGARTH, *Sentencing as a Human Process*, Toronto, University of Toronto Press, 1971, p. 176; see also J. ROBERTS, *Empirical Research on Sentencing*, Ottawa, Department of Justice, 1988, pp. 44-46.

47. It is important to point out that we are not arguing for flat-time sentencing without early release, nor for longer terms of imprisonment. Rather, we simply point out the dangers associated with a system in which the decision of the trial judge can be undermined by decisions taken by subsequent actors in the criminal justice process.

48. See A. VON HIRSCH, *Federal Sentencing Guidelines: The United States and Canadian Schemes Compared*, New York, Centre for Research in Crime and Justice — New York University School of Law, 1988, pp. 1-27, for a discussion of the Commission's proposals in light of other initiatives in the United States.

49. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, Chapter 6.

50. *Id.*, pp. 153-155.

general) as well as promoting a sense of responsibility on the part of the offenders. In short, the statement ends by including many of the traditional sentencing purposes, although the term “purpose” is eschewed in favour of the more modest term “consideration”.

Is the Sentencing Commission’s statement an advance upon the *status quo*, in which no codified statement of purpose exists? Whether it would provide effective guidance, and reduce unwarranted disparity depends to a great deal upon the extent to which a proportional sentence is modified by the utilitarian “considerations”. The fundamental principle of sentencing is clearly articulated to be proportionality, but the clarity and pre-eminence of the principle is impaired when it is surrounded by a crowd of other principles and purposes, all jostling for attention. There is also the danger that the statement will be misinterpreted in practice. Judges may feel that the presence of the considerations justifies interfering with the principle of proportionality, even though this kind of reasoning would appear to be prohibited by the statement.

A statutory statement of the purpose and principles of sentencing does not have to be uni-purpose in nature. Multi-purpose statements might work, but the inter-relationships between the different principles have to be made explicit, and this does not appear to be the case in the Sentencing Commission’s proposal. A practical example may clarify the difficulties. Consider two offenders convicted of a serious case of burglary. In terms of culpability, they deserve comparably severe punishments. However, individual A is a first offender, employed and with a steady work record, while offender B has a poor employment record, evinces no interest in gainful employment and has several previous convictions for burglary. If incarceration is justified in light of the seriousness of the offence, it is not necessary that both offenders be sent to prison. What is needed is a clear statement that will permit the imposition of sanctions that are qualitatively different but of equivalent severity. The Sentencing Commission’s proposal offers no such guidance.

Paragraph c, subsection (ii) of the Commission’s statement of the principles of sentencing states that “a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances”.⁵¹ According to this principle, the two offenders should receive the same sentence, since as co-accuseds, the offence and the circumstances are essentially the same. However, paragraph c, subsection (v), sub-subsection (cc) suggests that a term of imprisonment should be imposed *only, inter alia* “where any other sanction would not sufficiently reflect the repetitive nature of the offence”.⁵² This principle would suggest that only offender A should be sent to prison. Clearly the sub-sections are at odds with each other, and the sentencing judge is given little direction as to how to resolve the dilemma. Finally, the picture is complicated still further when one realises that however the judge decides to proceed, he or she :

may give consideration to any one or more of the following :

- (i) denouncing blameworthy behaviour;
- (ii) deterring the offender and other persons from committing offences;
- (iii) separating offenders from society, where necessary;

51. *Id.*, p. 154.

52. *Ibid.*

- (iv) providing for redress for the harm done to individual victims or to the community;
- (v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.⁵³

If a statement is to have multiple purposes, then there must be a clear indication as to how these utilitarian principles permit rational choices between equally onerous but qualitatively different dispositions.

What effect would the Commission's statement have upon sentencing practices across the country? In all probability the impact would be largely symbolic, serving to remind judges of what they already know, rather than to guide their actual sentencing decisions. For example, not many judges need to be reminded that "the maximum penalty prescribed for an offence should be imposed only in the most serious cases".

If the Commission's statement of sentencing purpose is unlikely to produce much positive change, can it possibly have adverse effects? The dangers with the Commission's proposal are two-fold. First, we fear that judges will find within the statement's breadth the justification for continuing to pursue their own individual sentencing philosophies. The problem with an all-encompassing statement is that no one can disagree with it. Given the multiplicity of views, a statement of sentencing purpose that provokes no disagreement can offer no guidance. Second, there is the danger that judges (among others) will regard the document as an eloquent re-statement of the *status quo*, and this will impede genuine reform.

3. Daubney Committee

The statement of purpose contained in the Daubney Committee report is essentially a re-formulation of the Sentencing Commission approach. The Sentencing Commission, it will be recalled, attributed an overall purpose to the criminal law, namely that of "contributing to the maintenance of a just, peaceful and safe society". The Commission reserved for sentencing in particular, the purpose of preserving and protecting respect for the law through the imposition of just sanctions. Silent about the purpose of the criminal law, the Daubney Committee report concatenates the two Commission proposals, and adds the theme of accountability.⁵⁴ Thus, the purpose of *sentencing* (not the criminal law) is, according to the Committee, to "contribute to the maintenance of a just, peaceful and safe society by holding offenders accountable for their criminal conduct through the imposition of just sanctions".⁵⁵

As well as encouraging offenders to take responsibility for the harm caused by their conduct, sanctions are also expected to perform a variety of other functions. They are expected to encourage reparation, facilitate victim-offender reconciliation, provide offenders with opportunities to facilitate their rehabilitation,

53. *Id.*, pp. 154-155.

54. The description of the concept of "accountability" is rather murky in the Committee's report. It is clear that it has many features in common with rehabilitation. To the extent that the two are interchangeable, the Committee's statement is likely to encounter the problems we (and others) have identified.

55. HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL, *op. cit.*, note 30, p. 35.

and, — if this were not enough — to denounce the behaviour and/or incapacitate the offender (where necessary). As with many previous formulations, then, criminal sanctions are asked to perform a great deal.

The Daubney Committee's statement did not end there, however. It continues with a series of principles to be considered at sentencing. Most of these are drawn directly from the Sentencing Commission report, although there are some subtle shifts in emphasis. For example, the Commission proposed that proportionality be "the *paramount* principle governing the determination of sentence".⁵⁶ The Daubney Committee simply noted that "the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender".⁵⁷

What distinguishes the sentencing philosophy of the Committee, is the emphasis on the accountability of the offender. This forms the core of the Daubney statement, whereas it is simply the last consideration cited by the Commission. But the Daubney Committee also had an eye for accountability in the other direction. Reflecting the concerns of victims' groups, the Daubney Committee was concerned with accountability on the part of the criminal justice system. The system is encouraged to be accountable in two directions : to the offender (by providing opportunities for rehabilitation) and to the victim (and society) by providing more information to the former and greater protection for the latter. It is worth noting in this context that the Daubney Committee's work was conducted when Canadians were reading about several tragic cases in which it was apparent that accountability and information-transmission through the system had broken down (see Introduction).

4. Department of Justice Proposals⁵⁸

In 1990, the Minister of Justice, in collaboration with the Solicitor General, released a discussion document containing the federal government proposals for reform in the area of sentencing and parole. The Department of Justice proposals consist of an amalgam of the Sentencing Commission and Daubney Committee formulations. The proposed statement is as comprehensive and as lengthy as the two preceding documents. It follows the Daubney Committee's approach to the fundamental purpose of sentencing, namely contributing to a just society. At this point it differs from its predecessors by following this fundamental purpose with a list of goals. These were essentially just "considerations" with which the Sentencing Commission concluded its proposals. Now they stand proudly at the beginning of the statement, having been promoted to the rank of objective. The rest of the statement then follows, almost *verbatim*, the principles of sentencing advocated by the Sentencing Commission. The same problems associated with the earlier documents are likely to recur with this re-formulation. That is, judges have considerable latitude in choosing among a number of different sentencing purposes.

56. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, p. 154.

57. HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL, *op. cit.*, note 30, p. 55.

58. In June 1992, shortly after this section was written, the Minister of Justice introduced a sentencing reform bill (Bill C-90). The arguments contained in this section also pertain to the proposed bill (but see also the post-script for a brief commentary on Bill C-90).

A judge in any particular case will not find in a statement of this nature a great deal of guidance, but rather simply the licence to pursue whichever purpose appeals at the time.

We add one final comment upon the statement of sentencing purpose endorsed by the Daubney Committee and the federal government. They both argue that the purpose of sentencing is to contribute to a just society by the imposition of just sanctions. But the Sentencing Commission might reasonably ask how exactly do such sanctions promote a just and safe society? The answer would have to be that in the *absence* of just sanctions, society is less just and less safe, presumably because people have less faith in, and respect for, the criminal law. Accordingly, some people might have recourse to personal justice. Couched in these terms, it sounds very much as if just sanctions have their salutary effect through promoting respect for, and confidence in, the criminal law. Which brings the argument back to the Sentencing Commission's position that a just and safe society is the aim of the criminal law, and that this aim is advanced by the imposition of just sanctions, which in turn generate respect for the law.⁵⁹

To summarize, we would criticize all the proposed statements for being too lengthy, too inclusive and insufficiently focused. In a chorus of sentencing purposes, no single voice will stand out from the rest. If proportionality is to be the guiding principle, and effecting justice the purpose, this should be made more explicit in a manner that will guide judges in that direction, and discourage them from taking other roads to reach a sentencing decision. Ultimately however, the efficacy of a statement of purpose and principle will depend upon the nature of the guideline system which accompanies it, and this is the topic to which we now turn.

B. SENTENCING GUIDELINES

— Background

Central to the sentencing systems of Canada and other western nations is the presence of broad judicial discretion in which judges have the power to impose a wide range of sanctions from an absolute discharge to life imprisonment. If there is one feature common to all reform initiatives proposed or implemented, it is the presence of some form of guideline system. Among the innovations that have been devised to structure sentencing decision-making, guidelines have proved to be the most popular. But the term guidelines includes a variety of options. The numerical guidelines with which most people are familiar are but one incarnation of the principle of structured discretion.⁶⁰

59. The Commission's statement then, contains a logical trap. If one accepts that the purpose of sentencing is to contribute to a just society, one must perforce also accept the corollary that this is accomplished through preserving the authority of, and promoting the respect for, the law.

60. See K. PEASE and M. WASIK, "Discretion and Sentencing Reform: The Alternatives" in *Guidance or Guidelines*, New York, Manchester University Press, 1987, pp. 1-2.

1. Law Reform Commission of Canada

In its brief, the Commission notes that :

the most serious problem with our current scheme is the disparity it creates. Given that the equality section of the *Charter of Rights and Freedoms* comes into force shortly, it is appropriate that aspects of our sentencing process which detract from equality should be given high priority.⁶¹

With this in mind, it is perhaps not surprising that the Commission's guideline system was more constraining than most other proposals. Under its "Benchmark" system,⁶² a disposition would be assigned to each offence in the Code. In order to accommodate relevant mitigating and aggravating factors, departures would be allowed, but these would not be permitted to exceed 10 % in either direction for custodial sentences. Thus if a crime carried a benchmark disposition of five years, the allowable range would be from four and a half to five and a half years. As with the Sentencing Commission proposals, provision is made for exceptional cases, although unlike the CSC package, no definition of "exceptional" is given, save for the rather hollow phrase where "compelling reasons exist".⁶³

These proposals do not appear to provide sufficient flexibility, and are unlikely to prove acceptable to sentencing judges who see too much constraint in a less constraining system such as the Canadian Sentencing Commission proposals. Under the L.R.C.C. proposal, there are only five classes of offence seriousness, far fewer than the number of categories used in guideline systems elsewhere.⁶⁴ Nor does the system make explicit the role of prior record in the determination of sentence. Presumably it would be treated as an aggravating factor, but the Commission says little about the issue. Finally, the benchmark system does not provide guidance to establish the relevance of different mitigating and aggravating factors for specific offences.

2. Canadian Sentencing Commission

While there has been a great deal of debate and scholarly commentary about other aspects of the Sentencing Commission package, there has been little criticism of the guideline system. However, while the scheme itself has been praised for its flexibility and clarity, most commentators have rejected the presumptive nature of the system. We begin however, with a brief overview of the guidelines themselves.

The Commission reviewed various alternative models of sentencing guidelines before settling upon its presumptive scheme.⁶⁵ Some practitioners have

61. LAW REFORM COMMISSION OF CANADA, *Brief of the Law Reform Commission of Canada to the Canadian Sentencing Commission*, Ottawa, Law Reform Commission of Canada, 1985, p. 35.

62. For a thorough discussion of the benchmark system, see K. JOBSON and G. FERGUSON, *loc. cit.*, note 3.

63. As with other sentencing reform packages, we cannot provide in the course of this survey, detailed reaction to all aspects of the package.

64. For example, Michigan has 14 levels (see State of Michigan, Sentencing Guidelines Manual, Department of Justice, 1982) while Minnesota has 10 and the State of Washington has 14 (See A. VON HIRSCH, K. KNAPP and M. TONRY, *The Sentencing Commission and its Guidelines*, Boston, Northeastern University Press, 1987, pp. 177-188).

65. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, Chapter 11.

faulted the scheme for being too complex. It is not. In reality it is both simple and flexible, two characteristics desirable for any guideline system. The focus is on providing guidance as to the most critical decision confronting a judge at sentencing: whether to incarcerate the offender. Under the Commission's scheme, for each offence there would be a presumptive recommendation. There are four broad categories, representing the probability that the offender will be incarcerated.

The most serious offences carry an unqualified presumption of custody. These are called Presumptive "In" offences, meaning that unless exceptional circumstances exist — warranting a departure from the recommendation — an offender convicted of a "Presumptive In" crime should be sent to prison. The "Presumptive Out" is the other end of the spectrum. Unless compelling and exceptional circumstances exist, the offender should *not* be incarcerated.

Between these two presumptive sentences are what are known as "Qualified" dispositions. A "Qualified In" offence means that the offender should be incarcerated unless two conditions are met: (a) the offence is not serious *and* (b) the offender has no relevant record. A "Qualified Out" offence means that the offender is *not* to be incarcerated unless two conditions are met: (a) the offence is serious *and* the offender has a relevant record.

In this way, there are four alternatives ranging from a presumptive "In" to a presumptive "Out". These provide guidance as to the critical decision confronting a judge: whether the offender should be incarcerated or not (the In/Out decision). In the event that the judge wishes to impose a sanction *other* than the presumptive one, this would be easily accomplished. For example, if a judge favoured the imposition of a community-based sanction for an offender convicted of an offence that carries the presumption of custody, the judge would have to specify the reasons for this departure from the guideline. At the present time, judges in Canada are not obliged to provide reasons for sentence, although numerous reform bodies have advocated such a requirement. The advantages of such a requirement are apparent: among other benefits it facilitates appellate review. Under the Commission's guideline package, all offences in the *Criminal Code* would be assigned one of the four types of presumptive disposition. In addition, the Commission's system would provide information on the quantum of punishment. A detailed sentencing guideline sheet would be provided, which would present data on current sentencing practices, recent decisions from the case law as well as a list of relevant mitigating and aggravating factors for that particular offence.⁶⁶

The Commission's system is an innovative compromise between more rigid guideline systems such as those used in some American states, and guidance that is achieved in the absence of numerical ranges, such as the systems recently adopted in Sweden and England.⁶⁷ The Commission's package provides the sentencing judge with significant guidance. Even if the Commission's statement of purpose proved ineffective, the accompanying guideline scheme would ensure that sentencing practices would change, resulting in greater consistency.

Critical reaction to the Commission's proposals in this area, as already noted, focused on the degree to which the guidelines would be binding, that is, the fact that they were presumptive and not merely advisory. Some critics remarked that presumptive guidelines were both unnecessary and undesirable in the Canadian

66. Appendix F of the Sentencing Commission's report.

67. See A. VON HIRSCH and N. JAREBORG, *loc. cit.*, note 21, p. 275.

context. Such a system was also decried for being an “American” solution to a Canadian problem (disparity), yet sentencing guidelines exist outside America, and sentencing disparity is by no means restricted to Canada.

3. Canadian Bar Association

While it differed from the Commission’s position in some important respects, the C.B.A. also endorsed several aspects of the Commission’s reform package. Perhaps the major criticism of the Canadian Sentencing Commission made by the Canadian Bar Association concerns the likely impact of the presumptive guideline scheme. Although one of the goals of the Sentencing Commission work was the ex-carceration of certain types of offenders through the implementation of the principle of restraint, the authors of the C.B.A. brief thought the opposite effect might occur. The C.B.A. brief offers several reasons to support their position that increased use of incarceration would occur if the Sentencing Commission’s model were adopted. The authors were clearly apprehensive that the enhanced sentence provisions would result in increased number of long-term offenders. According to this proposal, the sentencing judge would be able, under certain circumscribed conditions, to impose an enhanced sentence which could exceed by up to 50 % the statutory maximum. Thus an offender convicted of a sentence with a maximum penalty of 12 years imprisonment (the longest term under the Commission’s revised maximum penalty structure) would be liable for an enhanced sentence of up to 18 years in prison. We too, feel that there is a real danger that this provision will be invoked more often than the Commission anticipated or desired. The danger is that an enhanced sentence will become in practice just another way of imposing an exemplary sentence.

4. Daubney Committee

The Committee endorsed a voluntary version of the Commission’s model, although it left open the question of whether the guidelines might become more binding at a later date. The two grounds evoked in the Committee’s report for rejecting presumptively-binding guidelines are frequently heard in Canada. Without much explanation, the Committee suggested that sentencing guidelines are only likely to prove useful to a retributive or desert-based sentencing philosophy. Accordingly, guidelines would be of little use to the accountability-oriented model favoured by the Committee. This assertion implies a conceptual link between sentencing guidelines and a particular sentencing philosophy which simply does not exist. Guidelines are nothing more than a mechanism to ensure that a philosophy is put into practice; they are not tied to any particular perspective. If we had a precise idea of which offenders could be rehabilitated — and how — a guidelines system could be implemented with rehabilitation as the primary (or exclusive) sentencing aim. The Committee also seem to have been unaware of the possibility of guidance systems that do not involve numerical values, although the Swedish and English reforms show that this is another possible direction for sentencing reform.⁶⁸

68. See A. VON HIRSCH, “Guiding Principles for Sentencing: The Proposed Swedish Law”, (1987) *Crim.L.Rev.* 746.

The second ground for rejecting presumptive guidelines is equally unconvincing. The report cites the example of the U.S. federal sentencing commission, whose guidelines are predicted to double the federal prison population within the next few years. The profligate use of incarceration endorsed by the U.S. Commission cannot be attributed to the presumptive nature of its guideline system. The reasons lie elsewhere and have already been addressed in other publications.⁶⁹ Put simply, the U.S. Commission adopted in its guidelines a policy that promoted the use of incarceration at the expense of sentences of probation. With such a policy, even if the guidelines had been purely advisory, there may well have been an increase in prison populations. Finally, on this point of burgeoning prison populations, it is worth noting that although most people continually cite American examples in this context, the prison population in Great Britain grew substantially in the 1980s, and this in the absence of a desert-based philosophy or a guideline system. Indeed, it is only since the introduction of a desert-based philosophy contained in the 1991 *Criminal Justice Act*⁷⁰ that prison populations in England and Wales are projected to decline.⁷¹ In short, sentencing guidelines are not wedded to any particular philosophy, but rather a means by which a declared sentencing purpose translates to the level of actual sentencing practices.

5. Department of Justice

— Guidelines : Advisory or Presumptive?

Canada appears to have travelled further down the road away from presumptive guidelines since the release of the Commission's report. As noted earlier, the Daubney Committee rejected the presumptive model but suggested that the advisory guidelines could become more binding at a later date. In 1988, at the annual meeting of the Canadian Bar Association, the Minister of Justice unveiled a series of initiatives related to sentencing. These included guidelines that would be purely precatory in nature, but now there was no mention of the possibility that they might become more binding (*i.e.*, presumptive) at some later point. Then in 1990 the Department of Justice published its blueprint for reform entitled "Sentencing. Directions for Reform".⁷² The document contains proposals to reform a number of critical areas. Besides the statement of purpose (see above) it deals with a legislated code of evidence and procedure for the sentencing hearing, as well as reform of the collection of fines and intermediate sanctions. Sentencing guidelines are mentioned only *en passant* as one of the tasks of the proposed sentencing/parole commission. The document is coy regarding the nature of these guidelines, although it is probably safe to assume that in the absence of an affirmative statement to the contrary, the guidelines would be purely advisory.

This a critical question. How binding should a sentencing guideline system be? In our view, two essential prerequisites for a just and effective guideline system are (a) *some* form of obligation upon judges to follow the recommended

69. See *id.*, "Federal Sentencing Guidelines: Do they Provide Principled Guidance?", (1989-1990) 27 *Am.Crim.L.Rev.* 367.

70. *Criminal Justice Act 1991, Chapter 53*, London, Her Majesty's Stationary Office. See also: *Crime, Justice and Protecting the Public: The Government's Proposals for Legislation*, London, Her Majesty's Stationary Office, 1990, pp. 5-6.

71. See M. WASIK and A. VON HIRSCH, *loc. cit.*, note 21.

72. GOVERNMENT OF CANADA, *op. cit.*, note 33.

sentences when a departure is not warranted, and (b) a mechanism for departures from the recommended sentence, when appropriate circumstances exist. Guidance without exception is a prescription for unwarranted uniformity : unlike cases will be treated alike. Guidance without any obligation is a prescription for the *status quo* : given the freedom to ignore recommendations, most judges will do just that. This has been clearly established by empirical research in the United States. Careful impact analysis in a number of American states has revealed the futility rather than utility of purely advisory sentencing guidelines.⁷³ The author of a recent review of this research noted that :

Voluntary sentencing guidelines appear to offer little promise as a means to the achievement of rational, consistent accountable sentencing. Voluntary guidelines, where evaluated, have not been shown to elicit high levels of compliance, to reduce sentencing disparities [...] or even to be taken seriously by judges and lawyers. As a means of regulating or structuring sentencing behaviour, they have been ineffective.⁷⁴

Advocates of advisory guidelines argue that the nature of the judiciary is different in Canada. For one thing, Canadian judges are appointed rather than elected. There is also a stronger tradition of appellate review in Canada, which may bolster the effect of advisory guidelines. Nevertheless, the research in the U.S. does not inspire confidence in the ability of advisory guidelines to influence sentencing practices here in Canada.

There is a second reason to think carefully before settling for purely precatory guidelines. If they really are a mere simulacrum of true guidance in sentencing, they could be worse than no guidelines at all. They may convey the impression that unbridled discretion has been tamed, when in reality little has changed. Opponents of any form of guidelines are suspicious even of advisory systems : they view them as the Trojan horse from which presumptive guidelines will emerge at the earliest opportunity. What is advisory today will become prescriptive tomorrow, so the argument runs. But this form of guidance may also be opposed because it pre-empts the establishment of a guideline system that really works. The impact of advisory guidelines then, may simply be to shelter the system from true reform.

It is not clear that the judicial climate in Canada is conducive to the implementation of presumptive guidelines at this time. As already noted, many commentators were critical of the presumptive nature of the Commission's guideline scheme. In the absence of a scientific survey of the judiciary, it is hard to know how judges are likely to react to such a scheme. Nevertheless, straws in the wind — such as testimony to the Daubney Committee — suggest that the judiciary would respond more positively to advisory rather than the more restrictive presumptive guidelines. If guidelines are to be advisory rather than presumptive, there should at least be clear conditions attached. For example, one obvious condition could be a mandatory review after a period of time, such as three years. This would permit a thorough impact analysis to be conducted. If this analysis revealed little or no impact due to the guidelines, there would be an opportunity to revisit the degree of constraint attached to the guidelines.

73. For a summary of the impact analyses conducted in the U.S., see M. TONRY, *Sentencing Reform Impacts*, Washington, D.C. National Institute of Justice, 1986, pp. 1-103.

74. *Id.*, p. 98.

C. EARLY RELEASE FROM PRISON

— Background

The question of what to do with parole has been at the heart of discussion sentencing reform for many years now. A major reason for this is that one of the driving forces behind reform has been a desire to promote truth in sentencing. Whatever its positive benefits, parole distorts sentences of imprisonment, and undermines the credibility of the system (see earlier sections of this paper). One solution, adopted in some American states, has been to abolish parole. Less radical responses have consisted of reforming parole, as has been the case in England and Wales.⁷⁵ Whichever route is taken, it is apparent that sentencing reform must address the presence of parole, and at the very least, take steps to ensure greater integration of the sentencing and parole systems.

1. Canadian Sentencing Commission

The Sentencing Commission recommended the abolition of discretionary release on parole for all inmates save those serving terms of life imprisonment. Central to the Commission's position was a desire to reconcile time actually served in prison with the sentence pronounced in court.⁷⁶ Under the Commission's model, the abolition of full parole would be accompanied by a reduction in sentence lengths (to prevent increases in actual sentence durations which would result in over-crowding in Canada's penal institutions). Inmates would also be able to reduce the custodial portion of their sentences by up to one-quarter through credits for good behaviour.

Parole has for some time found a more receptive audience in Canada than the United States. Accordingly, it is perhaps not surprising that of all the Sentencing Commission's proposals, this one encountered most resistance from academics and practitioners alike. It seems clear that conditional release (in some form or other) will continue to form part of the correctional system in this country. We conclude that proposals to reform the sentencing process must recognize this fact if they are to have a realistic chance of being implemented.

2. Canadian Bar Association

The C.B.A. brief to the Daubney Committee rejected the abolition of parole, and advocated instead the integration of the parole and sentencing processes. The Association favoured the retention of a discretionary release mechanism, principally on the grounds that the risk to the public in the vast majority of cases is minimal. The Association's brief advocates the opposite of the Canadian Sentencing Commission: it argues for the abolition of remission-based release (and mandatory supervision). All releasing authority would reside with the parole board.

Central to the Association's reaction to the Sentencing Commission document was the fear that it would lead to more repressive sentencing practices. As we have already noted, the C.B.A. feared that, among other things, the

75. See Lord CARLISLE, *The Parole System in England and Wales: Report of the Review Committee*, London, Her Majesty's Stationary Office, 1988.

76. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, Chapter 10.

enhanced sentence provisions would be over-used. This apprehension appears to have stiffened their support for parole. It is clear that the C.B.A. report regards parole as an appropriate mechanism by which inequities in sentencing can be corrected. As the report notes :

any sentencing system which subjects people to the destructive potential of long-term confinement requires an effective early release mechanism if "just sanctions" are to be achieved.⁷⁷

This reveals skepticism that sentencing guidelines can prevent repressive sentencing. However, while the evidence from states like Minnesota suggests that the right guidelines can be effective in preventing abuses of the nature envisaged by the C.B.A. The quote also shows that the authors assume considerations of desert can emerge at the parole stage to reduce sentence disparity. If so, it is important for the system to be clear about what it is doing. If considerations of desert are to be incorporated into the releasing decision, this should be formally acknowledged, and the empirical consequences explored.

Finally, among the recommendations to ameliorate parole decision-making, the C.B.A. report advocates : "a re-consideration of eligibility dates [...] [and] clearly and publicly articulated criteria for release in respect of different categories of offences and distinct groupings of offenders".⁷⁸

3. Law Reform Commission of Canada

Promoting clarity and truth in sentencing was clearly important to the Commission. This is reflected in their recommendation to abolish parole and remission-based release. Curiously though, early release would rise again under the L.R.C.C. proposals, but in a different incarnation. Conditional release from prison would be permitted at the half-way mark; the releasing authority would lie with Correctional administrators. Unlike the present system, the influence of the sentencing judge would be stronger: a judge would be able to specify special releasing conditions (presumably more intensive supervision) for offenders deemed at trial to be "particularly dangerous". Echoes of this idea are also to be found in proposals advanced by the Solicitor General (see Section 5 *b*) below).

4. Daubney Committee

The Committee's reaction to parole reflects their reading of the mood across the country, and the nature of testimony at the public hearings. Accordingly the Committee favoured the reform and retention of parole rather than total abolition. Perhaps the most important proposal advanced by the Committee was a deferred parole eligibility date for violent offenders. Eligibility for release on full parole would remain at the one-third mark for most inmates, but would rise to the 50 % mark for offenders sentenced to prison for one of the offences listed in the schedule attached to the *Parole Act*.

77. *Report of the Canadian Bar Association Special Committee on Imprisonment*, p. 45.

78. See the report of the Canadian Bar Association Special Committee on Imprisonment and Release, p. 55.

5. Ministry of the Solicitor General of Canada

(a) 1988 Proposals

When reviewing the initiatives emerging from the Solicitor General of Canada, it is important to understand the hostile climate of public opinion prevailing throughout the past few years (see Introduction). Never entirely comfortable with the concept of early release from prison, the Canadian public have opposed current parole practices on utilitarian grounds (*i.e.*, public safety), and on grounds of desert. Many people oppose a system which enables some inmates to leave prison after one-sixth of the sentence has been discharged (under the day parole program). (Contrary to popular belief, inmates released on day parole do not usually have to return to the prison at night; frequently they reside in the community at a half-way house). Public indignation is often further inflamed by news media coverage of sentencing hearings in which journalists frequently refer to the first parole eligibility date (P.E.D.) when reporting the sentence imposed. The possibility of parole merges, in the public's mind, with the certainty of release and the total expiry of the sentence.

In June, 1988 the Solicitor General of Canada announced his intention to seek cabinet approval for amendments to the *Parole Act* that would result in an increase in time served: the parole eligibility date would move from one third to one-half of the sentence.⁷⁹ Reaction to this proposal was hostile and swift. It came from both sides of the parole debate, opponents and proponents alike. Those in favour of retaining parole decried the proposals as a foolhardy erosion of a system that results in success for the vast majority of inmates released under supervision. As well, they saw the proposal as the first step towards total abolition of parole,⁸⁰ and the introduction of flat-time sentencing. Opponents of discretionary release condemned the Solicitor General's proposal on the grounds that it would forestall any real reform of the system. In their view it represented mere tinkering with an engine that was in drastic need of a total rebuild. The Solicitor General was also criticized on a political level for acting precipitously, *i.e.*, before the parliamentary committee had completed its review and published its report.

This critical reaction led to back-pedaling on the part of the Ministry and the proposal was quickly modified. A few months later, in August 1988, at the international conference on sentencing and parole held in Ottawa, the Solicitor General announced that parole eligibility would remain at the current one-third mark for offenders convicted of non-violent crimes but inmates serving time for crimes of violence would have to serve half the sentence in prison before becoming eligible for release on full parole.

79. SOLICITOR GENERAL, *News Release: Kelleher Proposes Major Reforms to Parole System*. Ministry of the Solicitor General of Canada, June 15, 1988.

80. See J.P. BRODEUR, "The Attrition of Parole", (1990) 32 *Can.J.Crim.* 503.

(b) *Bill C-36*

At the time of writing, the House of Commons Committee has just passed Bill C-36⁸¹ to reform the Correctional process, with particular emphasis upon conditional release from prison. Constraints upon space limit us to commenting upon the aspect of the bill most relevant to the issues discussed in this paper: the statement of the purpose of conditional release. Consistent with previous government proposals, the proposed bill attempts to reconcile and integrate the sentencing and parole functions. According to the bill, the statement of the purpose of the correctional system is to "contribute to the maintenance of a just, peaceful and safe society".⁸² This purpose is repeated later in the bill, where it is to be accomplished by "means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their re-integration into the community as law-abiding citizens".⁸³ This suggests that rehabilitative considerations will be uppermost in the minds of releasing authorities.

Almost immediately the statement runs into conflict with a competing principle. The first principle that should guide parole boards is "that the protection of society be the paramount consideration in the determination of any case".⁸⁴ The preoccupation with risk is further reflected in the criteria for granting parole:

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by re-offending, present an undue risk to society before the expiration according to law of the sentence the offender is serving.

Thus re-integration of the offender is placed securely within the constraints of the protection of society. Translated into practice, this probably means that boards will become more conservative in their releasing decisions, with the result that the grant rates for day and full parole which have been falling in recent years will decline still further.

Additional evidence of the tightening of parole comes from the proposals regarding release dates. Perhaps the most significant change proposed by Bill C-36 is the introduction of a two-track eligibility date. Under Bill C-36, under certain circumstances, the sentencing judge is empowered to order the offender to serve half of the sentence in prison rather than one-third, before being eligible for release on full parole. Thus S. 741.2 states:

Where an offender is sentenced to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that Act that were prosecuted by way of indictment, the court may if satisfied, having regard to the circumstances of the commission of the offences and the character and circumstances of the offender, that the expression of society's denunciation of the offences or the objective of specific deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.⁸⁵

81. *An Act Respecting Corrections and the Conditional Release and Detention Offenders and to Establish the Office of Correctional Investigator*, Bill C-36.

82. Bill C-36, section 3.

83. *Id.*, section 100.

84. *Id.*, section 101 (a).

85. *Id.*, s. 741.2.

The Minister's position, in 1988, it will be recalled, was to defer parole eligibility for certain offenders, namely those convicted of a crime of violence. As happens in these matters, the targeted population has multiplied since then. First, drug-related offences were included. This additional category was noted in the Government's blueprint document, released in 1990.⁸⁶ Although the government publication describing the bill talks of violent offenders and offenders serving time for drug-related offences, this is only part of the story.

Examination of the actual bill reveals that the offences which can trigger a deferred eligibility date are drawn from almost every section of the *Criminal Code*. The specific offences are listed in Schedules I and II of the *Corrections and Conditional Release Act*. One finds crimes relating to firearms use (e.g., s. 85, use of a firearm during the commission of an offence; ss. 86 (1), pointing a firearm); offences against the administration of Justice (s. 144; prison breach); sexual offences (s. 155; incest; s. 159, anal intercourse); offences against the person (e.g., assault and sexual assault); offences against property (s. 344, robbery); wilful and forbidden acts (s. 434.1, arson, own property) and attempts/conspiracies (s. 465, conspiracy to commit murder). While the device began with the intention of snaring a very specific catch, it appears to have become something of a driftnet, trawling a wide assortment of different offenders.

Bill C-36 has few merits and many deficiencies. By providing the sentencing judge with the power to defer parole eligibility, the bill integrates the sentencing and releasing decision to a greater degree, and this is in our view a positive step. However, there are also clear dangers. First, it is hard to identify a single characteristic unifying the heterogeneous collection of offences listed in the schedule. If public safety (a utilitarian aim) were the exclusive criterion, this might explain the presence of crimes of violence. But does the public need to be protected from s. 159 (anal intercourse)? It would seem that the schedule offences reflect a *mélange* of legal moralism and utilitarianism. There is no coherent rationale — either in terms of desert or utilitarianism — underlying this collection of offences.

Moreover, why are some offences from a particular *Criminal Code* category selected and not others? Why, for example, robbery but not break and enter? These seemingly arbitrary distinctions are likely to engender resentment and perceptions of injustice among offenders convicted of offences in the same category (or even the same offence), but who end up with different parole eligibility periods. For long-term offenders, the difference can be substantial. The difference between the one-third and the one-half mark of a 12-year sentence is an extra two years in prison. Also, the possibility that the offender may have to serve one-half rather than one-third of the sentence in prison may simply bolster the leverage exercised over accused persons by crown counsel in plea bargaining discussions. Finally, we note that several of these offences account for large numbers of admissions to federal institutions. For example, at the federal level, robbery alone accounts for one quarter of the inmate population.⁸⁷ We have little idea, at the present, of the extent to which judges will avail themselves of this additional power. We simply note that if they defer the parole eligibility date in a substantial

86. GOVERNMENT OF CANADA, *op. cit.*, note 33, pp. 1-39.

87. CORRECTIONAL SERVICES OF CANADA, *Basic Facts about Corrections in Canada*, Ministry of Supply and Services Canada, 1991, p. 29.

number of cases, it is likely to have important adverse effects on the current inmate population, which is already high, relative to other western nations.⁸⁸

To summarize, the reforms regarding parole eligibility contained in Bill C-36 are likely to have the effect of increasing the total time served in prison, swelling the current number of inmate/years being served. Unlike the Canadian Sentencing Commission's proposals, they are not accompanied by any reduction in sentence length. Thus the move towards reconciling the sentence imposed with the time served — one of the aims of sentencing reform in many jurisdictions — is only accomplished at the cost of making the system more punitive. It is an expensive step towards truth in sentencing.

D. SENTENCING/PAROLE COMMISSION

— Background

The idea of a permanent sentencing commission was first advanced 20 years ago by a U.S. judge. Since then, all American states that have undertaken serious reform of the sentencing process have done so by means of a permanent commission. In the U.S., sentencing commissions exist at both the state and the federal level. The structure, function and powers of these commissions vary,⁸⁹ but it is clear that the existence of a permanent commission is vital to systematic reform. Without a body of this kind, reforms may become petrified, or as outdated as the systems they replace.

1. Law Reform Commission

The Commission advocated the creation of a permanent sentencing commission that would (a) determine whether the benchmark dispositions were appropriate, (b) monitor the relation between sentencing and other stages of the criminal justice process; (c) carry out original research; (d) provide information to the courts and act as a liaison between Parliament and the Department of Justice respecting changes in sentencing legislation. No details are provided in the Commission's document regarding the structure of the proposed sentencing Commission.

2. Canadian Sentencing Commission

The Sentencing Commission was well aware of the necessity of a permanent body that would implement its proposals: the Commission's report devotes a chapter to the structure and function of a permanent sentencing commission (P.S.C.).⁹⁰ According to the Sentencing Commission, the P.S.C. would be a seven-member body, with the majority of members being derived from the judiciary. The Chairperson would also be a judge. All members, with the exception

88. In one recent survey, Canada ranked third in a list of western nations, after the U.S. and Switzerland. See CANADIAN CENTRE FOR JUSTICE STATISTICS, "International Incarceration Patterns", (1980-1990) 12 *Juristat Service Bulletin* 3.

89. For a description and analysis of the Sentencing Commission, see A. VON HIRSCH, K. KNAPP and M. TONRY, *op. cit.*, note 64, pp. 3-176.

90. CANADIAN SENTENCING COMMISSION, *op. cit.*, note 1, Chapter 14.

of the chairperson, would serve on a part-time basis. The P.S.C. would be expected to fulfill a broader range of functions than that proposed by the Law Reform Commission. These would include the establishment of a specialized sentencing information system to fill the current void in this area in Canada. In light of the critical role of sentencing statistics, it is worth adding a word about the state of the art in Canada.

(a) *Sentencing Statistics in Canada*

Although the Canadian Centre for Justice Statistics⁹¹ is on the road to releasing national sentencing statistics, it is a road the Centre has been travelling for many years now. In 1985, the Chief of Courts program at the Centre stated that the first sentencing data would be produced in April 1986, with "national data on sentences and dispositions by late 1987".⁹² Nearing 1993, we still do not have publicly-available national sentencing statistics in Canada. A few provinces are sending such data to the Centre, but this information is not yet available for release. This situation is now changing. The Adult Criminal Court Survey located at the Canadian Centre for Justice Statistics should have truly national sentencing statistics for release within a couple of years.⁹³

In addition to performing the role of gathering and publishing sentencing statistics, the P.S.C. would perform the functions proposed by the Law Reform Commission, and also play an important role in integrating the provincial courts of appeal into the system. According to the Canadian Sentencing Commission, a permanent commission of this scope would cost under one million dollars a year (estimate in 1987 funds). This figure may well have to be revised upwards; nevertheless, it is clear that the proposed P.S.C. would not cost more than double this fairly modest figure.⁹⁴

3. Daubney Committee

The Daubney Committee endorsed the creation of a permanent sentencing commission, but said little in its report about the structure of such a body. It did make a suggestion that distinguishes its recommendations from its predecessors. The Committee recommended⁹⁵ the establishment of an additional body,

91. Part of Statistics Canada, this body is mandated to produce criminal justice statistics for the country.

92. See B. GRAINGER and S. GAGNON, "Necessary Statistical Data for a New Sentencing Approach" in *Sentencing*, edited by H. DUMONT. Cowansville, Les Éditions Yvon Blais Inc., 1987, p. 50.

93. The reasons why we do not have such data at the present are complex, and have to do with the federal-provincial split in criminal justice, as well as the fact that the body that directs the Centre, known as the Justice Information Council, must approve any such initiatives. This body (the J.I.C.) has yet to be convinced of the utility of national sentencing statistics to Canada. As with the abolition of the Law Reform Commission, this is another dimension on which Canada has the dubious distinction of standing apart from most other western nations, where sentencing statistics are routinely available.

94. See A. DOOB and J.P. BRODEUR, *loc. cit.*, note 22.

95. HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL, *op. cit.*, note 30, p. 68. (recommendation number 9).

a Judicial Advisory Committee (J.A.C.), which would consist of a panel of trial court judges from across the country. The purpose of this body would be to advise the permanent sentencing commission regarding modifications to the sentencing guidelines. Since the Committee desired to have this kind of judicial input, it suggests they had in mind a P.S.C. composed principally of non-judges. Otherwise, it would be a case of having judges (on the J.A.C.) advising judges (on the P.S.C.) advising judges (through the guidelines issued by the permanent commission).

Before turning to the federal government proposals in this area, it is worth noting that if consensus exists about any of the issues in sentencing, it is with respect to the necessity for a permanent commission. Almost all the groups or individuals who have written or testified on sentencing in Canada have endorsed the creation of a permanent sentencing commission.

4. Federal Government

The Department of Justice deserves praise for recognizing, shortly after the release of the Sentencing Commission's report, the necessity for a permanent body to regulate sentencing in Canada. The primary distinguishing feature between the Justice proposal and its predecessors is the fact that the parole and sentencing functions are to be included in a single commission. Thus in the 1990 blueprint for sentencing reform, the proposal is for an integrated commission that would develop guidelines for sentencing and parole. This is a substantial improvement upon the proposals of other groups to date. Integrating the sentencing and parole functions will have important consequences on both the symbolic and practical levels.

Another departure from previous proposals concerns the structure of the integrated commission. It would be composed exclusively of judges or parole board members. Curiously though, the Chairman would be neither a judge nor a parole board member. This seems to us to be a mistake. In order to maximize the impact of the Commission upon the judiciary, the Chairman should be a judge. In addition the commission would be bicameral in structure: members would be distributed across two panels, one of which would have decision-making authority with respect to parole, the other with respect to sentencing. There would be overlapping membership of the two panels, with some members serving on both panels. Although it is not specified, presumably judges and parole board members would predominate on their respective panels.

In terms of the function of this body, it would be quite similar to the function proposed by the earlier Sentencing Commission. The joint commission would develop sentencing and release guidelines, would promote the exchange of information between the judiciary and the parole system, and would promote professional training for judges and parole boards. The commission would be expected to evaluate the guideline system, and report the results of these evaluations to the Minister of Justice. It would have a small staff of three or four persons.

In our view the functions ascribed to the commission exceed its abilities to perform them. Evaluating the impact of the guidelines is likely to require significant professional input. Moreover, although it is not spelled out in detail, it is clear that the proposed joint commission would be expected to collect, or facilitate the collection of national sentencing statistics, at the very least on a periodic basis, and quite possibly on an annual basis.

Although the creation of a permanent commission was a proposal repeated many times by various ministers of Justice between 1987 and 1992,⁹⁶ the possibility of expeditious implementation has receded. The same wave of fiscal restraint that swept away the Law Reform Commission of Canada appears to have sunk the proposed sentencing/parole commission before it was put into service. Although never formally announced, the 1992 federal budget states that the permanent commission is now "deferred". Exactly what is meant by this term is unclear, but one fears that the commission has been deferred in the same way that the Titanic's arrival in New York was deferred. If this is the case, it is to be regretted. At the present there is a clear momentum for reform in this area. If this body is not created now, we are unlikely to see the idea raised again in the immediate future.

SUMMARY

We conclude with a brief summary of the reforms that are likely to stand a chance of being implemented in these four areas. First, a statement of purpose appears uncontroversial, but in part because the model statements proposed have been so general and comprehensive. The challenge is to distill from these formulations a statement that will have real impact. As far as sentencing guidelines are concerned, events do not augur well for a presumptive scheme as binding as that proposed by the Sentencing Commission. Some form of advisory package must be made to work, perhaps by attaching the guidelines directly to the provincial courts of appeal. Parole will continue to exist, although it seems likely that its impact on sentencing will diminish, and the judiciary will acquire a greater degree of control over sentences of imprisonment than in the past. Finally, a permanent sentencing commission has the near-unanimous support of the criminal justice community. The challenge with this feature of reform will be to overcome governmental reluctance to incur further criminal justice expenditures, even on the modest scale required to create such a commission.

PART III. CONCLUSIONS : THE LESSONS FOR REFORM

We end this paper with some conclusions regarding the four primary areas of sentencing reform discussed in this paper.

A. STATEMENT OF SENTENCING PURPOSE

The nature of a statement of sentencing purpose is critically related to the existence (and binding force) of a guideline system. In the absence of sentencing guidelines, or the presence of a purely advisory system, the statement of purpose becomes critical : it becomes the sole vehicle to effect reform of current practice. If Canada decides to forsake a guideline system with some force, then it must pay particular attention to the formulation of a statement of sentencing purpose. This means resisting the temptation to include any (and every) aim that has been attrib-

96. See article by the Federal Minister of Justice, A.K. CAMPBELL, "Sentencing Reform in Canada", (1990) 32 *Can.J.Crim.* 387.

uted to the criminal law. It also means avoiding aims that are unclear, or that conflict. The statement does not have to contain a single purpose, but if multiple purposes are included there should be clear direction to the judiciary. Thus, under a desert-based statement, judges should not be able to abandon this purpose because they are confronted with a case in which deterrence seems more appropriate. We develop these ideas elsewhere, but if a multi-purpose statement is to be adopted, then there should be clear guidance as to how the different purposes affect the determination of sentence. That is, proportionality determines the severity, or quantum, but there may be room for equally punitive sanctions that are qualitatively different. In practical terms this means that one offender may receive a brief custodial term while another may be sentenced to a period of intensive probation (or some alternative intermediate punishment) that is comparable in severity.⁹⁷

Finally, on the issue of a statutory statement of the principles of sentencing, it is important to note that the proposals advanced to date by the Sentencing Commission, the Department of Justice (and others) do not exhaust the possibilities in this area. The statutory statement introduced in England and Wales, and also Sweden provide competing models. It is clear that these alternate formulations have not been given sufficient consideration in the Canadian context, in part perhaps because they are so recent. This is a pity; these European formulations have much to recommend them, and contain important lessons for Canada.

B. SENTENCING GUIDELINES

The debate on the issue of sentencing guidelines can be summarized in the following way. There are several clear advantages to having a guideline system. Guidelines (a) promote consistency in sentencing; (b) make the task of sentencing easier for judges; (c) facilitate appellate review and (d) provide the criminal justice system with a mechanism to give life to the statutory statement of sentencing purpose. There are however, also some clear disadvantages, having to do, mostly with the manner in which the guidelines are implemented. One fear is that they can become politicized, meaning that guideline ranges are changed, on an *ad hoc* basis, whenever the permanent sentencing commission feels sufficient pressure from external groups. This is what we might call the “run-a-way” commission, in which the body effects an unprincipled (and unwanted) change in sentencing practices. This, we would argue, is the case with the United States federal sentencing guideline commission. The composition of the commission is therefore vital to its chances of success.

One thing is perfectly clear, however. Sentencing guidelines without *some* degree of force are simply a waste of time. Whichever of several guideline models is eventually adopted in Canada — and the presumptive model advanced by the Sentencing Commission is but one — it must constrain judicial behaviour, or it will simply be ignored. The danger is that Canada will end up with the worst-case scenario, namely a vague, or over-inclusive statement of purpose and principle, accompanied by purely advisory guidelines. If this were to happen, a great deal of effort to achieve reform would have been largely wasted.

97. Clearly this requires developing a common metric between punishments to ensure comparability in terms of severity.

C. PAROLE

The abolition of parole does not appear to be one of the likely reforms for Canada. What other alternatives are there? The creation of parole guidelines is one obvious step towards improving the system. If these are introduced in conjunction with sentencing guidelines, then so much the better. Integration of the sentencing and parole decision-making processes is necessary if the system is to move towards more truth in sentencing. Unfortunately, the reforms introduced through Bill C-36 may well have a negative impact upon the system. In the absence of any reform to sentencing practices (through sentencing guidelines) by permitting judges to defer parole eligibility in certain cases, this bill is likely to result in an increase in prison populations. If the proportion of time served is to be increased, this step must be accompanied by a reduction in sentence lengths.

In a subsequent article, we shall advance our own proposals for a statement of purpose, as well as some alternative guidance systems for Canada.

D. POST-SCRIPT

At the time of going to press, the Minister of Justice released a sentencing reform bill (C-90).⁹⁸ Time constraints preclude all but a brief comment on the bill, particularly as it pertains to the four key issues examined in this article.

The statement of purpose in Bill C-90 is essentially the same as the proposal contained in the policy document *Directions for Reform*, reviewed earlier, but with one subtle shift in emphasis. The earlier document contained a clear enunciation of the principle of restraint, derived from the Sentencing Commission's work: "a sentence should be the least onerous alternative appropriate in the circumstances".⁹⁹ In the Sentencing Commission's report, this was accompanied by conditions that had to be fulfilled before a judge could impose a sentence of imprisonment. This formulation has been abandoned in favour of the following wording: "an offender should not be deprived of liberty if less restrictive alternatives may be appropriate".¹⁰⁰ This seems to be a diluting of the strength of the principle of moderation in sentencing, and will not, in our view at least, reduce Canada's reliance upon imprisonment as the primary criminal justice sanction.

This aside, there are some positive features in the proposed bill. One is a section designed to increase the use of alternative dispositions for adult offenders. A second is a clear statement of intent to address two problematic areas: fines and intermediate sanctions. Another is the clear call for judges to state reasons for the sentences they impose, and to have these reasons entered into the record of the proceedings.¹⁰¹ Many groups and individuals, including the Canadian Sentencing Commission have made a similar recommendation. There is always the danger that it will lead to judges dispensing perfunctory reasons to fulfil the requirement of the bill, but at this point it seems worth trying. The document also states that a term of imprisonment "commences [...] on the day on which the

98. An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, Bill C-90.

99. Bill C-90, s.

100. *Id.*, s. 718.2 (d).

101. *Id.*, s. 726.2.

convicted person was taken into custody".¹⁰² This also is to be commended; it will help to eliminate one source of inequity in the sentencing system.

Overall though, the bill is as striking for what it omits as much as for what it contains. The document is totally devoid of any reference to sentencing guidelines, whether voluntary or presumptive in nature. And, consistent with the government's position described earlier, there is no mention of any permanent sentencing commission. Both of these omissions are curious, on at least two grounds. First because there is, as we have shown in this article, consensus that a permanent sentencing commission and some form of guidelines are necessary in Canada. And second because several Ministers of Justice, including the present incumbent, have argued in favour of both proposals. Thus, the present Minister wrote in 1990 :

a Sentencing and Parole Commission will be proposed as a vehicle for the development of policies within a coherent and consistent criminal justice policy framework [...] Part of its mandate would be the development of guidelines for sentencing and parole based on openness, fairness, and the reduction of disparity. Other activities would involve the development of training programs for sentencing judges, development of a research program, and promoting the exchange of information between sentencing judges and other criminal justice professionals.¹⁰³

In light of these (and similar statements by her predecessor) it seems incumbent upon the authors of Bill C-90 to provide some explanation as to why the permanent commission and a guideline system are now no longer part of the government's plans for reform.

For the present at least, it seems as if Canada will continue to have a sentencing process without any guideline system. In our view, the commendable policy goals alluded to in background documents, and in the press release accompanying the bill can only be attained through some form of guideline system. Without guidelines, it is unrealistic to expect significant shifts in sentencing practices. If this bill is passed in this form, the goals of sentencing reform sentencing will remain unrealised.

In their major, scholarly review of sentencing and parole published in 1985, Keith Jobson and Gerry Ferguson compared the sentencing process to an "old house [...] in need of careful renovation".¹⁰⁴ Those concerned about this edifice, and eagerly awaiting a major structural overhaul will be disappointed by the contents of Bill C-90. A poor statement of purpose without any guidelines is the equivalent, in Jobson and Ferguson's housing metaphor, to a cursory paint-job. Perhaps the time has come to seek new contractors.

E. CODA

To those able to recall the events of the 1950s, or those who have undertaken a historical review, recent events in Canada will provoke an unmistakable sense of *déjà-vu*. Almost 40 years ago (in 1956), the Fauteux Committee studied remission-based release and made several important recommendations

102. *Id.*, s. 719 ss. (4).

103. K. CAMPBELL, "Sentencing Reform in Canada", 32 *Can.J.Crim.* p. 391.

104. K. JOBSON and G. FERGUSON, *op. cit.*, note 1.

about sentencing reform.¹⁰⁵ That report was endorsed by many. One commentator entitled an article addressing reform “Now is the Time” and noted that :

Another very hopeful sign was the appointment [...] of the Fauteux Committee, whose report has received a large measure of approval [...] I am certain that Canada is now ready for a complete overhaul of our penal correctional methods. *Now is the time.*¹⁰⁶

The Fauteux report came and went. In 1965, another major study of the sentencing and correctional process was undertaken. The resulting report, published in 1969,¹⁰⁷ contained many recommendations for reform that remain to this day unfulfilled. The Goldenberg Report reviewed the relationship between sentencing and parole and called for changes, including a reduction in discretion for judges as well as the introduction of statutory sentencing guidelines as part of a major overhaul of sentencing.¹⁰⁸ And now we have the events described in this article, including the report of the Canadian Sentencing Commission.

An historic opportunity for significant reform exists.¹⁰⁹ It is unlikely that we shall see another sentencing reform bill in the near future. The criminal justice system will turn towards other problems, and will create other priorities. Bill C-90 then, represents the first chance in years, and also the last for some time to come, to change sentencing practices. It is an opportunity which must not be missed.

105. Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, *op. cit.*, note 27.

106. J. McCULLEY, “Now is the Time”, (1960) 2 *Can.J.Corr.* 216 (emphasis in original).

107. CANADIAN COMMITTEE ON CORRECTIONS, *op. cit.*, note 27.

108. STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, *op. cit.*, note 27.

109. In 1979, A. Vining wrote: “The Canadian sentencing system is in need of major reform”. This statement is clearly as true today as it was then. Little has changed. See A. VINING, *loc. cit.*, note 3, p. 355.