CONSISTENCY IN THE SENTENCING PROCESS

CONSISTENCY IN SENTENCING

A Paper prepared for the meeting of
Commonwealth Law Ministers at Christchurch,
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by

Members of the Society for the Reform
Criminal Law

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FOREWORD

The Society for the Reform of Criminal Law is an international non-governmental association of judges, legislators, lawyers, academics, and government officials, principally from common-law jurisdictions, who have come together to work actively on the improvement of the criminal law and the administration of criminal justice both in their own jurisdictions and internationally. The Society was founded in January 1988 following upon a conference, held in July 1987 at the Inns of Court in London, which was attended by over 200 leading judges, legislators, lawyers, academics and government officials in Australia, Canada, the United Kingdom, New Zealand, other Commonwealth countries, the United States, Europe and Israel.

In 1989 the Chairman of the Society, Mr Vincent Del Buono, was asked by the Commonwealth Secretariat whether members of the Society could prepare a major paper on consistency in sentencing for presentation to Commonwealth Law Ministers at their meeting in Christchurch, New Zealand, in April 1990. This invitation was readily accepted, and Sheriff Principal Gordon Nicholson, who was at that time a Commissioner with the Scottish Law Commission in Edinburgh, was asked to co-ordinate the preparation of the paper. He had been the Chairman of a major Society conference on sentencing, parole and early release which took place in Ottawa in August 1988, and he had subsequently established a network of Society members with a particular interest in the problems of sentencing and early release.

The paper which has now been prepared contains contributions from experienced judges and from distinguished academics all of whom have previously written extensively on the subject of sentencing and sentencing reform. Although the views expressed in the paper are those of the individual contributors, the overall aim has been to give a coherent and, it is hoped, helpful description and analysis of attempts to achieve consistency in sentencing around the world. By doing this, the paper attempts to focus discussion and debate, and to present a range of policy options for consideration.

Part 1 of the paper contains a general introduction and summary of the issues. Part 2 examines and analyses the concept of consistency, and asks whether consistency in sentencing is a policy objective which may require clarification and modification in certain cases. Part 3 of the paper contains a number of contributions which describe and comment on attempts which have been made, or are being made, to achieve greater consistency in some of the major jurisdictions of the world. Finally, the contribution in Part 4 seeks to bring all of this experience together; to discuss the advantages and

disadvantages of differing methods of trying to achieve consistency; and to present for consideration a range of possible ways in which future advances may be made.

Throughout the paper an attempt has been made to present information which is not only accurate but also as up-to-date as possible. However, sentencing practice and procedure can be affected very suddenly by decided cases, by the introduction of new legislation, by government pronouncements, and so on. The time required for the physical preparation, copying and distribution of this paper has meant that law and practice are stated as at December 1989.

Gordon Nicholson
Edinburgh.

January, 1990.

THE CONTRIBUTORS - A BIOGRAPHICAL NOTE

Professor Andrew J Ashworth is Edmund-Davies Professor of Criminal Law and Criminal Justice at King's College, University of London. He previously taught at Manchester University and then at Worcester College, Oxford and remains an Associate at the Centre for Criminological Research in the University of Oxford. He has been editor of the "Criminal Law Review" since 1975 and has published books and articles on criminal law, sentencing, evidence and the criminal process. He is Chairman of the Council of Europe's Select Committee of Experts on Sentencing. He is also a member of the Executive Committee of the Society for the Reform of Criminal Law.

Professor Jean-Paul Brodeur is a professor at the Ecole of Criminologie at the Universite de Montreal. He was Director of Research for two Commissions: the Canadian Sentencing Commission, 1984 to 1987, and the Commission d'enquete sur des operations policieres en territoire quebecois, 1978 to 1981. He has a PhD in Philosophy from the University of Paris and a Masters degree in Criminology from the University of Montreal. He is the Director of the International Centre for Comparative Criminology and has published numerous works on the police and sentencing.

Professor Anthony N Doob is a professor of criminology and psychology at the University of Toronto. From 1979 to 1989 he was the Director of the Centre of Criminology there. He was a member of the Canadian Sentencing Commission from 1984 to 1987. He has carried out research on various topics in criminology including sentencing, public attitudes concerning sentencing and other aspects of the criminal justice system, fear of crime, tax evasion and the exercise of discretion in decisions concerning young offenders.

Professor Joshua Dressler is a professor of law at Wayne State University Law School. He is the author of the treatise, Understanding Criminal Law and many scholarly articles on substantive criminal law. He is an Associate Editor of Criminal Justice Ethics. He is a member of the American Law Institute, American Society for Political and Legal Philosophy, and American Society of Criminology.

Dr John W Ekstedt is full professor of criminology and Associate Dean of Arts at Simon Fraser University, British Columbia. From 1967 to 1972, he was Senior Supervisor of Correctional Education in British Columbia and developed education programs for the province of Manitoba. From 1973 to 1979, he was Executive Director of the Justice Development Commission, Deputy Minister of Corrections

and Senior Policy Advisor to the Attorney General in British Columbia. He is the co-author of the text Corrections in Canada: Policy and Practice. He holds an MA from the University of Chicago and a PhD from the University of California.

The Hon Mr Justice John S Henry has been a judge of the High Court of New Zealand since 1984. He was President of the Auckland Law Society from 1979 to 1980 and Vice President of the New Zealand Law Society from 1980 to 1981. He was a Member of the Contracts and Commercial Law Reform Committee from 1969 to 1985 and was appointed Queen's Counsel in 1980.

Professor Andrew von Hirsch is a professor at the School of Criminal Justice, Rutgers University. He is also a Research Fellow in Penal Law, Uppsala University, Sweden. He is author of The Sentencing Commission and its Guidelines (1987); Past or Future Crimes (1985); and Doing Justice. His degrees include an LLB from Harvard, 1960; and an DIur (Hon), Uppsala, 1988.

Dr Margaret A Jackson is currently an Associate Professor in the School of Criminology, Simon Fraser University, British Columbia, and Associate Director for the Institute for Studies in Criminal Justice Policy. Her research interests include judicial attitudes and sentencing behaviour, corrections, child abuse, psychiatric decision making, criminal justice administration, planning and policy, and the mentally-disturbed, female, native and elderly offenders.

The Hon Judge Jon O Newman is a US Circuit Judge, US Court of Appeals for the Second Circuit. From 1972 to 1979, he was a US District judge, District of Connecticut, and from 1964 to 1969, a US Attorney, District of Connecticut.

Sheriff Principal Gordon Nicholson, QC is Sheriff Principal of Lothian and Borders in Scotland. He practised at the Scottish Bar from 1961 to 1970. He was appointed Sheriff (judge) in Dumfries in 1970 and presided there until 1976 when he transferred to Edinburgh. From 1982 to 1989 he was a full-time commissioner with the Scottish Law Commission. He is the Honorary President of the Scottish Association for the Study of Delinquency, and the Honorary President of Victim Support, Scotland. He is also the author of The Law and Practice of Sentencing in Scotland (1981).

The Hon Mr Justice Frank Vincent, QC is a justice of the Supreme Court of Victoria. He is also Chairman, Victoria Adult Parole Board, and a part-time member of the Victorian Law Reform Commission.

PART 1

GENERAL INTRODUCTION AND SUMMARY OF ISSUES

by

Gordon Nicholson

General Introduction

It is a measure of the attention which is now being paid to the structure of sentencing around the world that, in 1990, the subject of "consistency in sentencing" should feature on the agenda of a meeting of Commonwealth Law Ministers. As recently as 20 years ago any informed discussion of such a topic would have been most unlikely, largely because there seemed to be very little concern until then about the ways in which sentences are determined, imposed, and carried out.

During the last 20 years, however, there has been an upsurge of interest in this topic, and reformed sentencing structures have been introduced, or are under consideration, in many countries both in the Commonwealth and elsewhere. Major sentencing reforms have already taken place in, for example, the United States, New Zealand, Finland and Sweden; substantial reforms are under consideration in, for example, Canada and Australia; and in some jurisdictions, such as England and Wales, Canada and New Zealand, appeal courts have recently been setting out their own sentencing guidelines without the need for any new statutory provision. Internationally, bodies like the Council of Europe have in recent times been concerning themselves with disparities and inconsistencies in sentencing; and the subject of sentencing is likely to feature in the deliberations of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. A preparatory report for that Congress was produced in Vienna in June 1988, and it recommends, inter alia, that:

> "Member States should consider the following -
>
> (a) developing policies including explicit sentencing principles that provide guidance to sentencing judges, and that facilitate an understanding of sentencing by offenders, victims and the general public;
>
> (b) formulating the principles mentioned above in such a way that individual sentences can be assessed on the basis of those principles;
>
> (c) evaluating whether sentences are fulfilling the purposes ascribed to them within the context of the principles."

In this paper the topic of consistency is addressed in various ways by academic and practising lawyers from several different jurisdictions. In Part 2 the concept of consistency is itself analysed and discussed because, without a clear understanding of what may be involved, any remedies to remove perceived inconsistencies may be ineffective or misdirected. In Part 3 of the paper some of the major reform initiatives of recent years are described and commented on. Finally, in Part 4, Professor Ashworth has provided an objective assessment of the

advantages and disadvantages which present themselves in respect of the reform options which might be considered in those jurisdictions where reform has not yet taken place. The remainder of this Part of the paper seeks, for the convenience of Ministers, to summarise all that follows, and to set out a suggested list of topics for consideration.

Reasons for concern about sentencing, and anxiety about consistency

It is impossible to pinpoint any single explanation for the sentencing reform movement which has been taking place in recent years. Rather, it seems to have been brought about by an accumulation of factors, many of which interacted with each other to provoke a widespread desire for change. Most of those factors are referred to in the following contributions to the paper, and they may be summarised as follows -

(a) disillusionment about rehabilitation as an aim of sentencing, and resultant uncertainty about what should be the aims of sentencing;

(b) growing concern about inconsistency in the absence of general agreement about the aims of sentencing;

(c) growing interest in clearer sentencing aims: many people argued in favour of just deserts and proportionality as being the only rational and just aims which sentencers should be pursuing: others, however, argued that prison at least should be reserved only for those who had, by their conduct, shown themselves to be a continuing danger to society;

(d) growing concern about leaving the sentencing of offenders to the wholly unfettered discretion of judges without any effective form of legislative or other guidance or control;

(e) greater consideration for the position of the victim as a proper object of a sentencer's attention;

(f) anxiety about what was seen as the often excessive use of imprisonment for non-dangerous and non-violent offenders;

(g) concern about the resource and cost implications of ever-growing prison populations;

(h) growing anxiety, in at least some countries, that the general level of prison sentences was too high;

(i) conversely, anxiety in some countries that those convicted of serious offences were not receiving sufficiently severe sentences;

(j) dissatisfaction with apparently arbitrary parole arrangements which could result in consistent sentences being rendered inconsistent in their actual operation.

Other factors, too, came to be identified as leading to inconsistency. For example, an abundance of community-based resources in one district could lead to many more non-custodial sentences there than in another district where such resources were not to be found. There has also been in recent years a growing amount of evidence that in some countries ethnic and other minority groups are disproportionately represented in the criminal justice process. That, of course, raises questions not only for sentencers but also for police, prosecutors, social workers, probation officers and others.

A clear lesson from all of the foregoing appears to be that any attempt to achieve consistency in sentencing must take note of many important and contentious issues which go well beyond the simple proposition that like cases should be dealt with in a like manner and that unlike cases should be dealt with differently. Those issues will be examined in more detail later, but first it may be helpful to summarise the main approaches to sentencing reform which have either taken place or are under consideration around the world. As will be seen, they all appear to offer certain advantages and disadvantages.

Approaches to reform

Although each approach to reform is, to a greater or lesser extent, different from all others, there are nonetheless six major approaches which can be distinguished. These are -

(1) **Presumptive sentencing.** In California, and some other States in the United States, statutes have been enacted which grade offences by seriousness, and then prescribe three possible sentences for each grade of offence - a normal sentence, an aggravated sentence, or a mitigated sentence. The court must choose one of those sentences, and in this way a great deal of consistency can be assured.

(2) **Numerical guidance.** In US federal courts, and in several States such as Minnesota, sentencing commissions, acting under statutory authority, have prepared guideline tables for judges to follow. These are usually in the style of a grid with a number of offence levels down the side and an ascending series of numbers reflecting the offender's criminal history score along the top. Once the offence level and the criminal history score have been determined (taking account of aggravating or mitigating factors which may themselves be prescribed in the guidelines), the point on the grid where the two lines meet will disclose a guideline sentence, usually expressed as a

number of months imprisonment. Courts may depart from the guideline sentence, subject to appellate review.

(3) **Presumed disposals.** One element in the proposals advanced by the Canadian Sentencing Commission is that offences should be divided into four categories of presumed sentence - "in" (custody), "out" (community sanction), "qualified in" (custody unless it is a minor instance of the offence and the offender has no relevant criminal record), and "qualified out" (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).

(4) **Hierarchy of principles and policies.** A new sentencing law in Sweden sets out the principles which courts should follow in calculating the seriousness of each crime and when choosing sentence, but contains no numerical guidelines. The law makes clear the aim of sentencing (proportionality), but also states the circumstances in which other aims such as deterrence or rehabilitation may play a part.

(5) **Narrative judicial guidelines.** In recent years appeal courts in England, New Zealand and Canada have from time to time used the occasion of an appeal against sentence as an opportunity to lay down guideline sentences for particular types of offence. These guideline judgments are expressed in narrative form, like any other appeal court judgment, and usually set out a "starting point" sentence for the offence in question together with an indication of aggravating or mitigating factors which would justify a sentence above or below that starting point.

(6) **Legislative guidance as to use of certain sentences.** Both the Criminal Justice Act 1985 in New Zealand and section 1(4A) of the Criminal Justice Act 1982 in England and Wales seek to offer some guidance as to the circumstances in which a court ought, or ought not, to consider the imposition of a custodial sentence in respect of certain categories of offence or certain categories of offender. These statutes do not enunciate general sentencing principles or aims; nor do they offer any numerical guidance as to the appropriate length of sentence where custody is chosen; nor do they offer any guidance as to the appropriate type of community sanction where a non-custodial sentence is chosen. However, they create a framework of legislative intention within which appeal courts may, if they are so minded, build up a body of constructive case law.

All of the foregoing approaches to reform present certain advantages and disadvantages. These are considered in detail in the contributions by Professor von Hirsch (p 122 et seq) and Professor Ashworth (p 137 et seq) later in this paper. Along with the various factors pointing to the desirability of reform (mentioned earlier), they also bring into focus the many important issues which require to be addressed if effective steps are to be taken to tackle problems of inconsistency and generally to reform the structure of the sentencing process. These issues are considered in some detail in Professor Ashworth's contribution below. In the remainder of this part of the paper the important issues are, for convenience, set out largely in the form of broad propositions and questions which might form a basis for discussion and decision.

Achieving consistency in sentencing: topics for consideration

1. Simply to change sentencing practices will not necessarily bring out about consistency. Attention must also be given to the role and functions of, for example, prosecutors, probation officers, and parole boards.

2. An important first step towards fostering consistency is to settle the aim or aims which are to be the basis for decision making since, if no clear aims are declared, there are likely to be divergent approaches and hence inconsistency. All of the contributors to this paper are in agreement on this point.

3. If sentencing is to have more than a single aim, it is important to state clearly the circumstances in which one aim is to be preferred to another.

4. A declaration of the overall aims of sentencing, though undoubtedly important, is unlikely to achieve consistency unless it is accompanied by clear statements on assessing offence seriousness, on factors personal to the accused (especially prior record), and on factors which should be irrelevant to sentencing.

5. In any overall determination of sentencing policy, what weight is to be given to -

   (a) public protection;
   (b) victim compensation;
   (c) the sparing use of custodial sentences;
   (d) control of public expenditure?

6. To what extent is it constitutionally acceptable to introduce legislation which, to a greater or lesser extent, fetters and controls judicial discretion in sentencing? Both the High Court of Australia and the Supreme Court of the United States have accepted that such legislation is constitutional, but there may be residual doubts in some countries.

7. At a more practical level, is there likely to be judicial resistance to legislative control of sentencing discretion? If so, how can that best be overcome?

8. Assuming that some legislative intervention is required and justifiable, what general form should it take? Some options are -

   (a) guidelines within the legislation itself, possibly on the Californian model: this has the advantage that it is the result of a democratic process which might maximise public support, but on the other hand it can allow sentencing policy to be amended for short term political gains, and it is unlikely to be grounded in principled and well informed debate;

   (b) delegation to a sentencing commission to prepare guidelines within a legislative framework: this should ensure that a coherent body of rules and principles is formulated by a specialist body with time, resources, and broad experience of criminal justice, and this is likely to enhance consistency: on the other hand, such a body is a constitutional novelty, and much may depend on the choice of individuals as commissioners;

   (c) as a variant of (b) a sentencing commission could be given the task of preparing principled guidelines for subsequent inclusion in primary legislation: this produces greater accountability and ensures that the guidelines will have full parliamentary authority: on the other hand, any necessary adjustments to the guidelines in future will require legislative procedures which may be slow and cumbersome;

   (d) judicial self-regulation: this is the traditional common law approach and requires no legislative intervention other, perhaps, than the setting of the outer limits to the courts' powers: under this system some courts have, as mentioned above, developed a practice of issuing guideline judgments: however, not all appeal courts have been prepared to offer general sentencing guidance, and may not do so in future: moreover, even where an attempt is made to offer some guidance, it may only relate to relatively few crimes, and there is unlikely to be overall consideration of aims, principles and policies.

9. Once the means of introducing guidance has been determined, it will be necessary to consider what form that guidance should take. Possible models are the six "approaches to reform" outlined on pages 9 to 11 above. They, of course, have to be considered subject to the comments on them by Professors von Hirsch and Ashworth.

10. Apart from all of the foregoing, there are some other ways of influencing sentencing practices, and perhaps achieving greater consistency, which do not involve legislative or other forms of direction and control. They are -

(a) **Information systems.** There is a school of thought that sentencers would be more consistent if they were able to find out what other courts had done in similar cases. One way of furnishing such information is to build up a computerised index of all sentences passed since a certain date, suitably subdivided according to type of offence and offender, which would be available to judges through computer terminals. Information systems of this kind have been developed in Canada and in New South Wales where the system is now available to courts.

(b) **Co-operative developments.** If sentencers agree to co-operate with other criminal justice professionals in the introduction and development of a new sentencing structure, this may give them a commitment to its success, and so bring about some measure of consistency. This is thought to be a major reason for the success of the Intermediate Treatment scheme in reducing the use of custody for juveniles in England and Wales during the 1980s.

(c) **Judicial studies and training.** Study courses for sentencers may bring about greater consistency, but their impact is limited in the absence of clear aims, principles and policies (see 2, 3 and 4 above).

(d) **The context of sentencing.** Since sentencing decisions can be affected by actions taken by others (see 1 above), there may be advantage in considering matters such as: the role of prosecutors in selecting charges and negotiating pleas; the possibility that prosecutors should be permitted to address the court in relation to sentence; the circumstances in which a court should be obliged to consider a pre-sentence report from a probation officer or other official before passing certain kinds of sentence; and, the ways in which sentencing decisions can in effect be altered by the decisions of parole boards and other administrative agencies.

Conclusion

What has been said above and, all the more so, the contents of this whole paper demonstrate clearly that the difficulties which are associated with the reform of sentencing, and in particular with the achievement of consistency, should not be under-estimated. A great deal of research, discussion and careful

thought will be required if fair and effective changes are to be made to existing sentencing practices. While a completely unfettered and unprincipled discretion may be undesirable, a hasty and ill-considered reform would probably be worse than no reform at all. Moreover, while some of the fundamental problems associated with a wholly discretionary system are probably common to most jurisdictions, it does not follow that the solutions will, or should, be the same in all countries: different legal and court systems, and different social conditions, may well dictate different solutions. It is hoped, however, that, particularly for those countries which have not yet embarked on major reforms, this paper will provide a helpful starting point from which continuing discussion and debate can emerge.

PART 2

THE MEANING OF CONSISTENCY

ACCOUNTABILITY IN SENTENCING

by

Anthony N Doob and Jean-Paul Brodeur

Introduction

Individual sentences handed down in criminal cases are criticized frequently and publicly in many countries. In our country, Canada, sentences are most often criticized in terms of level of severity of the sentence. A majority of Canadians have been shown to have a generalized belief that sentences are too lenient.[1] A careful analysis of this generalized belief would suggest, however, that in Canada, as in some other countries, the generalized belief does not translate reliably to a view about individual sentences handed down in individual cases. The generalized beliefs are based in part on misinformation and misunderstanding. A more sensitive view of the Canadian public would suggest that they, like many within the criminal justice system, find Canada's sentencing structure more confusing than lenient.

In addition, judges are increasingly criticized for handing down sentences which are apparently inconsistent with other sentences. In other words, concern is expressed about disparity. We will largely be concerned in this paper with the problem of sentencing disparity. Why are we so concerned with disparity? First of all, it has often been claimed that the possibility of "unequal treatment" in law is incompatible with the notion of justice. Although we believe that this claim is justified, we would suggest in this paper that the more general concern is that punishments are being handed down in our society in an unprincipled way.

There is a natural tendency to explain away the problems of sentencing by asserting that they are due, to a considerable extent, to lack of knowledge. Hence it is sometimes argued that the problems of disparity could be lessened, if not entirely solved, by providing additional information to judges about court practice and the tariffs which are applied by their colleagues. In a similar fashion, it is argued that public criticism could be defused by better informing the general public about the role and responsibilities of courts and by disseminating accurate data on the level of severity of the sentences imposed by the judges.

Such an analysis, we suggest, is fundamentally wrong. The problems with sentencing - disparity in particular - can be seen to relate to problems of accountability. We argue that in many Commonwealth jurisdictions - in particular the one that we know best, Canada - the state, by way of its sentencing judges, simply is not accountable for sentencing decisions. This is a rather strong statement to make, in particular when referring to the process which is often described as the most serious intrusion of the state into the lives of its citizens. We say it, however, not merely as a challenge to those responsible for sentencing policy, but because we believe that unless true accountability is built into the sentencing process, sentences will, over time, no longer be seen as legitimate.

A definition of accountability

Concerns about "accountability" can probably be found in most countries with respect to most areas of the criminal justice system. There are concerns expressed from time to time about "police accountability" (usually with respect to apparently problematic interactions with ordinary citizens). There are concerns about the accountability of prosecutors on decisions they make to proceed with or to withdraw criminal charges. There are concerns about the power that prison authorities have over their prisoners. There are concerns about the "accountability" of parole authorities to both parole applicants and to the public for their decisions.

Interestingly enough, for the most part non-elected judges' decisions are typically not discussed in terms of the concept of accountability. Our guess is that if judges were asked to discuss their accountability they would do so in four ways. They might suggest that they are accountable "to the law". They might discuss the manner in which their decisions might be reviewed by higher courts (unless they were members of the highest court). They might discuss how they were "accountable" for their own behaviour and how some other body - a judicial council, for example - could make them account for any behaviour that might be seen as inappropriate for a judge. And, finally, judges might refer to the notion that they, as members of society, were, in some indirect way, accountable to the public. In this context, it might be suggested that "accountability" is achieved by way of the openness of our courts and the providing of explanations of decisions.

Indeed, accountability is often thought of as relating primarily to openness and legitimacy. If a person makes a decision that can be justified in some way, and the decision and the basis of it are open for public examination, and if deviations from legitimacy or openness can be corrected, then the decision maker is seen by many as being accountable. Borrowing from a recent book by Patricia Day and Rudolf Klein,[2] we suggest that such an analysis ignores two fundamental aspects of accountability. Day and Klein suggest that:

> "... accountability is all about the construction of an agreed language or currency of discourse about conduct and performance, and the criteria that should be used in assessing them. (p 2)
>
> "Accountability implies both a shared set of expectations and a common currency of justifications. There has to be agreement about the context, the reason why one actor owes explanation to another since it is precisely this sense of obligation which translates the giving of accounts into accountability. Equally there has to be agreement about the language of justification, what constitutes good reason for explaining conduct. ... In short, accountability, even at its simplest in the relationship between individuals,

> presupposes agreement both about what constitutes an acceptable performance and about the language of justification to be used by actors in defending their conduct. Furthermore, it implies a definition of the relationship between actors. To talk about accountability is to define who can call for an account, and who owes a duty of explanation." (p 5)

This view of accountability is innovative in that it goes beyond the traditional notion of responsibility and stresses that giving an account of one's behaviour implies using a medium that can be shared and understood by the party for which it is intended. The conditions for mutual understanding are said to be a shared set of expectations and a common currency of justifications. We shall elaborate on these ideas later in this paper.

Are judges "accountable" for sentencing decisions?

What then, in the area of sentencing, might be "a shared set of expectations" or a "common currency of justifications"? Simply put, it would be a "theory" or a set of guiding principles on sentencing and an explanation of how the sentence followed from the guiding principles. But, one might ask, don't we have a theory of sentencing in most Commonwealth countries? Don't we say that sentences should denounce the crime, rehabilitate, deter (individually and generally) and, if appropriate, incapacitate the offender? Many courts have laid down such a basket of principles. The problem, of course, is that this does not constitute "an agreed upon language or currency ..." It constitutes many. More directly, such an unordered and unweighted set of principles does not provide criteria for assessing the "conduct and performance" - the sentence, in this case - of the judge.

A few years ago, one of us was asked in an informal conversation with one of Canada's more senior judges what the empirical evidence was for unwarranted disparity in sentencing in Canada. The judge patiently listened as the evidence was described. There was evidence of variation from one location to another that could only be described in terms of differences in local custom unrelated to any underlying differences in crime or socioeconomic conditions; there was evidence from "simulation" exercises where large numbers of judges had been asked to indicate what sentence they would hand down in a particular case; and there was evidence that, depending on which purposes of sentencing they saw as paramount, different judges would emphasize different evidence, weigh various concerns differently, and come to different decisions about the appropriate sentence for a case.

The judge was told that the evidence suggested not so much that there was "random" variation, but rather that two different judges, sentencing on identical cases could start with the same set of facts. Because their "theories of sentencing" were different, they would end up with dramatically different, but

equally "justifiable", sentences. In other words, we told the judge, our sentencing structure allowed two judges to look at the identical case, apply different principles, emphasize different factors and come up with two vastly different but "justifiable" sentences. We suggested that evidence such as this would suggest that the sentencing system was in need of some attention.

The judge's response was simple: "Maybe both judges were right." Our judge, of course, was correct. Both sentences were "right" as long as the meaning of "right" is that both sentences could be "justified". The sentences could be justified, but the judges were not accountable for their sentences.

Defining disparity as a sentence that cannot be justified is equivalent to defining disparity out of existence. What we actually have is a set of principles that sometimes flatly contradict one another and which, depending on the priority given to any subset of them, and depending on the exact manner of application, could be used to justify virtually any sentence within the legally permissible range for that offence. The point is made more forcefully by Nils Jareborg in a common on many European sentencing laws:

> "... any jurisdiction which relies interchangeably upon two or more of these [standard purposes of sentencing] has an incoherent policy. In fact, it is normal that any of the mentioned types of policy is seen as sufficient for justifying a sentence. Like cases are then certainly treated differently but they are also treated alike - in relation to the disjunction of relevant policies. Disparity occurs only [under such incoherent policies] when the sentence depends on factors clearly irrelevant according to all the accepted sentencing policies ... (p 11)
>
> "No one can with certainty answer the question as to whether disparity exists unless he knows what sentencing pattern is the right one and whether a certain sentence deviates from that pattern." (p 12)[3]

Other than being within legislatively prescribed limits, sentencing, we would suggest, is almost completely devoid of expectations that can be seen as "shared" among a set of sentencing judges, let alone between members of the public and the judge, or any other pairing of individuals or groups interested in the criminal process. Furthermore, it would be hard to argue that we have an agreed "language of justification" for justifying sentences. Finally, we argue that we do not even have clarity on who can (or should) be called upon for an explanation.

Sentencing is, in many countries, in trouble. And disparity is a symptom of that trouble.

What forms does disparity take?

The most common association to the term "disparity in sentencing" is the situation where there is unwarranted variation in the sentence being handed down in two "equivalent" cases. Data often demonstrate that different sentencing judges in the same jurisdiction hand down very different sentences in identical written "simulated" cases. This constitutes evidence of disparity that is relatively uncontroversial, since it is difficult to argue against the view that identical cases should be treated alike.

Not treating similar cases similarly is actually only one side of the coin. The reverse situation - treating cases that are significantly different from one another in a similar way - is also a form of disparity. For example, if it is agreed that a particular factor should affect sentences and if it can be shown that this factor is not being taken into account, then clearly we have a different form of the same problem of disparity. This latter form of disparity is less conspicuous.

These two types of disparity, which we have described in relation to a single offence category (similar or different cases of robbery, for example) also apply across offences. Although it is not often thought of in the context of disparity, variation in sentencing patterns <u>across</u> offences raises problems of disparity which may even be more serious than intra-offence disparity. Disparity then becomes a <u>systematic</u> part of the sentencing process. For instance, if there are sound reasons to believe that two kinds of offences should have similar patterns of sentences and they do not, we have a type of cross-offence disparity that is analogous to intra-offence disparity. Similarly, if there are two offences that do have similar patterns of sentences, but there is an accepted view that they should not, we, again, have a form of disparity analogous to intra-offence disparity.

Individualized sentencing

In many Commonwealth countries, we pride ourselves on our system of "individualized" sentences. That sentences should be determined by sentencing principles and by a concern for the specific facts of a case is a legitimate, indeed a necessary, requisite of sentencing. However, the individualization of sentences is more often used as a rhetorical device to disguise anarchy in sentencing as order and to market chaos as deliberation.

At its best, the individualizing of sentences would imply a process where the purpose and principles of sentencing were clearly laid out. For example, sentencing in one jurisdiction might be governed by the principle that a sentence was to be proportionate to the harm actually done. Some form of standard for sentences would be set for different levels of harm for a particular offence. The judge, in individualizing the sentence, would then evaluate the harm done by the offender and then assess the appropriate penalty according to the agreed-upon standard.

Alternatively, if the primary purpose of the sentence was to rehabilitate the offender, judges would be obliged to assess the underlying factors that led the offender to commit the offence. Judges would then have to assess the evidence concerning the effectiveness of various treatments in dealing with the underlying cause of the offence and would then order the treatment most likely to "rehabilitate" the offender. Neither of the sentencing tasks - under a proportionality model or a rehabilitation model - would be easy. And neither task could be carried out completely reliably. There would always be some variation.

But this is not what is typically meant by "individualized" sentencing. The supporters of individualized sentencing often begin with the truism that "no two cases are alike". Though technically true, this statement implies that there is no consensus on what factors should be considered by the sentencing judge and which should not. The broadest definition of "individualization" of sentences implies complete anarchy in sentencing: Anything goes as long as an intelligent person can come up with a post hoc justification. A bit less anarchistic than this is the view that the judge first decides what the major goal of the sentence should be and then applies principles to achieve this goal.

Very few people, however, take an extreme view of the individualization of sentences. Most people would accept the view that there are some principles of sentencing, even though they might be reluctant to state these in such a way that there could be a shared understanding of what would justify a sentence.

Disparity and the need for a theory of sentencing

To have true accountability in sentencing, there must be a meaningful theory of sentences. Theory need not be understood as "grand theorizing" in the context of sentencing. It might be characterized in three ways. First, in the simplest sense of the word, a theory is a set of assertions which describe a phenomenon accurately. Hence a theory of sentencing would first attempt to present in a truthful way the reality of the sentencing process and the constraints that characterize the process. For example, in the overwhelming majority of cases, a sentencing hearing cannot last more than 15 minutes because of the crushing volume of cases that the lower courts have to process. Judges must determine their sentence in a matter of minutes. Within such a context, the individualization of sentences can only be a noxious illusion, because the most basic conditions to achieve this goal are lacking. Typically, for example, there is no time for careful deliberation and weighing of the principles and facts. In other words, having an accurate depiction of the practice of sentencing is the starting point in trying to achieve the much vaunted ideal of "truth in sentencing".

Second, within the context of sentencing tradition, a theory of sentencing refers to a set of principles upon which to base sentencing decisions. A theory of sentencing must tell the decision maker what principles are most important, and, by implication, what should not be given weight in the sentencing decision. In addition to "truth" which applies mostly to factual theories, there is the requirement that a theory must have consistency. This requisite applies equally to a set of norms, whether or not they are conceived of as sentencing principles, sentencing purposes, or sentencing guidelines (of whatever form). Hence a sentencing theory in this sense means simply a consistent set of sentencing norms.

Finally, the result of having a sentencing theory can be described by using the words of Day and Klein that we quoted earlier in this paper. If we have a true perspective on the reality of sentencing, we also have a "shared set of expectations" about what it can achieve and how it can do so. Second, a consistent set of sentencing principles will afford us the "common currency of justifications" which is now completely lacking in the sentencing structures of many Commonwealth jurisdictions. We will now apply these concepts to the problems of sentencing.

In its strictest sense, the term "disparity" means simply variation. Variation in sentencing per se clearly is not seen as bad. We have variation in sentences handed down for different offences and variation in sentences handed down for different instances of the same offence. The issue, however, that needs to be addressed is how one evaluates this variation.

When we hear about sentencing variation (across cases, across districts, across types of offenders, etc) and say that "it makes sense" we are, in effect, saying that the variation that exists fits a set of principles (or a single principle) that we agree with. On the other hand, when we find systematic variation in sentencing that we cannot explain by any acceptable set of principles (eg, variation in sentencing due to the race of the offender or victim), we might refer to that variation as unwarranted disparity in sentencing. A theory of sentencing, then, implies not only what should determine sentences, but what should not.

Imagine a situation where there are two co-offenders who had identical roles in an offence and one of the offenders had no previous convictions and the other had numerous recent convictions for similar offences. Let us first consider the case where they get quite different sentences - the one with the long criminal record getting a harsher sentence. We might be inclined, in many countries, to say that the existence of the difference in the sentences was not evidence of unwarranted disparity, since the one with the record was treated more harshly. However, implicit in such an evaluation is the principle that sentence severity and criminal record should be correlated.

Similarly, if they were to get identical sentences, whether one felt the outcome was appropriate would depend on one's "theory" of sentencing.

Since, in reality, no two cases are completely identical, the lack of a theory of sentencing would, in theory, allow any sentence to be justified because, after all, it is the responsibility of the judge to "individualize" sentences.

Another anecdote illustrates the problem of complex unstated "incoherent" theories of individualized sentencing. In discussing the evidence for disparity with a group of judges one day, one of us noted that in one Canadian province, for some offences, there is a good deal of variation from judicial district to judicial district on the use of conditional discharges. A judge suggested that there might be important variation in these locations, such as the prevalence of the offence, the tolerance for it in the community, or other factors that would "explain" the variation. Of course, the judge might well be right. But two observations can be made: "justifying" such variation in this way implies that such factors should be part of sentencing policy. Furthermore the discussion appeared to begin from the premise that the variation is acceptable ("because it is there") and to proceed to search for a post hoc explanation for it.

There is one final point which should be borne in mind with respect to the nature of a sentencing theory. In our earlier example, we have assumed that there normally is a correlation between the severity of a sentence and an offender's previous criminal record. This need not necessarily be so. One can imagine a situation where an offender with a shorter criminal record might be given a more severe sentence than an offender committing a similar crime with a longer record. In the case of a minor offence against property, some judges indicate that they like to give younger first time offenders a "short sharp shock" on the (empirically unsupported) belief that such "treatment" will be an effective individual deterrent. The same judge might be more lenient toward a more experienced shoplifter believing that overpunishing minor offenders is a practice to be avoided. Our hypothetical judge might, in other cases (eg, violent offences against persons) treat the prior criminal record as an aggravating factor.

If applied consistently, this set of rules concerning the use of previous criminal convictions could still constitute part of a "theory" of sentencing. The point that we want to stress is that a sentencing theory is not necessarily a simple-minded book of ready-to-use recipes. It is a rather detailed statement which attempts to spell out what is the desirable course of action in a variety of cases. This statement may be very complex, just as cases themselves are complex. Whether simple or complex, however, a theory of sentencing must be explicit.

Can disparity be eliminated without the difficulty of agreeing on a theory?

The simple answer to this question is "yes". The United States (Federal) Sentencing Commission, in what is now probably its most highly quoted statement of non-policy, said that it could not choose between a sentencing model based primarily on offence severity and one based on utilitarian goals, noting that "adherents of these [two] points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult.... As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result". A set of guidelines is then described. But where, especially in the absence of any overriding theory of sentencing, is the shared set of expectations governing the sentencing process and, more importantly, how could one possibly find a "common currency of justifications" for a particular recommended sentence where there was no initial agreement on how sentences should be determined?

More to the point, even if judges attempted to follow such guidelines religiously and even if the nature of the guidelines were so unambiguous that judges could reliably determine what the guideline was for individual cases - and there is every reason to believe that neither of these conditions hold - the problem of inter-offence disparity described earlier in this paper still may exist. And, of course, intra-offence variation in sentences could exist because judges would apply different sets of principles to set an actual sentence within or outside of the stated guideline.

As Nils Jareborg noted a few years ago, "In many countries, we find a penal system with an incoherent penal policy".[4] The goal of sentencing policy should be to achieve a level of coherence such that sentences and the policies that govern them make sense to all involved.

Our criticism of the US Sentencing Commission's work, then, should be put in the context of the present state of sentencing in many countries. As the "Carlisle" Report on Parole in England and Wales noted in 1988, the British government has thus far been successful in avoiding having to "grasp the nettle of sentencing reform for England and Wales". Similarly in Canada, though the Report of the Canadian Sentencing Commission was released in early 1987, there has been no outward sign that the government will be moving soon toward this difficult goal. It is not a simple or uncontroversial job. And, it is probably seen in most countries to be unnecessary. There are, therefore, few votes to be gained from sentencing reform.

In many common law countries, then, the legislative arm of government has left the problem of disparity - and sentencing policy - to the courts. The courts have dealt primarily with one

form of disparity: ranges for a given offence that are too wide. Thus very severe and in some countries very mild sentences have been appealed and quite often "pulled in" toward the centre of the distribution. Explanations are usually given for changes in individual sentences. When a sentence is made less severe, courts will often say something like "Insufficient weight was given to the goal of rehabilitating the offender". If the sentence is too mild, the court will substitute "deterrence" or "the serious nature of the offence" for the words "rehabilitating the offender". In this way, courts, like legislatures, can avoid making policy but at the same time narrow the distribution of sentences somewhat.

From time to time, however, some courts in some jurisdictions have ventured timidly into the policy area. The result is what are sometimes called "guideline" judgements, where the court of appeal has indicated some form of "starting point" in sentencing offenders convicted of a particular kind of offence. As an approach to dealing with the problem of high levels of variation in sentences, this might seem to be an adequate solution to the problem of sentencing. Interestingly enough, however, it is clear that sometimes even the court that created a "guideline" can have difficulty in following it in subsequent cases.[5] The reason for this is simple: without a theory, the court has no guidance in how to apply the rules to the next case they are faced with.

But such guideline judgements illustrate quite clearly a form of disparity we have already discussed: unexplained variation across offences. Without a theory - or an explicit set of principles - to guide sentencing, the public, offender, victim, and court have no way of deciding the relative severity of sentences across offences.

One of the terms of reference of the Canadian Sentencing Commission, on which we each served, was to recommend a new set of maximum sentences for all Criminal Code offences in Canada. Although some initial work was done on it in the early stages of the life of that Commission, some of the more difficult decisions were made after that Commission had agreed upon a set of principles to guide sentencing decisions. The Canadian Sentencing Commission recommended that the seriousness of the offence be the primary determinant of the sentence. Thus when the commissioners got to the point of deciding the maximum sentences for each offence the Commission had a framework to apply to each offence.

The theory of sentencing that the Commission had agreed upon gave "a common currency" on which to evaluate each offence. Without agreement about what should be considered, any disagreement could never have been resolved adequately. It is possible that two reasonable people might not agree on the relative seriousness of the most serious instances of an offence, but at least they would know that the ultimate decision should be guided by the "seriousness" of the two acts.

The handing down of a sentence for an individual case reflects the same problems. Without a true "theory" of sentencing, accountability is not possible.

A parting thought

We have insisted throughout this paper on the need for a sentencing theory. Our insistence upon this need may generate an imbalance that must be redressed. For the ancient philosophers, the human mind had two components - the intellect and the will. In stressing the importance of a sentencing theory for the creation of a framework for sentencing accountability, we might appear to favour the intellect over the will. This appearance is completely misleading for we believe that accountability cannot be promoted only by developing a set of sentencing principles, however thoughtful they may be. Doing justice and thinking about it are not the same thing. A theory of criminal justice does not implement itself by virtue of its profundity. Its application is dependent upon a political will to reform the sentencing process.

As we have noted before, few votes are to be gained by undertaking to reform criminal justice and fewer still will be obtained by lowering punishments for certain offences or for creating a coherent theory of sentencing. There are, in Canada, few signs that contradict the conclusion that the criminal justice system is generally the object of a benign neglect by the goernment. To be fair to our government, we are encouraged, from time to time, to see some small steps toward the creation of a process that might eventually lead to sentencing reform. It is not an easy process and not one that is likely to be done well if done quickly or in response to an apparent crisis. We look forward to seeing our own government (and others) make the difficult decisions which are necessary to move toward achieving accountability in sentencing.

Summary

We have suggested that the concepts of disparity and accountability are intimately related. Organizations and individuals are "accountable" when there is a "shared set of expectations" and a "common currency of justifications" for policy, decisions, or actions.

Although not often discussed in these terms, we have suggested that the major cause of disparity and general discontent in sentencing is that we do not have a set of principles to guide the development of sentencing policy and sentencing practice.

Efforts to deal with disparity without first addressing the issue of policy will not be doomed to complete failure, but will be severely limited in their effectiveness and ultimately will never be able to provide an adequate foundation for defining, understanding, and eliminating unwarranted disparity in sentencing.

FOOTNOTES

1. See A N Doob and J V Roberts "Public punitiveness and public knowledge of the facts: Some Canadian surveys". In Nigel Walker and Mike Hough, Public attitudes to sentencing: Surveys from five countries. Aldershot, England: Gower, 1988.

2. Accountabilities: Five public services. London: Tavistock, 1987.

3. Jareborg, Nils. "Introductory report" in "Disparities in sentencing: Causes and solutions". Reports presented to the 8th criminological colloquium (1987). Council of Europe: Collected Studies in Criminological Research. Volume XXVI. Strasbourg, 1989.

4. Council of Europe: Collected studies in criminological research, Volume XXVI, p 10.

5. See Alan Young, The Role of an Appellate Court in Developing Sentencing Guidelines, Research Reports of the Canadian Sentencing Commission. Department of Justice, Canada, 1988.

CONSISTENCY IN SENTENCING, JUST DESERTS, AND MERCY: SOME REFLECTIONS

by

Joshua Dressler

Initial Comments

At first glance, perhaps even second, consistency in sentencing appears to be a desirable goal. "Inconsistency" implies "irrationality" and, worse, "injustice". Injustice is an evil. Inconsistent sentencing is even more evil if it is based on especially ignoble grounds, such as ethnic, religious, or racial bias.

Commonplaces, however, are not always true; at least, they are more complicated than they initially appear. I submit that the principle that like criminal cases should be treated alike, more specifically, that persons convicted of like criminal offenses, should be punished alike, is only correct if "like criminal offenses" is very carefully and sensitively defined by lawmakers, which legislators may not be able or willing to do. I further submit that even if such care is taken, absolute equality among like cases might still be undesirable in some circumstances.[1]

What follows are some broad philosophical comments. I leave to others the discussion of specifics. My purpose is quite limited: to reflect at an early stage of the process on some very nebulous, but important, matters: the meaning of "justice", "moral desert", and the role of mercy in a progressive sentencing system.

What "Consistency in Sentencing" Ought to Mean: Providing "Just Deserts"

Persons are entitled to their "just deserts". In the context of criminal punishment this means that persons should be punished in proportion to the crime that they have committed, no more and no less. Generally speaking, a "crime" consists of the "social harm" or "wrongdoing" (actus reus) and "moral blameworthiness" components.

Few people disagree that a "crime" involves "wrongdoing", but it often seems to be the case that the second component - the culpability component - is given too little emphasis in many efforts to develop "consistency in sentencing". At least in regard to serious offenses, people are not punished for causing unwanted results unless they are morally to blame for causing them. People kill and injure other people, as well as impair other person's rights to property, but these acts, although they may constitute a basis for compensation of the victim by the wrongdoer, do not constitute a "crime" unless the actor caused the result in a manner that merits moral opprobrium.

True "consistency in sentencing", therefore, requires that the "crime" - both the harm component and the actor's blameworthiness for it - be carefully gauged, and that equality be judged in terms of both factors. A person does not receive his "just deserts", in other words, unless the sentencing system takes into consideration both factors.

Neither component of a criminal offense is easy to calibrate, but the "harm" component may raise somewhat fewer problems. It is not controversial that killing a person is worse than injuring him; theft of a million dollars is more harmful than theft of ten dollars.

But, even with the "harm" component some difficult questions arise. These questions are primarily normative, although some are empirical. I will speak to just two issues that any effort to create consistency in sentencing would have to consider. The point to be made here is that unless lawmakers are prepared to consider these types of issues they cannot provide true consistency.

First, various studies demonstrate that, at least insofar as public perceptions of crime seriousness are concerned, the nature of the victim may affect the "harm" analysis.[2] Some such distinctions are easy to understand: it is worse from society's perspective when a public official is killed or injured than when a private person is similarly harmed. In terms of harm, not all murders or assaults are alike.

On the other hand, some evidence exists that the rape of a "former spouse" is considered by the public less serious than the rape of a "stranger".[3] Although that particular example doubtlessly is tied to some special, historical anomalies (indeed, irrationalities) related to the offense of rape, the point here is that the determination of what constitutes a "like crime"[4] deserving "like punishment" is not always as easy as it appears. Are legislators prepared, in the name of justice, to take on the task? If not, then they cannot in fairness say that they seek genuine consistency in sentencing.

Second, some crimes involve intangible harm. Inchoate offenses, such as "attempt", and crimes that prohibit "immorality" primarily involve intangible harm. "Harm" in this sense can be defined as the "negation, endangering, or destruction of an individual, group, or state interest, which was deemed socially valuable".[5]

Traditional crimes, as well, include intangible harm. Rape causes tangible physical harm to the female victim, but she is also apt to suffer psychological distress. Rape may also impair her family structure, which in turn is hard to calculate in any simple matter. Is a rape of a single woman <u>really</u> equal in harm as a rape of a woman who has a family? If not, the sentence given to the rapist, holding all other issues equal, will have to be different.

The point, again, is that, even putting aside a myriad of other factors, and considering for the moment only the harm component of a crime, it is evident that, all else being equal, not all "murders", "rapes", or "thefts" are alike. There are aggravated and mitigated natures of each. Although <u>de minimis</u> differences doubtlessly can be ignored, a sensible, just

sentencing system that seeks consistency cannot ignore the major disparities within specific offenses.

However, unless the criminal code is made unacceptably complicated, the definitions of crimes cannot adequately consider all the permutations that exist. The disparate versions of murders, rapes, and robberies, must be left to the sentencing process. In the United States, the federal government recently developed sentencing guidelines, one major purpose of which was to reduce "unjustifiably wide" sentencing disparity.[6] A study of those guidelines will demonstrate that it has made a serious (although, perhaps incomplete) effort to categorize the various harm-related "adjustments" that a judge ought to consider.

Far more complicated - and perhaps fatal to any effort to provide genuine consistency in sentencing - is the process of measuring the wrongdoer's moral accountability for the harm he has caused. Again, I will focus on only a few matters.

First, is the actor's mens rea. This is the easiest aspect. Virtually all would agree that intentional wrongdoing is worse than accidental wrongdoing (the latter of which should not be criminal at all). The lines between intentional and accidental wrongdoing are also not hard to draw, even if it is difficult in the individual case to determine the actor's mens rea.

The American Law Institute's Model Penal Code draws four lines of culpability: "purposely", "knowingly", "recklessly" and "negligently". Although the terminology may differ in other nations, the general lines are fairly clear: the most culpable wrongdoer is one whose conscious object is to cause the harm in question ("purposely"); next is the person who does not wish the crime to occur but knows that it is virtually certain to arise if he continues on his intended path ("knowingly"); less culpable still are those who consciously take unjustified risks in their conduct ("recklessly"); and, finally, there are those who inadvertently take such risks ("negligently").

Second, a morally just sentencing system ought to consider the extent to which a person, even assuming that he has the requisite mens rea, deserves punishment in a much more general, but morally critical, manner. I would suggest the following important three principles:

Principle 1. "Desert" is based on the principle that a specific blameworthy act can be imputed to the person who is in court if, and only to the extent that, he had the capacity and fair opportunity to function in a uniquely human way, ie freely to choose whether to violate the moral/legal norms of society.

Principle 2. In this context, "free choice" exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct violates society's norms; and (3) conform his conduct to the law.[7]

Principle 3. Even among persons who possess "free choice" as defined above - and thus deserve to be punished - morally significant differences exist between persons, based on the degree of free choice that each person possesses.

What this means is that not only should a criminal code recognize excuses, eg, insanity, involuntary intoxication, duress, but it should also formally permit partial excuses, eg provocation, diminished responsibility.

But, it is impractical to recognize partial excuses to all crimes, for this can only be done if lawmakers are prepared to create degrees of all crimes, an unacceptable complexity. Therefore, a system that has as its goal "consistency in sentencing" must allow for differential treatment of wrongdoers, based on the individual culpability of the actor, which in turn is based on the actor's degree of free choice (as defined above).

For example, it is morally unjust to punish a retarded criminal, even if that person has sufficient capacity to form the requisite mens rea of a crime, and even if that person is not so seriously disabled as to be completely excusable, at the same level that we would punish a person of ordinary intellectual capacities who commits the same offense. The "crime" of a retarded person is not similar to the "crime" of a non-retarded person, at least as long as "crime" includes (as it should) a blameworthiness, and not merely a harm, component.

Thus, "consistency in sentencing" in this context requires that most judgments about moral culpability be handled at the sentencing phase. But, how will this be done? Notice that what I said before is that "a system that purports to provide consistency in sentencing must allow for differential treatment of wrongdoers, based on the individual culpability of the actor". There is almost (but not quite) a contradiction in that statement: we are seeking consistency, and yet we obtain it by providing differential treatment of individual wrongdoers, based on their just deserts.

It would seem that to truly say that two crimes are alike - and thus to punish them equally - we must allow the sentencing authority, who has read the testimony and observed the defendant, to have sufficient discretion to make a judgment about the convicted defendant's capacity and opportunity to behave lawfully.

Perhaps this means that all that any sentencing system can do is to provide a set of factors that the judge must consider (or not consider) in determining the defendant's culpability. There will have to be enough flexibility in the guidelines to allow the judge to judge. But, this threatens inconsistency, because issues of culpability inevitably are subjective.

When "Consistency" is Undesirable

Let me complete my observations with a view that, at least in the United States, is not in vogue these days: Consistency in sentencing, even if it is devised in a sophisticated manner, is not always desirable. At least in some cases, "like" cases (in the normal sense of the phrase) should not be treated alike. Let me explain.

As a matter of justice persons should be punished no more than they deserve, taking into consideration the factors discussed above - harm and blameworthiness. That is what we mean when we speak of giving a person his "just deserts". But, I further submit that sometimes - not often, but sometimes - justice should give way, just a bit, to mercy.

The difference between "justice" and "mercy" is significant. An offender has a moral right to be treated justly. Any sentencing system that punishes a person more than he deserves has acted unjustly. In contrast, wrongdoers are not entitled to mercy. To show mercy is a permissible, but not obligatory, act of the punishing authority.

When a judge displays mercy, he punishes a person less than he deserves. And, in doing so, justice is undermined to some extent. Nonetheless, if the choice is between a system that strives for near-perfect distribution of sentencing justice and one that is "unjustified", in the sense that it results in inconsistency in sentencing because it invites judicial mercy, I favor the latter system. A system of strict, unbending, merciless justice is not my idea of the preferred system, and I think that it is not one that most people ultimately would prefer.[8]

I do not suggest that judges should have unbridled opportunities to act mercifully. What I do suggest is that some leeway ought to exist in any sentencing system that may be devised that allows judges to express their very personal sense of compassion for the individual wrongdoer, unrelated to the harm and culpability questions discussed above.

For example: Suppose that D, a person of exemplary character, loses his job. He continuously seeks a new job, but fails to find one. He grows depressed, as his self-esteem is reduced, and as he observes his family suffering. One day, he is treated rudely in a grocery store. In response, he purposely and inexcusably smashes windows in the store and marches out with a bag of groceries, without paying.

D is probably guilty of malicious damage of property and of theft. Further, under my definition of "free choice" described above, he has free choice: he knew what he was doing, knew it was wrong, and had the capacity to conform to the law. He deserves "full" punishment in any "just deserts" sentencing system.

But, as a matter of compassion, the judge may wish to show mercy. Why? It may come down to nothing more than that this was a person of good character who did a bad act, and we are more willing to be merciful to a good person who acts out of character than we are to a person of bad character whose conduct is in character.

But, of course, here I may be showing my own biases - where I might show compassion in sentencing if I were permitted the opportunity. Someone else might show compassion in a very different type of case (perhaps to someone whose upbringing was so awful that, despite his bad character, mercy will be shown). Another judge might not wish to be merciful in any case, which would be that judge's right, too.

And, of course, all of this will lead to genuine inconsistency in sentencing. But, that is precisely what I submit ought to be included in the sentencing system: what I have in mind here is some freedom - some limited flexibility in the system - for judges to act for reasons highly individualistic to the case, that do not require justification within the ordinary sentencing guidelines or to an appellate court.

This leeway might be abused, of course, as any system that allows for discretion by human beings can be. But, it is also apt to be a more humane system. The international charge toward consistency in sentencing, to determinate sentencing, should not become so strong that mercy loses a place in the outcome.

Conclusion

Lawmakers should consider developing a system of sentencing that reduces unjustifiable disparity in sentencing. However, lawmakers need to be sensitive to three problems lurking in any effort to devise a "rational" sentencing system.

First, the system should not ignore the need for subtle line-drawing regarding the "harm" and "moral culpability" components of a "crime". In particular, the system should not paper over, or ignore, the difficult moral questions that arise in the "culpability" area.

Second, sentencing too easily can devolve into a mere exercise in calculation, when it ought to remain an exercise in some substantial degree of judicial discretion.[9] It is not possible for lawmakers, no matter how thoughtfully they act, to deal with every relevant factor that may arise in a given case, particularly in regards to the wrongdoer's culpability. Judges need to be given some leeway, even in an otherwise structured system, to graduate punishment in relation to the particular offender's culpability. That is essential to the concept of treating like cases alike.

Third, the effort to provide consistency too often means that unbending justice replaces mercy, when there is a place for both

goals in a penal system. Admittedly, the two goals conflict: to show mercy to an offender means that the wrongdoer receives less punishment than he deserves - an injustice, especially to the victim. But, a society that allows a little bit of injustice of this kind might be better than one that does not, if the injustice occurs because those who act in our behalf - here, the judges - are acting like persons, rather than like mindless computers.

FOOTNOTES

1. See Davis, Sentencing: Must Justice Be Even-Handed?, Law & Philosophy 1:77 (1982) (holding that justice in punishment need not forbid, although it does not require, disparities in punishment).

2. Eg, Rossi, Waite, Bose, and Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, American Sociological Review 39:224 (1974); Dressler, Thompson & Wasserman, Effect of Legal Education Upon Perceptions of Crime Seriousness: A Response to Rummel v Estelle, Wayne Law Review 28:1247 (1982).

3. Rossi, Waite, Bose, and Berk, supra note 2.

4. Or consider the following: is it worse for a person to steal a million dollars from a bank than to steal ten dollars from a destitute individual? The nature of the victim may matter, for the issue is not merely that the wrongdoer has been unjustly enriched, but that someone else has been unjustly harmed by that enrichment.

5. Eser, The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Interests, Duquesne Law Review 4:345, 413 (1965).

6. See Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, Hofstra Law Review 17:1 (1988). Breyer was a member of the Commission that generated the federal guidelines. For the views, often critical, of another member of the Commission, see Robinson, A Sentencing System for the 21st Century?, Texas Law Review 66:1 (1987).

7. Dressler, Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code, Rutgers Law Journal 19:671, 701 (1988).

8. Not all thoughtful people agree that mercy is desirable in a sentencing system. For example, Professor Jeffrie Murphy has argued that judicial mercy constitutes "unjustified sentimentality". Judges, he has said, should "keep their sentimentality to themselves for use in their private lives with their families and pets". Murphy, Mercy and Legal Justice, Social Philosophy & Policy 4:1, 9 (1986).

Perhaps he is right, but I think much can be said for the view that the criminal justice system - and, more specifically, the judge in relation to the offender - ought to be (even though it is not now commonly) analogized to a family. After all, the paternalism that is so much an acceptable part of the family relationship "has its roots in our common humanity". Morris, A Paternalistic Theory of Punishment, Am Philos Q 18: 263 (1981). Punishment ought to communicate a similar message.

9. See Silets & Brenner, Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986, Journal of Criminal Law & Criminology 77: 1069, 1082 (1986).

PART 3

CONSISTENCY AROUND THE WORLD

CONSISTENCY IN AUSTRALIA

by

Frank Vincent

THE PRINCIPLE:

> "Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that avoidance and the elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community." [Lowe (1984) 58 ALJR 414 at 415 per Mason J.]

1. Legislative framework

The legislature has a central role in establishing the framework for sentencing decisions, not only in relation to the fixing of penalties appropriate for offences, but also with regard to the range and type of sentence to be available to the courts and the degree of discretion to be left to them in determining the appropriate level of response in a particular case. Properly performed, this function should result in the development of a coherent and integrated system with appropriate hierarchies that reflect the relative seriousness attributed to different offences and which permit the application of rational sentencing policies.

Unfortunately in the Australian context the reality has, up to the present time, been somewhat less satisfactory. The relevant legislation is scattered amongst a mosaic of State and Commonwealth Acts (with some 4,000 separate penalty provisions listed in the Victorian Statute Books alone), with duplications and inconsistencies not only from Act to Act, but often within the one piece of legislation. In Victoria, for example, there are more than 100 sections under which an accused can be ordered to pay compensation or make restoration to his victim; the correlation between fines and imprisonment, where the two are prescribed sanctions for the same offence, vary from statute to statute; the degree by which statutory penalties increase for second and subsequent offences show no consistent pattern; and generally speaking the legislature has only haphazardly differentiated between adult, juvenile and corporate offenders for the purpose of punishment.

Although the legislature does provide for maximum penalties in relation to specific offences, when a number of serious offences are compared it becomes apparent that there has been no consistent approach adopted. For example, in Victoria an offence of armed robbery carries with it a maximum penalty of imprisonment for 25 years, whilst manslaughter carries a maximum term of 15 years, and until recently the offence of conspiracy to murder was punishable by imprisonment for 10

years. If one includes as well the fact that the penalties in respect of offences under Commonwealth legislation are often significantly different to those applicable in relation to comparable State offences, the situation becomes even more absurd. More often than not the apparent seriousness with which particular conduct has been viewed, as reflected by the criminal sanction attached to it, has been more indicative of political sensitivity about the subject than it has been of any rational response to the conduct concerned. For many years persons who had been found guilty of an offence under section 86 of the Crimes Act (Cth) for conspiracy to evade tax were liable to imprisonment for a term of three years. As a consequence of the increased concern about this kind of behaviour, the maximum penalty has been increased twice within the last few years, first to five years imprisonment and then to 15 years.

Sometimes the legislature may specify factors which are to be taken into account when determining whether a particular sanction is appropriate (see Magistrates' Court Act (Vic) s 58(a); Crimes Act (Cth) s 19B(1)(c)) or may provide for a suggested ordering of priorities in the imposition of sentences (see Crimes Act (Cth) s 509, s 17A, Penalties and Sentences Act, (Vic) s 13B(1)) however such statements or guidance have been rare. Rather the tendency in drafting has been to provide for a broadly defined crime which carries a single but relatively high maximum (and sometimes, but not always, minimum) penalty, leaving the judiciary with an extensive, albeit not unfettered, discretion to select the sentence appropriate to the circumstances of the case.

Re-examination of legislative policy objectives in sentencing is under way at both State and Federal levels. One approach which appears to have found favour with the numerous bodies concerned with this area of reform is that instead of prescribing individual penalties for separate offences, there should be a classification corresponding to crimes of different levels of gravity. Such a scheme would provide an opportunity to rationalize statutory maxima and to maintain consistency between the gravity of an offence and its possible penalty. Some steps have already been taken in this direction. In May 1988, South Australia became the first state in Australia to fix maximum penalties by reference to penalty divisions which were contained in an Act of general application. A similar approach has been recommended in the interim report of the Sentencing Task Force on Maximum Penalties which was commissioned by the Victorian Attorney-General earlier this year, and has resulted in the laying before Parliament of a Bill which not only attempts to bring all sentencing provisions together in the one statute and place them in a hierarchy whereby offence seriousness is matched with sanction seriousness, so that like offences are subject to like maxima, but which also attempts to identify the mitigating and aggravating factors to be considered by those passing sentences, to state the purposes of different types of sanctions and the circumstance in which they are to be used, and to articulate generally the principal policy considerations to be taken into account when sentencing.

The difficulty of avoiding disparity between offenders and inconsistency in sentencing in the Australian setting is rendered more difficult by reason of the Federal system and the jurisdictional limits of different Courts within State systems themselves. For example, injustices can occur in situations where some offenders may be just young enough to fall within the jurisdiction of a Children's Court whilst co-offenders who are only a little older may be treated quite differently. With respect to this particular matter, changes have been effected to the Children's Court Act (Vic) which will enable the Children's Court to commit the younger children for trial in the County Court so as to avoid the likelihood of disparity arising.

Furthermore, the ability of State law to apply in Commonwealth places within the State and to Commonwealth controlled off-shore areas adjacent to the State ensures, at least, a measure of territorial consistency: Commonwealth Places (Application of Laws) Act (Cth), ie the state law becomes "federalized".

2. Judicial discretion

Judicial discretion in determining sentence occupies a central position in the Australian criminal justice system's arrangements for the handling of offenders. Where legislatures fear to tread, Judges and Magistrates tackle the task of sentencing convicted offenders, doing their best to discharge the responsibility which the law leaves to them. Where discretion exists both as to the degree and species of punishment, sentencers find themselves, in performing their function, required to attempt to achieve a number of often contradictory purposes, which themselves are reflections of communal uncertainty regarding the aims of the criminal law.

Major sources of disparity are often very divergent views among sentencers as to the relative seriousness of the type of offences, the relevance of various characteristics of offenders, and in relation to the proper use of different kinds of sentences. To some extent these difficulties reflect the lack of legislative guidance on how these measures fit into the scheme of sentencing.

Consistency has been sought through the generation of a jurisprudence of sentencing principles which the courts are expected to take into account in future cases. However it has been argued that the precise jurisprudential nature of these principles is unclear. There is a divergence of views as to whether they operate as binding legal fetters on other sentencers or whether they are merely guidelines which aid in the application of the discretion which the fixing of a sentence requires.

The proposed Penalties and Sentences Act (Vic) 1989, the Bill for which is currently before Parliament, however, makes provision for the handing down by the Court of Criminal Appeal of what are termed "guideline judgments", setting out guidelines

to be followed by judges and magistrates when sentencing offenders and which are to be binding unless the particular circumstances of the proceeding are so materially different as to require a departure from them. Such judgments may contain, inter alia, the criteria to be applied in selecting among the various sentencing alternatives, the purposes that should be pursued in sentencing offenders for a particular class of offence, the appropriate range of the various sentencing alternatives, the criteria by which the sentencing judge or magistrate is to determine the seriousness of a particular offence, the criteria which the sentencing judge or magistrate may use to reduce the sentence for a particular offence or the weighting to be given to relevant criteria. Furthermore, the Bill also provides its own general form of guidance for those exercising discretion in that it attempts, inter alia, to provide sentencing principles to be applied by courts in sentencing offenders and to set out the objectives of various sentencing options.

In relation to the sentencing of Commonwealth offenders, State courts are trying to obtain a greater uniformity when applying Commonwealth law by a modification of the doctrine of precedent. In R v Abbrederis (1981) 3 A Crim R 366, the New South Wales Criminal Court of Appeal took the view that where a Commonwealth statute has been construed by the ultimate Court of Appeal within any state or territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other states or territories so long as it is permitted to stand unchanged by either the court of origin or the High Court. Similar approaches have been adopted in other jurisdictions and whether or not such decisions satisfy any technical definition of a binding precedent, they do act as important points of reference in promoting uniformity within the jurisdictional system and between jurisdictional systems.

Although the overwhelming majority of sentences are handed down in the lower courts, the principle data on standards of judicial sentencing and principles of the same are derived from a very limited number of appellate decisions by the Full Supreme Courts in each State or territory. Furthermore these decisions are, themselves, sparsely reported. Sentencing decisions in the County Court are not reported at all. Some guidance and statistical data is provided in text books, digests and bulletins: for example, the Australian Sentencing Bulletin provides information in relation to criminal appeals from all States and a crude breakdown of classes of sentences is available for Magistrates' Courts in year books prepared by the Australian Bureau of Statistics. In New South Wales, a monthly newsletter is available to Magistrates and Judges with such relevant up-to-date data. It is worthy to note that in Victoria, a project is currently underway in the County Court, headed by Judge Mullaly, which is concerned with the production of a sentencing manual which would provide guidance to judges on factors to be taken into account and their weight in relation to a range of offences, both serious and relatively less so, that typically present difficulty for a sentencing judge. The aim of such

guidelines is to encourage consistency of approach by identifying significant factors in relation to severity of the offence, identifying mitigating factors which should be taken into account in mitigation, encouraging judges to articulate the policy or philosophical basis of a sentence, and by providing tariff information, sentencing options and remissions/merit-time and other corrections sentence-discount practices.

Furthermore, a Bill to establish a Judicial Studies Board and a Bureau of Crime Research and Statistics is currently before the Victorian Parliament. The function of these bodies are stated to include, inter alia, the conduct of seminars for judges or magistrates on sentencing matters, the conduct of research into sentencing matters, the preparation and circulation of sentencing guidelines to judges, magistrates and other interested bodies, the development and maintenance of a computerised statistical sentencing database for use by courts, the provision of sentencing statistics to judges, magistrates and other interested bodies, the monitoring of present trends and initiation of future developments in sentencing, and the provision of assistance to courts to give affect to the principles contained in, what is currently, the Bill for the introduction of the Penalties and Sentences Act 1989.

The Australian Institute of Judicial Administration also plays an important role in the dissemination of information, particularly with the educational courses and seminars it organizes for judges and magistrates. In September 1987, an inter-jurisdictional seminar and discussion on sentencing was conducted by this body in Melbourne, while sentencing seminars for individual jurisdictions were conducted in Western Australia, South Australia and Queensland soon after.

Nevertheless, there is, at this stage, no continuing monitoring of judicial sentencing practice sufficient to reveal the frequency with which each separate sentencing option under the various State and Commonwealth laws is utilised, the consideration which led to its use, or its practical efficacy.

3. Appellate review

In the sentencing of State offenders consistency is sought to be achieved largely through the unifying effect of an appellate review by a Full Court. Disparity of sentencing standards, not only between individuals but between jurisdictions, has been recognized by the Appellate Courts as a serious deficiency in the criminal justice system. A recurrent theme is that it is the task of the Court of Criminal Appeal to minimise sentencing disparity not only because it violates the principle of justice that like cases be treated alike, but also because it is "unfair in the absolute sense that the sentences which fall toward either end of the scale are simply and plainly wrong when they are measured against fairness and effectiveness"; R v Griffiths 1977 137 CLR 293 at 326 per Jacobs J.

However the use of appellate review as a means of evolving a "common law of sentencing" has been assailed not only as an excessively slow process, but also as one which may be unsuccessful in reducing disparity if it does no more than replace the discretion of the trial judge with that of the Appellate Court. In fact, uniformity can be undermined by many factors, including the imprecise and contradictory nature of the sentencing principles expounded, which appear to vary according to the composition of the court, and the inadequate system by which the communication of principles developed by appellate courts to the courts of first instance, is effected.

Frequently appeals against sentences are perceived as merely incidental to those against conviction, and appellate judgments frequently concentrate more on issues relating to the admissibility of evidence or the judge's charge to the jury than on sentencing policy. Even when these decisions do concern sentence, in many cases, particularly those which involve a confirmation of the original sentence, they do not state any explicit principle, but merely confirm the appropriateness of the sanction applied to the particular offence in question, or illustrate the balancing of principles, or give an example of how a particular sentencing problem should be approached.

Appeals against sentences imposed upon Commonwealth offenders within the State are also taken by the State court hierarchy. While this contributes to a common approach to the sentencing of both classes of offender within the State, it can also lead to a variation between States in the handling of persons facing identical Commonwealth charges, although, as has been earlier mentioned, principles are being developed to deal with this problem. While the ultimate Australian Court of Appeal in sentencing matters is the High Court, it has, until recently, been reluctant to grant leave to appeal in sentencing matters and has not provided a sufficiently close superintendence of the sentencing of Commonwealth offenders to guarantee that like cases will be dealt with alike throughout the Commonwealth. A new route for the review of Commonwealth sentences, in order to bring about a more uniform national approach to the punishment of Commonwealth crime, has been suggested by the Australian Law Reform Commission. In its Interim Report on Federal Sentencing, the Commission recommends that appeals against sentences in Commonwealth matters within a State be diverted from the superior courts in the separate States where they are now handled, to the Federal Court of Australia. This would serve as the first Court of Appeal in all Commonwealth sentencing matters throughout Australia, and, in theory, would provide, in the sentencing of Commonwealth offenders, a degree of national consistency as yet unrealized.

Finally, although Appellate Courts see their task as that of minimising disparities in sentencing standards, they also recognise that a fair margin of discretion must be left to the

sentencing judge. Accordingly they will only interfere with the sentence when the sentence is manifestly excessive or inadequate ie the principle upon which an Appellate Court will operate is when it is contended that there has been some miscarriage of discretion. Therefore, it is actually possible for a judge to secure himself or herself against interference by an Appellate Court by simply selecting a penalty close to the middle of the range of sentences imposed for that specific offence with which he is dealing, for it could hardly be said that such a disposition was either manifestly excessive or inadequate. Nevertheless, such a sentence, while not inconsistent on its face, may in reality not have been tied to the real issues at all, and accordingly operate, in a practical sense, in an inconsistent fashion.

SENTENCING REFORM IN CANADA: PURPOSE, POLICY, AND PRACTICE

by

John W Ekstedt and Margaret A Jackson

Introduction

The purpose of this paper is to provide a summary discussion on the topic of sentencing practice in Canada. It will be organized around three perspectives: the history of sentencing initiatives; the principles, procedures, and practices which contribute to and/or serve to alleviate the problem of sentencing disparities; and the contemporary socio-political context. This work is being done to provide an appreciation of the elements of sentencing reforms as they have emerged in Canada historically and as they are being developed today.

Considerable attention has been given to the problems of sentencing practice in Canada in recent years. The creation of the Law Reform Commission of Canada in 1970 was a deliberate effort on the part of the Federal Government of Canada to begin a long term process of criminal law review which would include, as one of its parts, a review of sentences and dispositions. The Law Reform Commission has produced several research reports and working papers on the subject of sentencing. As well, other commissions and working groups, established since 1970, have explored particular aspects of sentencing in Canada.

The Law Reform Commission of Canada, especially in relation to its work on sentencing, had a number of historical predecessors which provided a broad base of review and recommendations for use by the Law Reform Commission and other study groups. These historical data include information on the emphases in sentencing practice which have occurred in the major socio-political areas of criminal law administration in Canada. It is the objective of the first section of this paper to briefly discuss this history.

Part I: The history of sentencing practice in Canada

It is generally conceded that sentencing practices, including the procedures established to serve the making of the sentence, tend to evolve from the constant requirement for compromise between contemporary community standards and the intentions reflected in legislation. The enigma of judicial decision-making is the requirement to interpret and apply legislation. This is particularly difficult as public attitudes change and when legislation does not provide options which satisfy public needs. Such was the case at the very beginning of Canada's experience with sentencing.

The historical roots of sentence administration in Canada are found in the penalty structure of England as it existed at the end of the 18th century. In 1791, Canada adopted the English Criminal Law. Since capital punishment was at the centre of the penalty structure in England, it also became the primary sentence imposed in Canada. (Sentencing Reform, p 22). Because this penalty structure seemed so disproportionate to many of the

offences which called for it, sentencing practices and procedures began to be modified to provide for alternative dispositions. It is arguable that the history of sentencing practice in Canada is a continuing response to the development of alternatives to capital punishment.

Banishment and transportation were the first sentencing options to capital punishment in Canada. These were provided for in the 1800 Statutes of Upper Canada and existed as the primary dispositions for serious offences until the establishment of the Kingston Penitentiary in 1835. At this time, incarceration became the preferred punishment for serious offences. Initially, there was some difficulty trying to determine equivalencies between time in incarceration and the time in which a person might have been banished or transported. By 1853 it had been decided that a sentence of seven years of transportation equalled a sentence of four years of incarceration (Sentencing Reform, p 24).

As patterns of sentencing (judicial decision-making) and systems of sentence administration (available dispositions, eg, prisons) were evolving, Canada was also developing politically. As Canada sought to establish itself as a federal State with divisions of power within it, there was a consequent effect on the way in which sentences were administered. In 1841 the provinces of Upper and Lower Canada were unified creating the United Provinces. In the same year a statute provided that provincial jails would be used for those persons serving prison terms up to a maximum of two years. A federal (penitentiary) sentence required a minimum of seven years in custody. Immediately it could be seen that this division of responsibility was awkward and presented extreme difficulties for a judge in determining sentence. Consequently, in the very next year (1842), amendments provided that a judge was not required to impose a maximum term of two years in a provincial facility or a minimum of seven years in a penitentiary. The minimum term for a penitentiary sentence was reduced to three years.

Concurrent with these developments was the determination in Canada of the location of power to make criminal law. By 1865, it had been generally established that the making of criminal law was the responsibility of the central government. This principle was embedded in the British North America Act of 1867 (now known as the Constitution Act). However, while the federal government's responsibility in the making of criminal law seemed clear, the responsibility of the provinces in the administration of justice was left less clear. This is in spite of the fact that the British North America Act locates the responsibility for the administration of justice with the provinces. Thus, in Canada, the federal government is responsible for the underlying philosophy of criminal justice as it is reflected in legislation, especially the Criminal Code of Canada. In most aspects of justice administration, the provinces bear the responsibility for procedures and practice. The constant collaboration and dialogue between the federal and provincial

governments on this division of responsibility remains the central issue in sentence administration in Canada to this day.

Following confederation, immediate attempts were made to rationalize sentencing in Canada. One of the important initiatives in this regard was the passing of the Consolidation Act of 1869 which attempted to rationalize the penalty structure in Canada on the basis of the English attempt to do so eight years earlier.

In 1868 the Penitentiary Act provided for the remission of sentences for good behaviour. Procedurally, the decision to allow for the adjustment of a sentence administratively continues as one of the most important and problematic aspects of sentence administration in Canada.

Finally, in 1892 the Criminal Code of Canada was enacted. It can be said that the enactment of the Criminal Code of Canada ended the era (1869 to 1892) during which the structure of Canadian criminal justice administration was initially rationalized. It also signalled the beginning of the modern era of criminal justice administration in Canada.

Sentence administration and the Criminal Code

The relationship between sentencing practice and sentence administration remains a matter of controversy and continuing discussion. The basic issue is whether dispositions emerge out of sentencing practice or sentencing practices emerge out of the availability of dispositions. There is no doubt that the era of the Canadian Criminal Code is one where the tension between sentencing practice and sentence administration is continually illustrated. The evolution of Canadian criminal justice since 1892 is found through a study of the history of amendments to the Criminal Code of Canada. While it is beyond the scope of this paper to discuss this history in much detail, it is worth noting that almost every period of major amendments to the Criminal Code of Canada have resulted from discrepancies between the decisions judges are required to make and the options available to them for disposition. The history of the Criminal Code is a history of adjustments to penalty structures as community attitudes about the seriousness of offences shifts and problems of sentence administration (primarily incarceration) increase.

During the first thirty years of the existence of the Criminal Code of Canada, the primary adjustments to it were with regard to the manipulation of the sentence of incarceration. However, beginning in the 1920s, the Criminal Code began to be amended to reflect new dispositions and new sanctions. These included probation (1921), suspended sentence (1927) and absolute discharge, conditional discharge and intermittent sentence (1972).

Not only has the Criminal Code of Canada been used to introduce substantial changes affecting sentencing practice in

the interpretation and application of law to criminal cases, but it has reflected the changes in ideology since 1892 which have influenced both sentencing practice and the practices of sentence administration. Probably the most profound of these ideological shifts occurred in the transition from a punishment ideology to a rehabilitation or welfare ideology. Because the system of criminal justice in Canada had been founded on such a severe set of punishment principles, the movement to modify these principles in practice evolved into an opposing ideology. In Canada, it is generally believed that this transition occurred in the 1930s and culminated in the 1938 report of the royal commission to investigate the penal system in Canada (the Archambault Report). This report triggered the age of rehabilitation in Canada and was followed in 1956 by an Inquiry into the Remission Service of Canada which resulted in the formation of the National Parole Board of Canada in 1958.

It is interesting that the development of a rehabilitation ideology in Canada proceeded with an anti-institutional bias. Very early in the evolution of reformative or rehabilitative practices, it was determined that the use of a penitentiary or prison for this purpose was inappropriate. Consequently, the one type of sentence to an institution which would follow from a rehabilitation ideology was not popular or significantly used in Canada, ie, the indeterminate sentence. While there has been some limited use of the indeterminate sentence in Canada, (and, indeed, it has been resurrected in recent times for purposes of addressing a class of offender-the dangerous offender), it is normally used in Canada as an administrative device rather than a rehabilitative device. In other words, the indeterminate sentence tends to be used in Canada as a means of extending punishment when there is evident danger to persons and the outcome of a sentence on the offender and the public cannot be satisfactorily predicted. In these cases, the release of a prisoner from incarceration is regarded as best being determined administratively. It would be wrong to say that the indeterminate sentence in Canada has ever been effectively associated with the principles or practices of rehabilitation.

In Canada, rehabilitation was adopted as an underlying sentencing rationale for many years. However, there was and continues to be confusion about the way in which this sentencing rationale can be practically reflected in sentencing policy. This has never been resolved. In some ways, the problem with the indeterminate sentence reflects this. For instance, in 1947 a Criminal Code Amendment Act was passed which permitted the incarceration of habitual criminals for indeterminate periods. This use of indeterminate sentencing for this purpose was almost immediately criticized and remained a continuing irritation within the criminal justice system in Canada until it was abolished in 1977. However, the habitual offender legislation was replaced by the dangerous offender legislation which, in practice, simply continues the confusion about the rationale and purpose for this type of sentence.

Probably the most influential report addressing Canadian criminal justice in modern times is the Report of the Canadian Committee on Corrections (Ouimet, 1969). Ironically, this report reaffirmed many of the philosophical notions underlying rehabilitation with which Canada had been wrestling for a little over three decades. However, the general approach taken by the Ouimet Committee marked the end of the rehabilitation ideology in Canada; at least in the sense that it had been originally proposed. In important ways, this Committee signalled the beginning of what is now referred to as the reintegration/reparation era of sentence administration in Canada. This Committee reinforced the anti-institutional bias concerning the reformation of the offender which was articulated in the Archambault Report. As well, this Committee made numerous recommendations with regard to changes in sentencing purpose, the availability of alternative dispositions, and the review of the criminal law, in order to further rationalize criminal justice practice.

Numerous commissions and working groups followed on the heels of the Ouimet Committee. They investigated conditions in penitentiaries and prisons, researched the incidence of new "criminal case" social problems (such as the non-medical use of drugs), as well as reviewing the principles of sentencing and the availability of dispositions for sentencing. In 1974 the Law Reform Commission of Canada produced its document entitled, Sentences and Dispositions. This work led, finally, to the creation of the Canadian Sentencing Commission in 1983. Its report was tabled in the Parliament of Canada in 1987. Surrounding these initiatives has been a complete and thorough review of the Criminal Code of Canada (indeed, the entire criminal law of Canada) begun by the Department of Justice in 1978. This work is ongoing.

Part II: Addressing the problem of sentencing disparity

The previous section has established the general context for an examination of sentencing practice in Canada through a review of the various commissions' efforts and the legislative changes which determined the nature of available dispositions. We turn now to consider more specifically the structures and procedures which have influenced the evolution of sentencing practice in Canada.

This section will consider the procedural and administrative outcomes of actual sentencing practice in Canada. A variety of legal factors which mitigate in the direction of consistency (as well as inconsistency) will be examined (eg criminal law procedure, Criminal Code directives, prosecutorial powers, etc). In addition, extra legal factors which may mitigate against consistency (judicial bias, prosecutorial bias, policy bias, regional differences, public attitudes, etc) in the Canadian context will be considered.

It is first important to reemphasize that the present structure and procedure for sentencing in Canada were not created to apply to Canada's current social realities. They remain tied to the past; the English past.[1] Our current sentencing scheme was derived with little change from the English model in which every offence had to be dealt with by imprisonment. Our system of classifying offences and dividing them into categories of indictable and summary offences was also modeled on English penal practices. The Canadian Criminal Code was based with little alterations on Stephen's English Draft Code of 1878. The Canadian Colonies did not really separate from English tradition until 1892 when Sir John Thompson presented Canadian Parliament with its code of criminal law, which abolished common law in Canada (Jobson and Ferguson, 1987, p 9). It was at that time that the classification of offences was changed from the English felonies and misdemeanors to the Canadian indictable and summary offences. This categorization of offences is highly significant in areas of Canadian criminal procedure such as the mode of trial, appeal procedures and the actual sentencing outcome. It should be noted that the Criminal Code of 1892 set out specifically that an accused person who was charged with an indictable (as opposed to summary) offence should normally have the opportunity to be tried by a court comprised of a judge and jury. "Speedy" trials, however, could occur, if the accused elected to be tried by a county or district court (higher courts) judge sitting alone without a jury.

The fact that much of Canadian legal procedure is articulated in a national criminal code is also significant. First, the point made earlier about the division of legislative powers between the federal government and the provinces means that Canada cannot have an exhaustive national code. It is perhaps best therefore, to examine the Code's limitations before continuing on to discuss its importance for sentencing practice and administration. For example, the Code does not even contain all that might be considered federal criminal law. It is usually presented with related statutes, such as the Narcotic Control Act and the Food and Drugs Act, separately provided. The Code presumes the operation of an adversary system, although there is no specific reference made to such a system (Arbour and Taman, 1980, p 32). There is very little expression of basic principles which are established in case law, such as the presumption of innocence. Finally, there are no guidelines or factors provided in the code to indicate when imprisonment as opposed to a non-carceral sentence is appropriate; nor is there any guidance concerning the appropriate range of sentence to be handed down (Jobson and Ferguson, p 10).

Approximately one third of the Criminal Code is directed to procedural matters. But, upon closer examination, some of the fixed procedures in the code lend themselves to practices which may result in disparate sentencing. For example, mandatory sentences can affect the practices of the justice system from

the time of police arrest. If there is a choice, it is not unreasonable to think that the police would select a charge that has a mandatory sentence as opposed to a non-mandatory one. Such an articulated punishment also provides the prosecutor with plea negotiation powers as well. Given the psychology of a mandatory sentence that is perceived to be more harsh, judges and juries might consequently be more likely to acquit if the accused is charge with an offence that has a mandatory sentence attached. There are additional problems of cost to consider because the defence is more likely to expend time and effort in delay strategies with a charge that has a mandatory sentence resulting (Ibid, p 17).

Another relevant point arising from the Code's limitations is the fact that it is silent on the issue of the relative weight or priority to be assigned to various factors such as, age of offender, employment status, marital status, etc. These are left to the discretion of the trial judge. Offender characteristics (as opposed to offence characteristics) have often been thought to possess greater potential to introduce disparity into the judicial sentencing outcome. It has been argued that, in their attempts to take into consideration factors such as age, employment status, etc, or from stereotypic considerations of the accused (as in the case of women, aborigines, etc), Canadian judges may hand down inequitable sentences relative to other similar offence pattern cases. A study by Warner and Renner in the 1970s, for example, on the criminal sentencing process of the Halifax courts suggested that disparity was introduced into sentencing outcomes. A disproportionate number of accused were non-white and came from the low income district of the city.

The sentencing of minorities has proven more generally, as with the blacks in the States, to be a critical issue in the discussion of disparity in Canadian sentencing outcome. Native offenders are represented disproportionately in the federal and provincial institutions compared with their proportions in the general Canadian population (Daubney Report, 1988, p 211). This increases as one moves to the north and west. Thirty one percent of those incarcerated in the Prairies, for example, are of native origin. These individuals, once in the system, are less likely to become involved with correctional programming, less familiar with release procedures and thus have a lower probability of being released on parole than the general inmate population.

In several jurisdictions, since the mid 1970s, there have been initiatives directed toward assisting the native offender in the trial process; these are generally termed "native courtworker" programs and normally involve native staff who guide the individual native accused through the trial. Unfortunately, many of these have not been thought successful because of role confusion - is the courtworker to be an advocate or a social worker? - and financial cutbacks, which affect the quality of the programming.

Women represent another group of Canadian citizens that appear to be dealt with unfairly at sentencing - primarily because of what lies ahead of them after disposition. Facilities and resources are severely restricted for women offenders, since they are "too few to count" and therefore a disparity of a different sort emerges (Ibid, p 13). There is, at present, only one federal penitentiary for female offenders in Canada. Women housed there are discriminated against because of the singular location of the institution and the limited range of programming available, relative to the situation for male offenders. The location issue should be somewhat alleviated in the near future, however, with the construction of new facilities in the West.

The same disparity concern could be said to be true for sexual offenders in Canada, but for an opposite reason. There are currently more sex offenders in prisons than the various treatment programmes can handle; therefore one problem is that there are waiting lists for sexual offenders. But each of the available programmes uses different techniques and the facilities themselves vary greatly according to setting (Ibid, p 208). As a result, there is disparity in sentencing outcome amongst the same offence-type group, again because of differential treatment.

Dangerous offender legislation appears to create disparity of a different sort which, in the context of current sentencing practice, appears difficult to rationalize. Application for a dangerous offender hearing occurs after the conviction of an offender. If successful, it essentially places the offender on an indeterminate sentence subject to periodic review. This type of indeterminate sentence appears to conflict with the utilitarian "just deserts" approach now popular in Canada. It seems a "throw-back" to the earlier "rehabilitation" model; but, in reality, as described earlier, may only be an administrative tool.

The type of disparity more often highlighted, however, is of the first kind. That is, over-representation of minorities. Fairness and equity in sentencing are issues in regional disparity as well. What the break-and-enter offender receives by way of disposition in rural Yellowknife in the North may vary considerably from what the same type of offender (with similar offence characteristics) receives in urban Toronto. Variation of this nature emerges even within provinces. Social/political/economic/cultural (especially with native and other visible minorities) factors enter into the equation.

Legal Aid has been effective to some extent in reducing the disparity which can occur when an accused cannot afford a lawyer. However, another important finding from the Warner and Renner study was that a major proportion of the 1,033 cases examined did not have a lawyer representing the accused. For the poor, Legal Aid was generally only available for indictable (more serious) charges and here Legal Aid workers appeared overworked. More lenient dispositions were given to accused who could afford their own lawyer (p 82).

Another form of disparity which can arise in treating roughly similar cases in like fashion may occur when the range of dispositions available varies from jurisdiction to jurisdiction. If a prosperous urban community creates and supports a number of alternatives to incarceration programs, an offender may not receive a carceral sentence; this outcome may not occur for an offender in a small, rural, relatively poor community, which can not/does not support such corrective programming.

It is interesting to note that when the ultimate disposition is no longer available to the courts, as occurred in Canada in 1976 with the abolishment of capital punishment, disparity of a different sort can result - that is, **offence** (as opposed to offender) sentencing disparity. A "ceiling effect" is placed on the severity of sanctioning possible, which means no matter how onerous the criminal act, no one gets more than a life sentence. As well, the adjustment of the penalty structure in the absence of a death sentence appears to have resulted in a disproportionate severity in the application of the carceral sentence. Whereas prior to the abolishment, it could be argued that the judiciary attempted to avoid the death sentence, afterwards, two patterns in sentencing outcome were observed: a lengthening of the period of time before an offender was eligible for parole and the disproportionate use of the life sentence - both as a probable consequence of the judiciary's attempts to reassure the public through visible examples of severity that the absence of the death penalty did not cause more lenient treatment of the offender (Ekstedt and Griffiths, 1988, pp 402-403).

In light of these various "potentials" for sentencing disparity, the focus by government commissions and legislative reformers has been upon the enigma detailed in the first section. That is, the judicial requirement to interpret sentencing legislation and apply it equitably seemingly requires supporting provisions not present in the Criminal Code, ie, sentencing guidelines to reduce the potential for disparity. Judges may be in need of such guidance because they are in the institutionalized position of making sentences; they must, by legislated authority relate old law to current social conditions. Social conditions, however, are not consistent or constant nationally.

The committees discussed earlier, Ouimet, Archambault, the Law Reform Commission, and the Sentencing Commission, focused their recommendations upon judicial decision making, because of the almost mythological role of judges as neutral arbiters. This vision of judicial sentencing is highly symbolic. It represents the most visible aspect, the culminating activity, of the police and courts. Therefore, the perception of justice being done in the courts is critical. Any assistance available to the judiciary in arriving at equitable sentencing through guidelines and recommendations seems sensible. However, as discussed below, remedies might be more appropriately addressed at earlier stages in the process to focus on the means to the end, not just the end itself. But let us examine the judiciary first.

Given the importance placed upon judicial decision-making, it seems important to consider initially what rationale is used by judges in sentencing. What is the philosophy which underlies the sentencing rationale? There does seem to be a rather basic conflict and subsequent tension between the operation of the courts in sentencing and the programs/practices of corrections and sentence administration. One argument made to explain this philosophically is that the courts view man as rational; with free will. Thus judges are "just deserts"/utilitarian in their orientation. Corrections as an institution is thought to perceive man as being influenced by external forces in the environment. Therefore, it is rehabilitation/treatment oriented. On the other hand, as Hogarth determined in 1971 with Ontario court judges, these varying philosophies are distributed amongst individual judges as well-resulting in further confusion influencing the outcome of sentence. In fact, the Ontario judges presented such a range of philosophies and attitudes about the sentencing function, that this alone might account for disparities. A judge sentencing an offender for strict punishment purposes might understandably vary sentence "harshness" from a brother judge who sentences with rehabilitative concerns in mind.

Another disjuncture in philosophic outlooks is the public perception of what sentencing philosophy/rationale should be and what the judiciary perceive it to be. In many ways, the public is the body in society most affronted, most concerned about apparent disparity in sentencing - reflecting the need to "perceive" justice being done. In Canadian society, there has been a decline of public confidence in the criminal justice system in general and the sentencing and correctional processes in particular (Daubney, p 9).

Canadians recently polled about such matters as severity of sentencing and the use of incarceration, indicated beliefs which appeared to differ from those of the Canadian judiciary. The public believed that sentences were not severe enough; the exception being some individuals who felt that sentences for native Canadians and poor people were too harsh (Ibid, p 9). In pursuing this interest in Canadians' perceptions of sentencing, a study by Gebotys and Roberts found that the public favour a sentencing model which does not include offender characteristics being considered in the outcome. If these factors <u>are</u> employed, the authors argue that the resulting sentences will be perceived as inequitable by the public. Therefore, if the purpose a sentence is to serve (eg, "straight" punishment versus rehabilitation) is a determinant in sentence length and sentence length is a crude measure of sentence harshness, then it appears essential, in order to consider the disparity issue, to determine not only what the judiciary feels should be properly considered in weighing case information, but what the public (and offenders) believe as well. Further, what the prosecutor considers as important may be just as critical.

The extent to which the prosecutor may contribute to sentencing disparity has not been well considered. It is true that there have been discussions about the potential for abuse by Canadian prosecutors (Verdun-Jones and Cousineau, 1979). However, this potential and its reality, remain little studied in the context of concerns about sentencing disparity. But Canadian prosecutorial powers may have more potential for decision making that leads to disparate sentence outcome, than judicial powers. What the prosecutor considers as legitimate sentencing philosophy; what facts are weighed by the crown in the processing (or dropping) of a case; probably affects sentence outcome more definitively than what the judge does at final sentencing.

The powers of the prosecutor are many. The most obvious occurs at the time of laying or reviewing the charge. In Canada, the Crown, in addition to the mandatory sentence option described earlier, may also have the discretion to decide whether an offence is to be classified as a summary or indictable offence (in the case of certain offences termed "hybrid" offences). As mentioned earlier, the determination of whether the offence is summary or indictable has important implications for further processing of the case to disposition. And, such discretion is not normally reviewable.

The other point at which prosecutors may have significant influence on sentencing outcome is at the time of sentencing. According to Stenning, the law concerning the prosecutor's role at sentencing is in a state of flux at present (Stenning, 1986, p 261). The prosecutor appears to have a common law right to make representations at the sentencing hearing and this right seems to be generally accepted. What is not clear is the form Crown representations to sentence should take and what matters (eg, type, quantum of sentence, etc) may be addressed by the Crown. The possibility of joint submissions, that is by both Crown and defence at sentencing time, does not seem accepted as a practice. But there are varying views about the Crown's speaking to sentence at all. Some state that the practice ought not to be allowed, unless specifically requested by the judge. However, members of the Manitoba Court of Appeal (in R versus Simoneau (1978), 40 CCC (second) 307), took the following position: "it has been suggested that it is objectionable for counsel to mention a specific term or, as a variation of making a specific recommendation to suggest a range of sentence, ... however, I see nothing wrong in being specific when the circumstances call for it" (as cited in Stenning, 1988, p 260).

Therefore, we see throughout the process of bringing an accused forward to trial and sentencing, that the prosecutor has innumerable points of decision making and subsequent powers related to those decisions, which may affect sentence outcome. To briefly list others of these in Canada: the prosecutor has the power to initiate a criminal prosecution; to lay the charge against the accused; to prefer an indictment against the

accused; to recommend a stay of proceedings; to select mode of trial; to determine what evidence is released in discovery; to negotiate what charge is actually laid; to influence the appeal procedure; and, to withdraw charges. Even in matters such as having control over the calling of the prosecution's witnesses, the outcome of the trial itself may be affected.

On the basis of their findings in their Halifax court study, Warner and Renner argue forcefully that there was not an adversarial model being adhered to by either the Crown or defence counsel. Of the 203 cases in which Crown and defence could make recommendations, rarely was there conflict between the two lawyers in the recommendation. The judge, in turn, usually agreed with the lawyer recommendations, suggesting that judicial independence or the judicial role as neutral arbiter was hard to demonstrate (p 92). But the prosecutor basically has control - control primarily over the flow of information - whether to use, when to use, how to use - and information is critical to decisions made in conditions of uncertainty, as sentencing decisions must be.

Information, interestingly enough, with the potential for creating bias, has been increasingly available in the Canadian courts. One piece of legislative reform which resulted in the need for additional offender information was the Bail Reform Act of 1972, with amendments following in 1976. This Act effected a major change in relation to the "onus of proof" in bail hearings. The onus of proof shifted to the prosecutor to "show cause" why the accused should not be released from custody. This required an investigation in order to determine the offender's status with regard to residential stability, employment status, etc.

As well, reflective of the earlier rehabilitation model in sentencing practice, changes were made with regard to what information on individuals was acceptable in the trial itself. Information from "friends of the court" allowed the individualization of the sentencing outcome. Such information was available through the pre-court inquiry, through pre-sentence reports, through social work evidence, and psychiatric testimony. The pre-sentence report (PSR) was the primary mechanism which came to be used to assess whether an offender was suitable for probation. The PSR normally contained demographic information on the offender such as, age, marital status, employment history, educational level, reports on alcohol and drug dependency, as well as materials relating to the offender's current offence, prior record, previous probation and parole, etc. (Ibid, p 263), the very kind of information which appears to contribute to disparity in sentencing.

For example, knowledge about the marital or employment status of the offender may affect the judge or jury's perception of the individual and his or her worthiness or deservedness for punishment. It is ironic that in the attempt to become more aware of the offender's individual treatment/life skills needs (in the interest of fair and humane justice process) the courts may

have, as a consequence, become more disparate and unfair in sentencing for specific offenses. It undoubtedly is a fine balance to make between the consideration of individual circumstance in sentencing and proportionality in sentencing; placing the emphasis on the offender or the offense. The traditional legal model has always stressed the consideration of offense characteristics in sentencing decision-making - confusion has arisen with the increasing amount of offender information competing for consideration.

Therefore with this increased flow of complicating offender information in the trial process and the control over that information largely determined by the prosecutor's decision-making, it appears not unreasonable to suggest that the prosecutor's role ought to be examined more closely in relation to concerns about sentencing disparity. That, however, is a task for further research. Given the lack of empirical data to date concerning the impact of the prosecutor's role on sentence outcome in Canada, we are limited to a selected review of the initiatives which have been taken to assist the judiciary to reduce disparity in Canadian sentencing.

There have been many reforms suggested and some implemented for educating the Canadian judiciary on information usage. These include judicial training seminars on sentencing and computerized data bases, with sentence ranges for current case decisions available "on line" for judicial use. However, the mere provision of information is obviously not sufficient. There is clear evidence that disparity in sentencing can result even when information is made known, not just about offender characteristics, but about the community, the corrections institutions, and the offender programming available.

In an Ontario study of alternatives to imprisonment, for example, additional awareness of programmes available, such as Community Service Orders (CSOs), resulted in a "widening of the net" effect (Jackson, 1982). That is, offenders who normally would not have been given a sentence of incarceration received a CSO. In many cases, the effect of this was to place persons in formal programs of social control when the absence of such a program would result in no application of formal control. Similarly, when information of jail overcrowding is made known to the judiciary in a jurisdiction, it has been observed in the past that there can be increased numbers of shorter sentences or intermittent sentences resulting. As mentioned earlier, awareness of the local "culture" in Canada has also resulted in disparity in sentencing, especially as seen in the far north, but also regionally from East to West. Simply increasing information can result in disparity. The key is to assimilate information wisely without bias to form a knowledge base, not merely a "data" base subject to prejudicial interpretation. The manner by which this is achieved requires that attention be paid to basic principles: clarification of sentencing purpose; self-awareness of biasing attitudes and beliefs. It is of little value to advocate sentencing guidelines to achieve consistency and fairness, if there is not even agreement about the purpose of sentencing.

Finally, some mention should be made of the offender's perspective in sentencing. These observations are based on a survey of inmates conducted in 1984 for the Canadian Sentencing Commission. The appearance of justice being done remains significant not only for the general public, but for those of the public who are processed by the system. Whether sentencing disparities result from prosecutorial negotiation, prosecutorial or judicial discretion, or such factors as race, sex, and the socio-economic level of the offender, they are often perceived to be **unfair** disparities by the offenders themselves.

The issue of sentencing disparity generated considerable discussion in all the inmate groups surveyed for the report. There were two related matters on which all groups were in strong agreement. These were: the influence of socio-economic circumstances and judicial bias or prejudice. Examples were provided of disparity in sentencing arising between men and women offenders and between rural and urban court settings. It was generally believed that sentencing in rural areas is harsher than in urban areas and that men receive harsher sentences than women. There was strong general agreement across all groups that some form of sentencing guidelines should be provided. Most groups were very careful to qualify this response with the concern that the ability to consider individual circumstances be retained in the development of sentencing standards or guidelines; that disparity resulting from mitigating circumstances of the individual was just and fair, while disparity resulting from socio-economic, racial, or gender factors was unjust and unfair.

There was also general agreement that both prosecutorial plea bargaining and overcharging were very common occurrences. These behaviours seemed to be accepted by most interviewees as "part of the system". A common observation made was that if you are rich and hire a good lawyer you will receive a lighter sentence, regardless of what is deserved. Lawyers were thus often viewed as the "criminals" of the justice system.

A primary finding from the British Columbia survey suggested offenders desire certainty in sentencing whether it be through a "flat" sentence or a predictable parole release date. They equated certainty with justice. They supported sentencing guidelines and a general reduction in judicial discretion. Yet it is clear that the offenders wanted a balance to the guidelines which can only be achieved through a consideration of mitigating case circumstances and offender characteristics.

It is now an acknowledged tenet in judgment/decision-making theory that, in the face of insufficient information, judgements tend to be based on pre-existing biases and stereotypes. This tendency was attributed to judges' decisions and lawyers' judgements by the inmates surveyed. A recurring message emerging from this review appears to be the need for information for all participants; but information which is placed

in a "knowledgeable" context, based on an understanding of the function and purpose of the process. It is not thought, even by the inmates themselves, that discretion in court decision-making should be eliminated entirely, but that there be a wise consideration and balancing of circumstances, individual offender characteristics, and offense characteristics in each particular case.

PART III: The contemporary socio-political context

Since the second world war, most institutionalized forms and methods for social order or social control have been challenged. This was particularly true during the decade of the sixties when the combination of relative affluence and reduction in perceived external threats to safety created, in many western nations, an interest, particularly among the younger "baby boom" generation, in introspective re-examination of personal goals and the validity of social institutions to support those goals.

In criminal justice, as well, the interest in re-assessing "first principles" became practically an obsession beginning in the decade of the sixties and proceeding into the decade of the eighties. In the United States, Lyndon Johnson's "War On Poverty" and Richard Nixon's "President's Commission On Crime" - both undertaken during the decade of the sixties - stimulated a series of initiatives some of which continue to this day. The Law Enforcement Assistance Administration (LEAA) was established in the United States for the purpose of re-assessing fundamental principles and practices in American criminal justice. The programmes and studies flowing from LEAA have had a significant impact on both the American and Canadian criminal justice systems.

Previous sections to this paper have pointed out the historical evolution of sentencing practices from the perspective of each era's interest in sentencing reform. However, there is no doubt that the last twenty years have produced an accumulation of initiatives in this area far in excess of anything which occurred in any previous era. As is generally the case, Canada has, in some ways, been influenced by the activities in the United States with regard to its method and approach in addressing these issues. Many of the studies undertaken in the United States during the decade of the sixties and seventies were instrumental in the development of Canadian reviews on this subject. However, while Canada was caught in the general thrust of interest in the broad area of criminal justice review, its political and judicial systems are sufficiently different to have resulted in some genuinely original and important work.

Possibly the most important shift in the last twenty years related to the review of criminal justice matters has been the movement away from a concentration on problems in practice to a restatement of fundamental objectives. It has been generally conceded that in a decentralized federalist state like Canada, it is extremely difficult to implement consistent standards in

sentencing practice without a nationally recognized and clearly articulated sentencing purpose. While it is true that some official reviews in the criminal justice area were recommending attention to re-articulated statements of purpose as far back as the 1930s (Archambault, etc), the activity of actually establishing a nationally accepted statement of purpose in the area of sentencing did not begin until the early 1970s.

In the criminal justice area, the creation of the Law Reform Commission of Canada (1970) is usually regarded as the first formal effort to develop modern standards of criminal justice practice. Actually, other events preceded the formation of the Law Reform Commission of Canada which are significant and should be mentioned. The first of these was the passing by parliament of the Government Organization Act in 1966. This was an Act which created the Department of the Solicitor General for Canada and refocused the federal government's attention on problems of policing and corrections. The Minister for Justice at the time of this initiative was Pierre Elliot Trudeau, who, on becoming Prime Minister of Canada in 1968, became instrumental through his choice of Ministers and Deputy Ministers for Justice and Solicitor General, and because of his own constitutional interests, in the promotion and support of a continuing set of activities intended to revitalize Canadian federalism and address justice issues. There was a serious attempt in the late sixties and early seventies to restructure the dialogue between federal and provincial jurisdictions on a number of issues. It must be remembered that, in Canada, no national initiative can be successful without multilateral cooperation between these jurisdictions. Every task force and commission set up to review justice in Canada has used an approach intended to promote and increase dialogue between these jurisdictions on the issue under review.

It is probably fair to say that, over the last twenty years, Canada has been a leader in the production of quality studies and reports on matters related to criminal justice. The mechanisms established in Canada to proceed with these reviews have been quite successful and have maintained a reasonable standard of objectivity. However, it is also possible that the means by which this was accomplished became counterproductive to the implementation of proposed reforms.

Governments in western democratic societies are particularly sensitive about proposals for judicial reform. On the one hand, political intervention in judicial decision making is viewed as improper and contrary to principles of natural justice. On the other hand, the maintenance of the judiciary and the provision of a legal basis for judicial interpretation are legitimate responsibilities of governments. It is, therefore, important for the government to act to promote systems of justice which are compatible with the political objectives of society while not unduly interfering with the actual and immediate decision-making of judges in the consideration of specific cases. This line is sometimes fuzzy and there is general resistance among the

judiciary, in Canada, to any form of political review. As a result of this, it has been the practice of Canadian governments to place review commissions and task forces, particularly on this subject, at arm's length in order not to be immediately identified with any recommendations which may arise from them. The Law Reform Commission of Canada, for instance, was established with its own autonomous status reporting indirectly to the Department of Justice for Canada but provided with the freedom to act independent of the interests of the Department of Justice. However, this also works in reverse and legitimizes the Department of Justice, as well as cabinet and parliament, to act independently of any recommendations of the Law Reform Commission. The result of this has been that the Law Reform Commission of Canada has experienced continuing frustration with the government's policy response to their recommendations as well as the implementation of their recommendations through the government bureaucracy. This is interesting, since the freedom enjoyed by bodies like the Law Reform Commission of Canada gives them opportunity to actually make reformist recommendations while their position in relation to government makes it almost impossible for them to actively promote and implement those recommendations.

Another, more recent, change to the socio-political "ethos" of Canada has influenced the way in which the government and judiciary interact around matters of reform. This was the bringing into effect of the Charter of Rights and Freedoms on proclamation of the Constitution Act in 1982 (the end goal of Pierre Trudeau's constitutional reform efforts). The Charter gives the judiciary both the responsibility and the power to review the legislation of all governments in Canada to determine whether or not they stand in violation of the provisions of the Charter. Many argue that this has forced the judiciary into a social policy development role in Canada. While there is some indication that the higher courts have resisted assuming this role, decisions by the lower courts (where most Charter cases are heard) gives evidence to increasing involvement in policy disputes (eg the abortions issue). It is arguable that the result of all this is a judiciary with a growing sense of its own collective power and responsibility moving beyond the simple debate on the characteristics of judicial independence (where the issue rests on the relationship between government and the judiciary in case law matters) into the larger arena of the test between judicial supremacy and political or parliamentary supremacy in policy matters. This may be increasing the tension between the judiciary, the legislature, and the executive arm of government, further complicating any attempt by government to reform sentencing standards or sentencing practices.

Finally, it is worth noting that, in Canada, most of the contemporary initiatives to review sentencing practice and recommend sentencing reforms were established by the Liberal government and/or a bureaucracy with its roots in Liberal

policies. However, in 1984, the Progressive Conservative party defeated the Liberals and assumed the responsibility for the federal government in Canada. It is apparent that there exists some tension between the recommendations arising out of the task forces and commissions created by the Liberal government of Canada and the requirement of the Progressive Conservative government to respond to them. The recommendations of bodies like the Canadian Sentencing Commission may appear more "radical" than the current parliament and government executive are prepared to support.

It is arguable that all the major committees and task forces studying sentencing reform in Canada have been affected by these variables. Three of these bodies: the Law Reform Commission of Canada; the Canadian Sentencing Commission; and the Standing Committee on Justice and Solicitor General (Daubney Committee); give evidence to this in spite of the fact that they are very different types of committees. The Law Reform Commission of Canada is a continuing committee with appointed Chairs and regular staff. While it retains its independence from the bureaucracy of the government ministries involved in justice, it is clearly supported and its membership confirmed by those government agencies.

The Canadian Sentencing Commission was an adhoc committee established to respond to the work of the Law Reform Commission of Canada (and others) and produced a working document with recommendations for specific reforms. The structure of this commission allowed the specific recommendations to emerge out of a fairly "academic" and radical bent. The commissioners were appointed by order in council through recommendation of the bureaucracy of the Department of Justice with confirmation by the Minister for Justice. However, the commissioners were not instrumental in the direct activity of accomplishing the research or constructing the arguments resulting in the recommendations. Much of the research (perhaps the entirety of it) was accomplished by persons in Canada who had been identified with the Liberal goals of justice reform for many years. Many of the recommendations of the Canadian Sentencing Commission were recommendations which had been presented in various forms in Canada for twenty years or more.

The Daubney Committee represents yet another method employed in the Canadian context to pursue these reform issues in a politically acceptable way. The Daubney Committee was a committee of parliament created to respond to issues arising from the capital punishment debate in Canada as well as the recommendations of a variety of task force groups and commissions on justice matters. It was also an attempt to provide a particular Progressive Conservation "stamp" for any statements or recommendations about justice reform that emerged. The report which resulted from their work, "Taking Responsibility", has been well received in Canada, particularly

by the working bureaucracies of the justice system. It attempts to provide a balance between the obvious and generally agreed requirements for reform and the more radical and more extensive recommendations emerging from the work of other commissions and task force groups.

Regardless of the differences in the construction and formation of these various study groups, they all are affected by the conservative reflex resulting from the tension between political interests and broader social reform interests in Canada. While the more radical recommendations of the Canadian Sentencing Commission may not be implemented in the foreseeable future, the more conservative recommendations of the Daubney Committee may also not find implementation. The reason for this is that while the first may not receive the political support necessary to overcome judicial and bureaucratic reticence, the second may not stimulate reform because it provides the judiciary and the working bureaucracy with too many options for maintaining and expanding the status quo. (It is interesting to note that, as this paper is being written, the Canadian Criminal Justice Association is organizing a "lobby" to obtain a response from government to the recommendations of the Daubney Committee.)

The reform of the criminal law and criminal justice practice is necessarily a difficult and time consuming process. In societies where the promotion of individual liberties is held in equal regard with the desire for social order and collective well being, the ability of the state to intervene arbitrarily in law reform is blunted. Change occurs slowly and even as the creation of statute law follows belatedly on changes in social attitude, so the reform of practices occurs some distance away from the rhetoric which has preceded it.

FOOTNOTE

1. The example of Quebec's legal system is briefly highlighted to indicate one of the basic differences in the development of Canadian legal structures arising from the attempt to recognize the two founding cultures of modern Canada. Quebec has a mixed system of law: the public (criminal) law has developed from the English common law, while its private (civil) law is derived from its Romeo-German background. The development of Quebec civil law represented an attempt to preserve the province's French cultural identity from the growing influence of the Canadian national identity. On June 10th 1857, a bill entitled "An Act to Provide for Codification of the Law of Lower Canada Relative to Civil Matters and Procedure" was adopted. It essentially codified the provisions relating to civil matters and were based upon the French civil code (Gall, 1983, p 136).

   Thus it could be said that this effort represented an attempt to reduce potential for disparity in legal matters; by having the familial, social, and economic systems of the French minority maintained in private law, while adhering to the structures and rules of the English source of public law (Ibid, p 136).

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SENTENCING IN GREAT BRITAIN

by

Gordon Nicholson

Introduction

Before attempting to describe how sentencing operates in Great Britain, it should be made clear that Great Britain consists of two entirely separate legal jurisdictions, namely that of England and Wales and that of Scotland. Although similar in many respects, the two jurisdictions have separate systems of law, separate court structures, separate prosecution services, separate prison services, and separate, though not wholly dissimilar, arrangements for parole. A brief description of the two systems may be helpful.

The criminal justice system in England and Wales

In England and Wales the majority of criminal law is in statutory form. Thus, most crimes have a maximum sentence prescribed by statute. In a few cases that is life imprisonment, but in most cases it is a determinate sentence of a number of years of imprisonment. There are two courts which have criminal jurisdiction in England and Wales - the Crown Court and the magistrates' court. The Crown Court is presided over by a High Court judge or, more commonly, a circuit judge, and deals with all cases on indictment (that is to say, before a jury). The magistrates' court is presided over by stipendiary or, more commonly, lay magistrates, and deals mainly with summary cases (that is to say, without a jury). The sentencing powers of the Crown Court are limited only by the maximum sentences provided for specific offences. The magistrates' court cannot generally impose a sentence of more than six months imprisonment or a fine of £2,000.

Apart from sentences of imprisonment and fines, courts in England and Wales also have available to them a wide range of alternative disposals. These include suspended and part suspended sentences of imprisonment; community service orders; compensation orders; and probation orders (with or without special conditions).

The prosecution of crime of England and Wales is now the responsibility of the Crown Prosecution Service. Prisons in England and Wales are the responsibility of the Home Office and, although parole was introduced throughout Great Britain by the same statute, the Criminal Justice Act 1967, there is a separate Parole Board for England and Wales, and the early release procedures operated by that Board are in some respects different from those which operate in Scotland.

The criminal justice system in Scotland

In Scotland the majority of criminal law is not in statutory form, and is to be found in the common law. That is the case in relation to, for example, murder, rape, robbery, assault, fraud, theft, and many other common crimes. As a result none of those crimes has a statutory maximum sentence: in all cases the maximum is a sentence of life imprisonment.

There are three courts which have criminal jurisdiction in Scotland - the High Court, the sheriff court, and the district court. The High Court has universal jurisdiction throughout the whole of Scotland, and its sentencing powers are unlimited. It deals only with cases on indictment, and in practice only the more serious cases are prosecuted before it. The sheriff court is a local court and is presided over by a sheriff, who is a professional judge. The sheriff court hears cases on indictment and summarily. When dealing with a case on indictment the sheriff may impose up to three years imprisonment: when dealing with a summary prosecution his sentencing powers are broadly similar to those of the English magistrates' court. The district court is the only lay court in Scotland. It deals with minor crimes which are prosecuted summarily, and its sentencing powers are restricted to a maximum of 60 days imprisonment or a fine not exceeding £1,000.

Like courts in England and Wales, Scottish courts have available the disposals of community service orders; compensation orders; and probation orders. However, suspended and part suspended sentences of imprisonment are not available in Scotland.

The prosecution of crime in Scotland is undertaken by a public prosecution service under the direction of the Lord Advocate for Scotland. Prosecutors in Scotland have a virtually absolute discretion as to whether crimes will be prosecuted summarily or on indictment, and as to the court in which a prosecution will be conducted. Since, in Scotland, maximum sentences are, as described above, greatly influenced both by the mode of prosecution and by the court in which the prosecution takes place, this means that prosecutors can exercise a considerable influence on the likely, or at least possible, sentence in a given case.

Prisons in Scotland are the responsibility of the Scottish Office and, as noted above, there is a separate parole board for Scotland.

Consistency in sentencing

Despite the significant differences which exist between the criminal justice systems of England and Wales and Scotland, the two jurisdictions share one thing in common - a virtual absence of any statutory guidance on sentencing. Over recent years there has been, both north and south of the border, a considerable amount of legislation relating to sentencing. However, the purpose of this legislation has been either to introduce new non-custodial disposals, such as community service orders, or to create procedural barriers which must be overcome before a prison sentence, and in particular a first prison sentence, can be imposed on an offender. There has been almost no legislation which seeks to define the aims and objectives of sentencing, or which offers guidance on the choice or quantum of particular sentences. One limited exception to that is to be found in certain statutory provisions, applying only to England

and Wales, which relate to the imposition of custodial sentences on young offenders. Section 1(4) and (4A) of the Criminal Justice Act 1982 (as amended by the Criminal Justice Act 1988) offers some guidance as to the circumstances in which a custodial sentence may be considered in such cases. (Section 1(4) and (4A) of the 1982 Act are reproduced as an appendix to this part of the paper.)

The general absence of legislative guidance in Great Britain springs no doubt from a reluctance on the part of Parliament to fetter, or to appear to be fettering, the independence of the judiciary. In the result, however, the intentions of Parliament are far from clear. What is reasonably clear (though it is never explicit in the legislation) is that for several years Parliament has been seeking to reduce the use that is made of imprisonment. Consequently, new non-custodial disposals have been created and, as noted above, reports exploring the possibility of using some of those disposals may have to be obtained and considered before a prison sentence can be imposed. What the legislation does not do, however, (apart from the one exception noted above) is to state the considerations which should guide the choice between a custodial or a non-custodial disposal; nor does the legislation give any indication of the kind of offender who, in the opinion of Parliament, ought not to receive a prison sentence.

Some indication of the present Government's views on such matters has been given in a recent Green Paper,[1] Punishment Custody and The Community, which was published in July 1988. That Paper contains provisional proposals for introducing, in England and Wales, a new kind of non-custodial order which could contain elements of community service and compensation coupled with intensive supervision and, possibly, some curtailment of liberty in the form of a night curfew or electronic monitoring. In presenting those proposals it is said to be the Government's view that "custody should be reserved as punishment for very serious offences, especially when the offender is violent and a continuing risk to the public".[2] However, those words represent the views of the present Government, not Parliament, and it remains to be seen whether or not effect will be given to them in future legislation. A White Paper, containing proposals relating to those, and other, matters is expected to be published early in 1990.

While the present absence of legislative guidance may be regretted (and is regretted by many) it does not mean that judges in Great Britain are left entirely rudderless when it comes to selecting and imposing a sentence. There are other ways in which some guidance is offered, though the ways in which that is done are somewhat different in England and Wales and in Scotland.

Sentencing guidance in England and Wales

There are at present three main ways by which some consistency in sentencing may be achieved in England and Wales.

These are: guideline judgments by the Court of Appeal; the activities of the Judicial Studies Board; and local and national agreements and guidelines among judges or magistrates sitting in the same court or district.

Guideline judgments. For some years now the Court of Appeal (Criminal Division) has adopted the practice of using an appeal against sentence as an opportunity to express a view on the appropriate sentence levels for different manifestations of a particular offence. Such "guideline judgments", as they are known, are given approximately twice or three times a year,[3] and well known examples have concerned drug offences,[4] causing death by reckless driving,[5] and rape.[6] In such cases the court will normally specify what ought, in its view, to be the sentence, or sentence range, for offences of varying degrees of gravity, and may also identify aggravating and mitigating factors which would entitle a sentencer to select a sentence above or below the guideline levels.

On one view the giving of guidance in this way is no more than a natural extension of the normal functions of an appeal court, and as such it may be more acceptable to other judges than guidance imposed by an outside body such as Parliament. On the other hand, guideline judgments have been criticised on a number of grounds. First, it is said that guideline sentences may be unrealistically high since they have been determined by a court which is accustomed to dealing only with sentences which are appealed: the court has no experience of the general run of sentences for those same offences which may be much lower, and which are never the subject of appeal. Second, it is said that, since guideline judgments are only given occasionally and in relation to a small number of offences, it is not possible to construct any coherent sentencing policy out of them. (In fairness, the Court of Appeal has never claimed that it is trying to formulate a general sentencing policy by means of guideline judgments.) Third, and this is perhaps a more significant consequence of the foregoing criticism, it is said that, since guideline judgments are only delivered in relation to the most serious offences, they offer no guidance in relation to the mass of less serious offences which are dealt with daily in the Crown Courts and the magistrates' courts.

Judicial Studies Board. For many years judges in England and Wales have met together from time to time to discuss matters of common interest, including sentencing. Some years ago, however, it was decided to coordinate such activities, and to support them, by the creation of the Judicial Studies Board. This Board is presided over by a High Court judge, and it arranges meetings, seminars and conferences at which, among other things, judges are kept informed about a range of topics concerning sentencing, at which judges can discuss among themselves their approach to particular sentencing problems, and at which, from time to time, judges take part in sentencing exercises. Additionally, the Judicial Studies Board prepares, and sends to all judges, a regular supply of information about

matters such as new or impending legislation, and recently decided cases of importance.

Local agreements. It has been common for some years, particularly in magistrates' courts, for local benches to adopt agreed "starting points" for sentencing. Since the fine is the most common penalty in such courts, the starting point in relation to a given offence will normally be expressed as a fine of a certain amount on the assumption that the offence is an average one of its kind, that the offender is a first offender, and that he is earning average wages. The actual penalty in any case may then be fixed above or below that starting point depending on the aggravating or mitigating factors which are present. This sort of approach goes a considerable way towards achieving some consistency in sentencing, but of course it may do so only on a very localised basis. The starting points selected by the magistrates in town A may be quite different from those selected by their counterparts in town B, and so any consistency that is achieved may only be of a very limited kind.

To meet this problem the Magistrates' Association has very recently (September 1989) published a provisional Sentencing Guide for Criminal Offences (other than Road Traffic).[6] Although the use of this Guide is not mandatory, it is hoped that all magistrates will use it as a basis for their sentencing decisions. The Guide lists all the common offences which are tried in magistrates' courts and, in each case, sets out a guideline penalty (usually a fine) together with various plus or minus "seriousness indicators". Although the aim of the Guide is to bring about greater consistency in sentencing, it is stressed that "the guideline is the point from which it is hoped magistrates will start, not where they will finish". The Guide is a bold step in relation to achieving consistency for less serious offences, and its effectiveness will no doubt be watched with interest.

Other means of achieving consistency in England and Wales

Although the foregoing represent the main ways by which some attempt is made to achieve consistency, there are others which might go some way to realising that result. One is the right which was recently given to the Attorney General to refer to the Court of Appeal sentences which are thought to be unduly lenient.[7] It seems to be fairly clear that this new power was introduced, not so much for the purpose of trying to achieve consistency in sentencing, but rather as a response to a series of well publicised cases where the sentences were perceived as being excessively lenient. Nonetheless, it is possible that the achievement of greater consistency might be a consequence of this new procedure, provided of course that it were to be utilised with some frequency. For the time being it is too early to say whether or not that will be the case.

Finally, it should not be overlooked that, at least in courts where several judges sit regularly, a degree of consistency in

sentencing may be achieved simply by virtue of the fact that those judges are likely to be aware of each other's views and sentencing practices, and may as a consequence adopt some measure of uniformity of approach. However, that consequence cannot be guaranteed, and any consistency which does flow from working proximity alone may of course be very local in character.

Sentencing guidance in Scotland

In Scotland a limited amount of guidance on appropriate levels of sentence is to be found in the decisions of the Court of Criminal Appeal, sitting within the High Court. However, that Court has never sought to offer explicit guidance of the kind that has been favoured in recent years by the Court of Appeal in England. Normally the Court confines its attention to the circumstances of the particular case before it, and only very rarely does it make pronouncements which have a wider effect. The result is that, although it is never expressly stated, a kind of tariff can in fact be discerned from the Court's judgments, though that is so only in relation to a small number of very serious offences such as, for example, rape or armed robbery. So far as less serious cases are concerned, there is no obvious pattern which might be followed by judges sitting alone.

Unlike the position in England and Wales, there is in Scotland no equivalent to the Judicial Studies Board, nor has any attempt been made so far to produce a guide for sentencers similar to that recently prepared by the Magistrates' Association. It is also the position for the present that, in Scotland, the Crown has no right of appeal against sentences which are thought to be too low: the recent statutory innovation referred to above applies only in England and Wales. Newly appointed sheriffs, and justices in the district court, do attend introductory training courses at which some attention is given to sentencing; but as a rule such courses are concerned with the general approach to sentencing and with its attendant procedures, and they do not aim to offer guidance on sentencing choice and sentencing levels. In the result Scottish judges at all levels are currently offered much less guidance on sentencing than are their colleagues in England and Wales.

Other moves towards achieving consistency

(a) Unitary fines

Both in Scotland and in England and Wales some thought is currently being given to the possible introduction of a unitary or day fine system similar to that already in use in countries like Sweden and West Germany. Under such a system a unit would be calculated for each offender on the basis of the amount which he could reasonably be expected to pay towards a fine on a daily, or possibly a weekly, basis, and the fine would then be expressed in terms of a number of such units. The number of

units would be determined having regard to such considerations as the seriousness of the offence, the offender's record, and so on. An experimental unitary fine system has now been operating for more than a year at four magistrates' courts in England and Wales.

The main perceived advantage of a unitary fine system is that it will produce greater equivalence of impact between offenders of different financial means. It does not, however, guarantee overall consistency in sentencing since the determination of the number of units for a given offence will remain within the discretion of the sentencing court. In the experiment referred to above the courts have had their existing guidelines converted to show numbers of units rather than amounts of money; but, as noted earlier, such guidelines are to be found as a rule only in magistrates' courts, and any consistency which they achieve might not be reflected were unitary fines to be used in all courts.

(b) Parole and early release

Although the main emphasis in any discussion about consistency tends to be on the sentence selected by a sentencing court, it is as well to remember that any attempts to achieve consistency at that stage can be undermined at a later stage by virtue of administrative decisions concerning parole or other early forms of release. In this regard it is important to note that in Great Britain, as in some other jurisdictions, there may be a tension between the punitive aims of a sentencing court and the aims of a parole board which may be largely measured in terms of rehabilition and continuing dangerousness.

The present position in Great Britain (ignoring for present purposes some minor qualifications) is that offenders sentenced to determinate periods of imprisonment are entitled to a one-third remission of sentence for good behaviour. Moreover, such offenders may be considered for discretionary release on parole after they have served one-third or one year (in England and Wales six months) of their sentence, whichever period is the greater. Since the grant of parole is a discretionary matter, similar and consistent sentences of imprisonment may in fact turn out to be dissimilar and inconsistent in their actual operation with offenders being released on different dates notwithstanding that they had all received identical terms of imprisonment. Conversely, a judge in England, applying rational and consistent principles, might discriminate in sentencing three co-defendants by sentencing one to nine months imprisonment, one to 15 months imprisonment, and one to 18 months imprisonment. In practice, because of the operation of remission and parole, all three might be released from prison on the same day after serving six months of sentence. Needless to say, it is just as inconsistent for different cases to be dealt with in the same way as it is for similar cases to be dealt with in different ways.

In response to criticisms of the present parole system two committees of inquiry were established, in 1987 and 1988 respectively, to examine the operation of parole in England and Wales and in Scotland. The English committee, under the chairmanship of Lord Carlisle reported at the end of 1988, and the Scottish committee, under the chairmanship of Lord Kincraig, did so early in 1989.[8] Although the recommendations of the two committees differ on some points of detail, both express one of their main aims as being to restore some certainty in sentencing. To that end they propose that parole, with its discretionary system of release, should be reserved only for those serving long, determinate sentences.[9] In the case of all other determinate sentences it is recommended that there should be automatic conditional release at the half-way point in a sentence with a liability to recall for the balance of the sentence in the event of re-offending within the unexpired balance. These reports are presently being considered by Government, and it remains to be seen whether any implementing legislation will follow.

CRIMINAL JUSTICE ACT 1982
(as amended)

s.1(4) A court may not--

(a) pass a sentence of detention in a young offender institution; or

(b) pass a sentence of custody for life under section 8(2) below,

unless it is satisfied--

(i) that the circumstances, including the nature and the gravity of the offence, are such that if the offender were aged 21 or over the court would pass a sentence of imprisonment; and

(ii) that he qualifies for a custodial sentence.

s.1(4A) An offender qualifies for a custodial sentence if--

(a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or

(b) only a custodial sentence would be adequate to protect the public from serious harm from him; or

(c) the offence of which he as been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified.

FOOTNOTES

1. Cm 424.

2. Ibid, para 1.8.

3. R v Aramah (1982) 4 Cr App R (S) 407.

4. R v Boswell [1984] 1 WLR 1047.

5. R v Billam [1986] 1 All ER 985.

6. For some years now the Magistrates' Association has published, for the use of magistrates, a table of suggested penalties for road traffic offences.

7. Criminal Justice Act 1988, ss 35, 36.

8. The Parole System in England and Wales - Report of the Review Committee, 1988, HMSO, Cm 532; Parole and Related Issues in Scotland - Report of the Review Committee, 1989, HMSO, Cm 598.

9. Carlisle Report: over four years; Kincraig Report: over five years.

SENTENCING IN NEW ZEALAND

by

John Henry

Court structure

There are two courts of original jurisdiction, the District Court and the High Court. The District Court deals with summary offences and indictable offences triable summarily. It has limited jurisdiction to conduct jury trials. The High Court is concerned with what could be described as the more serious indictable offences. An appeal lies to the High Court sitting as a single Judge and from the High Court to the Court of Appeal, which sits with a minimum of three Judges.

Sentencing provisions

The statutory provision creating an offence (all offences are statutorily based) also provides the maximum penalty which that offence can attract. In some instances a minimum penalty is also provided, but in general those are confined to offences of a regulatory nature or relate to the removal of a privilege such as disqualification from holding a licence to drive a motor vehicle. There are also examples of mandatory penalties, the most notable being murder for which a sentence of life imprisonment must be imposed. Subject to those somewhat rare exceptions, the particular statute will leave the Court with a wide discretion so as to enable the particular circumstances of the offences and of the offender to be assessed. The exercise of this discretion is controlled primarily from two different sources.

The first is a general statute, namely the Criminal Justice Act 1985, which inter alia provides the Court with a variety of sentencing options and also contains guidelines in some instances which the Court must apply. (Some extracts from the 1985 Act are reproduced as an appendix to this part of the paper.) The purpose of the Act is to bring sentencing practices and principles up to date in the light of social changes. Main objectives include the protection of the community from violent offenders, the creation of a cost-effective system with an increased emphasis on community participation and a recognition of the effects of crime on victims. Imprisonment for property and minor offences is discouraged. The statutory options which are in theory available wherever a sentence of imprisonment may be imposed include:

.. discharge without conviction

.. convict and discharge

.. come up for sentence if called upon

.. imposition of a fine

.. reparation

.. imposition of a community-based sentence involving the carrying out of some form of community service

.. periodic detention
(weekend residential work programmes)

.. supervision (probation)

.. corrective training
(a three months full-time custodial sentence for young offenders only)

.. preventive detention
(indefinite imprisonment, used primarily for persistent sex offenders).

The guidelines contained in the Act lay down certain matters of policy for the Courts to follow. For example:

violent offenders are to be imprisoned in the absence of special circumstances (s 5)

offences against property punishable by 7 years imprisonment or less are not to carry imprisonment in the absence of special circumstances (s 6)

any sentence of imprisonment to be as short as possible (s 7)

an offender under 16 years of age is not to be imprisoned for an offence that is not purely indictable (ie not triable summarily in the District Court and therefore necessarily of a serious nature)

imprisonment is not to be imposed unless the offender has received (or refused to accept) legal representation (s 10)

time spent in custody awaiting trial or sentence must be taken into account (s 81)

eligibility for parole is in general not a relevant factor. The Court is not empowered to order a non-parole period of imprisonment.

In practice these guidelines have generally been found to be of assistance in sentencing in that they help to define broad parameters and to clarify the social policies determined by government. It is believed they have contributed to meeting the problem of consistency, and probably also have had a favourable effect on the number of persons imprisoned.

Court of Appeal

The second source of control is the Court of Appeal which tends to set patterns of a general nature in its overall appellate consideration of sentences brought before it by either the offender or the Crown. Of recent years the Crown's right of appeal against inadequacy of sentences has been used and this

has had the effect of patterns becoming more readily discernible. The Court of Appeal also from time to time makes statements of principle, setting out what are known as "tariff" sentences for the guidance of the Courts of original jurisdiction for certain types of offending and thus promoting consistency. Examples are:

RAPE

R v Puru [1984] 1 NZLR 248
R v Te Pou [1985] 2 NZLR 508
R v Clark [1987] 1 NZLR 380

SEXUAL ABUSE OF CHILDREN

(cases as yet unreported)

AGGRAVATED ROBBERY

R v Moananui [1983] NZLR 537

DRUG OFFENCES

R v Smith [1980] 1 NZLR 412
R v Urlich [1981] 1 NZLR 310
R v Latta [1985] 2 NZLR 504

Reform proposals

(a) A committee is presently considering the establishment of a sentencing information system which would be available on computer retrieval to demonstrate the range of sentences imposed for similar types of offending. No firm proposal has yet been formulated but the committee has indicated its initial preference for a statistics base similar to that operating in Canada, a variation of which is also understood to be used in New South Wales.

(b) A Ministerial inquiry into the prisons system recently reported to the Minister of Justice. The inquiry covered wide-ranging topics relevant to all aspects of the system, including the philosophy of imprisonment as being an answer to crime. The effectiveness of imprisonment as a means of achieving its stated aims is questioned by the report, particularly in the light of a high prison population, the undue proportion of prisoners being of Maori origin, and the extent of recidivism. For the purposes of this paper, the relevant recommendations centre on a system of habilitation centres, described as a range of therapeutic centres in which offenders are contained in custody. Whether or not such a system would require a consequential change in the assessment of the length of custodial sentences will need consideration by the Courts in due course. The report suggests a general change of approach which may well have an effect on the appropriateness of present sentencing principles.

CRIMINAL JUSTICE ACT 1985 (AS AMENDED)

SOME RELEVANT PROVISIONS

5. Violent offenders to be imprisoned except in special circumstances

(1) Where--

(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and

(b) The court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(2) Where--

(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and

(b) The offender has previously been convicted on at least 1 occasion within the preceding 2 years of such an offence; and

(c) The court is satisfied that, in the course of committing the offence, and in the course of committing the previous offence, the offender used violence against, or caused danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(3) In determining the length of any sentence of imprisonment to be imposed in any case to which subsection (1) or subsection (2) of this section applies, the court shall have regard, among other matters, to the need to protect the public.

(4) This section shall be read subject to section 8 of this Act.

5A. Violent offending while on bail, etc.

(1) Where--

(a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and

(b) The offender was, at the time of committing the offence, on bail or remanded at large in respect of any other offence involving violence against, or danger to the safety of, any such person; and

(c) The court is satisfied that, in the course of committing the offences, the offender used violence against, or caused danger to the safety of, any other person,--

the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.

(2) In determining the length of any sentence of imprisonment to be imposed in any case to which subsection (1) of this section applies, the court shall have regard, among other matters, to the need to protect the public.

(3) Any sentence of imprisonment imposed by the Court shall be cumulative upon any sentence of imprisonment to which the offender is then subject for the offence for which the offender had been on bail or remanded at large, unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the sentence should be concurrent with the earlier sentence.

(4) This section shall be read subject to section 8 of this Act.

6. Offenders against property not to be detained except in special circumstances--

Where an offender is convicted of an offence against property punishable by imprisonment for a term of 7 years or less, the court shall not impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate.

7. General limitation on imprisonment--

(1) Where an offender is convicted of an offence punishable by imprisonment, the court shall, in considering the sentence it should impose, have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with promoting the safety of the community.

(2) Where the court considers that it should impose a sentence of imprisonment, the term of the sentence shall be as short as is, in the opinion of the court, consonant with promoting the safety of the community.

(3) This section shall be read subject to section 5 of this Act.

8. Limitation on imprisonment of persons under 16 years--

(1) No court shall impose a sentence of imprisonment on a person who at the time of conviction is under the age of 16 years except for a purely indictable offence.

(2) In subsection (1) of this section, a "purely indictable offence" means any indictable offence within the meaning of section 2 of the Summary Proceedings Act 1957, other than an offence for which, by virtue of section 6 of that Act, proceedings may be taken in a summary way in accordance with that Act.

9. Corrective training or imprisonment may be imposed where offender unlikely to comply with other sentences--

Nothing in section 6 or section 7(1) of this Act shall limit the discretion of the court to impose a full-time custodial sentence on an offender where the court is satisfied on reasonable grounds that the offender is unlikely to comply with any other sentence that it could lawfully impose and that would otherwise be appropriate.

11. Reparation to be considered in all appropriate cases--

In every case where an offender is convicted of an offence for which a sentence to make reparation may be imposed, the court shall impose such a sentence (whether by itself or in conjunction with any other sentence or order) unless it is satisfied that it would be inappropriate to do so.

12. Court may take into account offer to make amends--

(1) In imposing a sentence in any case, a court may take into account any offer of compensation made by or on behalf of the offender to the victim.

(2) In deciding whether and to what extent any such offer of compensation should be taken into account, a court may have regard to whether or not the offer has been accepted by the victim as expiating or mitigating the wrong.

(3) Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn any question of sentence pending the payment of compensation.

12A. Court not to take into account alcohol or drugs, etc., in certain cases--

(1) Subject to subsection (2) of this section, where--

(a) An offender is convicted of an offence; and

(b) The court is satisfied that, in the course of committing the offence, the offender used violence against, or caused danger to, any other person,--

the court, in imposing a sentence, shall not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by alcohol or any drug or other substance, unless the court is satisfied that the offender did not consume or use the alcohol, drug, or other substance voluntarily.

(2) Nothing in subsection (1) of this section shall limit the power of the court to impose any sentence or to make any order or to give any direction intended to promote the rehabilitation of the offender.

FEDERAL SENTENCING GUIDELINES IN THE UNITED STATES OF AMERICA

by

Jon O Newman

Background

In the United States, the effort to lessen disparity in sentencing has produced significant developments, whose ultimate worth remains to be determined. The most comprehensive approach was adopted by the federal government. All sentences of those committing federal crimes after November 1, 1987, are now imposed by federal judges in accordance with an elaborate system of "sentencing guidelines".

Though the great majority of crimes in the United States are prosecuted in state courts and most ordinary "street" crimes such as murder, assault, rape, and robbery are not within the authority of the federal courts, federal crimes include a wide variety of criminal conduct, ranging from special offenses such as federal tax evasion to more ordinary offenses involving drugs, gambling, bank robbery, and a wide variety of frauds. Many crimes may be prosecuted in both federal and state courts. Drug offenses are a prime example. In fiscal year 1988, the federal courts concluded cases involving 56,441 defendants. The volume and range of federal criminal jurisdiction is therefore sufficiently broad to warrant examination of the origin, operation, and merits of the federal sentencing guideline system.

Three developments contributed to the evolution of the sentencing guidelines, two involving policy and one involving technique. During the 1960s and 1970s, the amount of reported crime in the United States increased, and crime became a political issue. Sentiment for more effective law enforcement was frequently expressed, often accompanied by demands for more severe punishment. Conservative proponents of this point of view sought not only longer prison sentences but also changes in the parole system to prevent the early release of sentenced prisoners.

During this same period, liberals approaching criminal law issues from quite a different perspective also found much to criticise in sentencing patterns. Concerned about fairness, they criticized disparities in sentencing and pointed out that even where somewhat similar sentences were imposed, the parole system contributed to disparities because of seemingly unjustified variations in the times served before parole release. Liberals who had at one time championed rehabilitation as a core concept in sentencing became disillusioned, some doubting that rehabilitation occurred during incarceration and most agreeing that parole authorities lacked the ability to determine when sufficient rehabilitation had occurred to warrant parole release.

The technical development occurred in 1973 when the United States Parole Board (now called Commission) began to use guidelines for making parole release decisions. Recognizing the disparities in its own decision-making, the Board analyzed thousands of its decisions and attempted to determine the average time served for various combinations of offenses and

offender characteristics. The Board produced a table or grid with several columns for different degrees of severity of the offense and several rows for different point scores that reflect adverse aspects about the offender, primarily the extent of his prior record. At the intersection of each row and column was a different range of months, with the high figure of each range no more than four months greater than the low figure. The Board made its parole release decisions according to the range appropriate for the prisoner as indicated in the table in about 85% of all cases, departing about equally above and below the indicated release ranges in the remaining 15%.

The Sentencing Reform Act 1984

The political interest in punishment that was both more severe and more fair coupled with the use of a mechanism for structuring penal decisions combined to produce a climate favorable to sentencing guidelines. In 1984 an unusual coalition of conservatives and liberals joined forces in the United States Congress to enact the Sentencing Reform Act 1984. This law created a Sentencing Commission and assigned it the task of devising sentencing guidelines. The statute requires federal judges to use the guideline system for all sentences. Previously a judge had discretion to select a sentence anywhere from probation up to the maximum penalty specified for a particular crime, except in those few instances where the law defining the offense also specified a minimum sentence. The 1984 law provides that the sentence must be selected from within the range of permissible sentences set by the sentencing guidelines, except in those situations where the judge determines that the case at hand presents "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines".

In 1986, the Commission, which includes three federal judges, issued its first set of guidelines, applicable to offenses occurring after November 1, 1987. The guidelines were used infrequently at first, both because of the time for post-November 1 crimes to reach the sentencing stage and because about half the federal judges ruled that the guideline system violated the United States Constitution. In 1989, the United States Supreme Court ruled that the guidelines were constitutional, and they are now used for an increasing percentage of federal crimes as offenses occurring after the effective date of the guidelines reach the federal courts.

The sentencing guidelines

The guidelines are extraordinarily comprehensive and detailed, filling a book of more than 200 pages. They apply to all federal crimes. They work as follows: For each type of offense, for example, drugs, robbery, or fraud, a "base offense level" is set forth. Specific numerical values are specified that increase the base offense level because of aggravating factors, for example,

the extent of injury inflicted or the amount of money taken. Further adjustments are specified, again with numerical values, depending on characteristics of the victim and the offender's role in the offense. These adjustments are added to the base offense level to yield a final offense level. Points are assigned to reflect the seriousness of the offender's prior criminal history.

The various offense levels and criminal history scores are arranged in a sentencing table, resembling the parole guidelines in format. (That table is reproduced for reference as an appendix to this part of the paper. The version shown in that appendix is the original one: it has subsequently been modified very slightly.) The sentencing table contains 43 rows, one for each of the offense levels, and six columns for different criminal history point totals. At the intersection of each row and column is a sentencing range that sets the minimum and maximum sentences for an offender with the appropriate offense level and criminal history. The range between the minimum and the maximum of each range is usually six months at the less severe levels of punishment and as much as 80 months at the most severe levels. The judge selects a sentence from within the specified range, but has limited discretion to "depart" and select a sentence either above or below the guideline range.

As an example, in a robbery case, the judge would start with the base offense level for robbery, which is 18. The judge would then add 3 levels because the amount of money taken was between $50,000 and $250,000, then add 3 more levels because a weapon was used, then add 2 more levels because injury (but not serious injury) occurred, then add 2 more levels because one of the bank tellers was tied up, then subtract 2 levels because the offender played a minor role in the offense, such as driving the getaway car, and then subtract 2 more levels because the offender acknowledged responsibility for the crime. The final offense level is therefore 24. The judge then calculates the criminal history score, assigning 2 points for a prior conviction for which the offender was sentenced to six months and 1 point for a prior conviction for which the offender was sentenced to 30 days. The total of 3 points places the offender in criminal history category II. The judge then consults the sentencing table and sees that for offense level 24 and criminal history category II, the sentence range is 57 to 71 months. The judge then selects a sentence within this range, unless the cause presents special circumstances justifying a departure above or below this range.

Parole and right of appeal

The Sentencing Reform Act also made two important changes in federal sentencing practices, in addition to requiring use of sentencing guidelines. First, the Act abolished parole. Whatever sentence is imposed under the guideline system, whether within the guideline range or, where permitted, as a departure from the range, is served without the possibility of reduction by

parole release. The sentence can be shortened by about one-seventh since the prisoner may earn 54 days a year for good behavior.

Second, the Act authorizes appellate review of sentences. Previously federal appellate courts had no authority to entertain appeals challenging the severity of the sentence, except in the extremely rare situation where the sentence was so extraordinary as to violate the constitutional ban against cruel and unusual punishments. Under the new Act, every sentence may be appealed. Sentences imposed within the applicable guideline range may be challenged on the ground that the sentencing judge selected an incorrect guideline; sentences imposed outside the applicable guidelines range may be challenged on the ground that the departure was unreasonable.

Assessment of sentencing guidelines

Since the number of cases involving offenses after the effective date of the sentencing guidelines is still fairly small (though increasing rapidly), it is too early to draw firm conclusions about them. Initially, nearly all of the federal judges were opposed to the guidelines, finding them too complicated and too restrictive of their discretion. With the guidelines now in use, that attitude is beginning to change, though most federal judges would still prefer to return to the era before guidelines. There is reason to believe that sentences have become more severe, especially for drug offenses, but that increase is attributable to new federal laws that require high mandatory minimum sentences, with the guidelines merely reflecting these new statutory requirements.

Whether disparities are being reduced has not yet been assessed. Some prosecutors have reported a reduction in the percent of defendants pleading guilty, presumably because defendants do not receive nearly as great a reduction in sentence for forgoing a trial under the guidelines as they did previously. However, data on the incidence of guilty pleas has not been systematically assembled. The appellate courts are seeing a number of appeals, but thus far the total is not overwhelming. As had been hoped, the appellate courts, in deciding guideline cases, are beginning to fashion sentencing "law", something that was virtually absent from federal criminal jurisprudence. Ultimate assessment of the guideline experience will have to await at least another year of the new system.

In a few of the state jurisdictions in the United States, limited guideline systems are in use. These systems are neither as comprehensive nor as complicated as the federal guideline system. Most apply only to selected categories of offenses and focus primarily on the decision whether or not to incarcerate, rather than on sentence length.

The United States experience with sentencing guidelines, especially at the federal level, is a bold experiment in structuring the discretion of sentencing judges. It will warrant careful examination in the coming years.

United States Sentencing Commission

SENTENCING TABLE

Guideline Range in Months of Imprisonment

Offense Level	Criminal History Category I (0)	II (1 or 2)	III (3 or 4)	IV (5 or 6)	V (7 or 8)	VI (9 or more)
1	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 127	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

STRUCTURING SENTENCING DISCRETION: A COMPARISON OF TECHNIQUES

by

Andrew von Hirsch

This paper attempts to compare, briefly, different techniques for structuring sentencing discretion that have recently been tried or proposed in several jurisdictions, including the United States, Canada, England and Sweden.

I SENTENCING COMMISSION GUIDELINES

Several jurisdictions, mostly in the United States, have tried a variety of approaches to guiding sentencing discretion: mandatory minimum sentences, statutory presumptive sentences, and guidelines for parole release.[1] One technique, however, has attracted particular notice and I shall focus on it: sentencing commission guidelines.[2]

1. The elements of sentencing commission guidelines

Sentencing commission guidelines are now in effect in Minnesota, Washington State, Pennsylvania and the US federal judicial system. Several more States are considering their use.[3] A government-appointed study commission has recently proposed sentencing guidelines for Canada.[4]

The guideline device constitutes an amalgam of three elements. The first element is **presumptive sentencing ranges.** Ranges are set forth as the ordinarily applicable penalties. Usually, these ranges are arrayed in tabular form on a grid, and depend on the gravity of the current crime and the extent of the criminal record. The sentencing judge is expected ordinarily to impose sentence within the prescribed ranges. However, the judge may depart from the ranges on account of circumstances of aggravation and mitigation, and the guidelines usually provide a non-exclusive list of qualifying aggravating or mitigating circumstances. When judges depart from the guidelines, they are required to state their reasons, and such departures, and their grounds, are appealable. The idea is to provide courts with consistent starting points when they sentence, while still allowing flexibility for the out-of-the-ordinary cases.

Because guidelines are often expressed in numbers on a grid, they appear to impose narrow limits on judicial discretion. The actual degree of constraint, however, depends on the width of the presumptive ranges and on the standard for departures. Wide presumptive ranges and easy departure criteria may give judges nearly as much leeway as they have under traditional sentencing law. Narrow ranges and strict departure standards will constrain discretion significantly. Different US jurisdictions differ significantly in this respect: Minnesota, for example, has considerably more tightly-drawn standards on the use of imprisonment than Pennsylvania.

Appellate review is the second major element. Traditionally, US sentencing law did not provide for judicial review. In States in which sentencing guidelines are established, the enabling statute also provides for judicial review. Since the standards are not

self-executing, judicial review is essential to insure that sentencing courts apply the guidelines correctly. Review is also necessary in order to develop a case law interpreting the grounds for departure from the presumptive ranges.

A rule-making commission is the third element. The authority to write the guidelines is delegated by the legislature to an independent rule-making commission. A commission is supposed to have more time for developing the standards than a legislature, to have greater opportunity to develop specialized expertise, and to be better insulated from political pressures (particularly, pressures to inflate sentences to unrealistic levels, in order to demonstrate "toughness" to the electorate). In some jurisdictions - eg, Minnesota and the US federal system - the enabling statute provides that the guidelines, after their issuance by the commission, are to take effect unless the legislature interposes its veto by enacting a resolution of disapproval. In other jurisdictions - eg, Washington State - the commission's proposed guidelines must be affirmatively approved by the legislature.[5]

The foregoing three elements are, in theory, separable. A jurisdiction might enact presumptive sentence ranges through legislation, without use of a sentencing commission. (Indeed, statutory presumptive-sentence schemes take very much this approach.) In the United States, however, direct legislative involvement in writing the standards has proven problematical, because of the pressures of "law and order" politics.

2. The variety of guideline approaches

To suggest the variety of sentencing guidelines, let me mention the salient features of three schemes. The **Minnesota** guidelines took effect in 1980.[6] The guidelines purport to reflect a desert rationale, albeit in a modified form that gives somewhat more emphasis to the prior criminal record than a pure desert rationale would. The guidelines are designed to limit the use of imprisonment primarily to more serious offenses - principally, those against the person. The ranges in the grid cells prescribing imprisonment are fairly narrow, and departures are supposed to be invoked sparingly. The guidelines, as originally written, were designed not to increase the aggregate use of imprisonment. A major limitation, however, is that the guidelines do not purport to regulate non-prison sanctions - thus leaving the choice between jail and non-custodial penalties, and the choice among non-custodial penalties, substantially unregulated.

The **US Sentencing Commission's** guidelines,[7] applicable only to federal crimes, took effect in November 1987. The guidelines do not opt for any particular rationale - indeed, expressly abjure such a choice. The standards are quite severe, with probation permitted only for relatively modest thefts and similar offenses. Lower-middle level offenses are to be dealt with by community confinement, and other more serious ones by imprisonment. The Commission estimates that the standards will lead to a doubling

of the federal prison population, but offers no suggestions about how the federal corrections system should absorb such an increase. However, the guidelines offer broad authority for departure from the guideline ranges. Thus it is uncertain to what extent the guidelines will actually foster greater consistency in sentencing practice.

The **proposed Canadian guidelines system**[8] would involve the creation of a permanent sentencing commission charged with writing guidelines applicable throughout Canada. According to the proposal, an explicit rationale would be provided, emphasizing desert. The availability of correctional resources would be systematically considered when the guidelines are written. Imprisonment would be invoked considerably more sparingly than under the US federal system.

Two innovations of the Canadian Commission are worth noting. First, the proposal would provide for a less abrupt transition from imprisonment to lesser sanctions than is found in the Minnesota and Washington guidelines. Each offense category would be assigned one of four presumptions. Offenses most serious would receive an unqualified presumption of incarceration, those least serious an unqualified presumption of non-custody. Between these would lie two additional, qualified presumptions, applicable to offenses in the middle range of gravity. Under these qualified presumptions, the decision to incarcerate would depend upon whether the act was a more (or less) serious instance of that category of offense, and also on the extent of the criminal record. Second, the permanent sentencing commission would be called upon to include, in its standards, guidelines governing the choice among non-custodial penalties. This would be a marked improvement over Minnesota's standards, where that choice is left to discretion without explicit guidance.

3. Factors affecting the quality of guidelines

The quality of a sentencing commission's guidelines depends upon the commission's willingness to undertake certain tasks.

(a) An explicit rationale. A sentencing commission, in writing its guidelines, needs to formulate an explicit rationale. Should the system emphasize punishing offenders in proportion with the gravity of crimes or, instead, rely more heavily on aims of deterrence or predicted risk? The choice of rationale is critical because the different penal aims are in potential conflict: whereas desert focuses chiefly on the gravity of the current crime, individual risk depends chiefly on early criminal record and social factors.[9] In the absence of an explicit rationale, the system may not serve <u>any</u> purpose: it may, for example, fail to punish proportionately while still failing to predict risk. Indeed, a chief defect of discretionary sentencing systems is the lack of a coherent rationale or policy. A sentencing commission is well suited to the task of choosing a rationale, because it can make its choice in an informed fashion.

An explicit rationale has value for the guidelines in two respects. The first is the formulation of the guidelines themselves.[10] Minnesota, for example, faced the choice of continuing to give the primary emphasis to the prior record (as the state's courts tended to do before the guidelines), or shifting toward substantially greater emphasis on the gravity of the current crime. Its choice of a rationale (the Commission opted for a modified form of desert rationale) helped decide this question in favor of the latter emphasis. A rationale is likewise useful in deciding what kind of factors should be listed as aggravating or mitigating - those that reflect increased or reduced harm and culpability, or those that reflect such other conceptions as risk or supposed need for treatment.

The other usefulness of a rationale is in providing guidance for the courts. Most sentencing guidelines provide a non-exclusive list of aggravating or mitigating factors, leaving the courts the power to add other kinds of factors. An explicit rationale helps provide the courts with guidance in choosing which additional factors are acceptable.

Two of the existing guideline systems - Minnesota's and Washington's - explicitly adopt a rationale emphasizing desert, as does Canada's proposed scheme. The Pennsylvania and US federal commissions make no such explicit choice, and it is not clear what rationale their guidelines reflect, if any. This is a major weakness. In particular, the courts will have great difficulty interpreting the rather open-textured departure rules of the federal guidelines without a coherent set of aims.[11]

Choosing a rationale does not mean the commission must choose one penal rationale to the exclusion of all others. But if a hybrid rationale is adopted, it is essential to make explicit the relationship among the various aims, and comparative weight to be accorded them. In the sentencing literature, several such hybrid models have been proposed.[12]

(b) Impact analysis. A sentencing commission needs to take prison capacity into account in writing its guidelines. If the guidelines fail to do so and would overtax available penal resources, they will have to be disregarded or circumvented in actual sentencing decisions.

Impact analysis leaves the commission still free to alter comparative severities to fit its chosen rationale. Minnesota, while attempting to keep aggregate use of imprisonment unchanged, shifted comparative severities markedly to fit its desert-oriented rationale, so as to give crimes against the person more punishment and property crimes less. Thus impact analysis is quite different from the "historical" approach to guidelines that some US jurisdictions have used: of basing sentences for particular crime categories on previous averages of time served.[13]

The Minnesota and Washington commissions set, as their aggregate population target under the guidelines, the existing capacity of the state's prisons. However, a commission could set a population target that was slightly lower than existing capacity - or slightly higher, provided that target was realistic. However, severe guidelines create strong incentives for avoidance.

II THE ENGLISH APPROACH: GUIDANCE BY CASE LAW ALONE

Sentencing guidelines provide numerical standards to guide the choice of sentence. The rule-maker (namely, the sentencing commission) prescribes the normally-recommended ranges of sentence, and the principal grounds for departure. The appellate courts' role is merely to enforce those standards, and to develop case law that interprets the guidelines' standards concerning the grounds for departure.

A quite different approach, in use in England, is to rely wholly on the appellate courts to supply the requisite guidance. The English statutes furnish virtually no principles on choice of sentence, and no sentencing guidelines exist. However, the Court of Appeal, Criminal Division, issues opinions when it reviews sentences from the lower courts. Recently, these opinions include so-called "guideline judgments", indicating normally-appropriate dispositions for selected types of crimes (eg, a "starting point" of five years' imprisonment for rape).[14]

One English writer, David Thomas, contends that the Court of Appeal's judgments, considered together, supply a substantial degree of guidance.[15] Other English observers, however, are less sanguine: they question the extent to which a discernable pattern emerges from the Court's decisions, and also question whether the lower courts, in the majority of cases that are not appealed, give much weight to the Court's sentencing judgments.[16] Moreover, the Court's decisions themselves are often less than satisfactory: claims about deterrence or treatment are made with little regard for the availability of supporting evidence; concerns about proportionality are not well articulated.[17]

Other jurisdictions that have relied only on the appellate courts have not even achieved what the English courts have. Despite ample appellate-review powers, the Swedish courts - before the recent legislation, to be discussed next - did not develop any comprehensive case-law jurisprudence of sentencing, and have not emulated the English Court's practice of issuing guideline judgments. Canadian appellate courts have shown a similar reluctance.[18] Left to their own devices, without explicit principles on choice of sentence stated in statute, appeal courts in most jurisdictions are likely to be unwilling to take the active policy-making role that the English scheme presupposes.

III PRINCIPLES FOR CHOICE OF SENTENCE: SWEDEN'S NEW STATUTE

A middle way between numerical sentencing guidelines and the English approach is Sweden's new technique: statutory principles governing the choice of sentence. Here, the rule-maker (in Sweden's case, the parliament) sets forth a rationale, and general principles governing choice of sentence. The courts are then expected to apply these principles to develop the tariff. Sweden's technique differs from sentencing guidelines in that no numbers are supplied, and the ranges recommended for specific offenses are supposed to be decided by the courts. It differs from the English approach, however, in that the courts will not be working in a vacuum when they develop the tariff: they receive guidance from the statute regarding the rationale to follow, the offense and offender characteristics that ordinarily should receive most weight, and the main kinds of situations in which prison sentences would be appropriate.

Sweden's legislation derives from, and elaborates upon, a Finnish sentencing-principles statute adopted in 1976.[19] The legislation was recommended by a government-appointed study commission, the Committee on Imprisonment, that issued its report in 1986.[20] With modest alterations, it was enacted by the Swedish Parliament in June 1988.[21]

The legislation[22] makes the choice of sentence depend chiefly on the "penal value" (ie, seriousness) of the offense of conviction. Penal value, under the statute, is determined by the degree of harmfulness of the conduct, and the offender's culpability in committing it. Aggravating and mitigating circumstances are listed in the statute, and these generally refer to situations of specially heightened or reduced harmfulness or culpability. Imprisonment is to be invoked chiefly in two situations: when the penal value (seriousness) of the conduct is high; and when the penal value is in the upper-middle range, and the offender has a significant criminal record.

This sentencing-principles approach has two important prerequisites. One concerns the rule-maker. Drafting sentencing principles is as exacting work as devising numerical standards. While one need not undertake the time-consuming task of filling numbers in a grid, this makes it all the more important to state the principles and criteria with some precision - and with the requisite understanding of the empirical and normative issues involved. The drafting body thus needs time and expertise. The Swedish standards are in statutory form, but the process of drafting was not unlike that which a sentencing commission would undertake. The work was done over a period of several years by a study commission aided by a working group of penologists, who were familiar with the sentencing literature and with reforms in other jurisdictions. More routine methods of drafting - for example, a bill written in a ministry - would have yielded less satisfactory results.

The second prerequisite is a supportive judiciary. There must be appellate courts willing to take the stated principles seriously, and to apply them in generating a tariff of normally-recommended dispositions; and there need to be cooperative lower courts. Sweden may well have such a judiciary. Swedish courts tend to give legislative declarations of purpose considerable weight, and to review committee reports and other legislative history in applying them. Appellate review of sentencing has long existed. Lower courts tend to be "legalistic" - that is, sensitive to appellate court guidance. In other jurisdictions, the judicial traditions may be otherwise. There, numerical guidance may provide more authoritative guidance: the trial judge is given to understand that he or she must sentence within the applicable range on the grid or else come forward with permitted reasons for departure, or else face reversal.

Were this sentencing-principles approach adopted in other jurisdictions, it might be supplemented by an advisory sentencing commission. The commission could both help formulate the standards for legislative approval, and provide courts with advice on applying the standards and generating the tariff.[23]

IV CONCLUDING THOUGHTS: COMPARING APPROACHES

What are the comparative merits of the various methods of structuring sentencing discretion, discussed in this paper?

Numerical sentencing guidelines offer more definitiveness: the tariff of normally-recommended dispositions is part of the guidelines themselves, and the courts have the less onerous task of enforcing the standards and developing a case law on departures. In jurisdictions where prison overcrowding is a serious potential problem, moreover, the standards can be written with estimates of available prison capacity in mind.

The potential drawback of numerical sentencing guidelines is that the numbers may take on a life of their own. Even though a sentencing commission is better insulated from political pressures than the legislature itself, it still must produce a table of numbers that meet legislative approval or at least avoid legislative repudiation. The search for acceptable-looking numbers can eclipse principled solutions. Even in Minnesota, the commission felt compelled, in order to make the standards more "saleable," to give more weight to the offender's criminal record than its own purported rationale would have indicated.[24] Sentencing guidelines, moreover, are likely to be accepted chiefly in jurisdictions already having a tradition of courts' applying and interpreting administrative rules.

Statutory sentencing principles, Swedish style, avoid the problem just mentioned, because the rule-maker is writing general principles, not specific numbers. It should be easier to gain assent, say, to the general principle that lesser felons (even with long records) ought not be imprisoned than to defend a

grid where a car thief convicted for the eighth time receives probation. With the principle established in law, it may be easier for the courts to apply it in most cases, and resort to imprisonment of such felons only in quite unusual situations. The approach might also permit evolution of more differentiated standards than can be stated on a simple grid. The potential drawback is the scheme's dependence on active court assistance in developing the tariff pursuant to the stated principles. Reluctant courts will mean that no consistent pattern of dispositions will emerge.

There may be no single answer about which is the preferable approach. What is needed is principled guidance for sentencers. Whether that guidance can best be provided by numerical guidance, or by a body of stated principles, will depend on the character of the legal system in the particular jurisdiction.

FOOTNOTES

1. See Tonry, Sentencing Reform Impacts. Washington, DC, US Government Printing Office, 1987.

2. For a fuller analysis of the sentencing commission device, see von Hirsch, Knapp and Tonry, The Sentencing Commission and its Guidelines (Boston: Northeastern University Press, 1987).

3. Oregon has approved a system of sentencing guidelines, in the spring of 1989. Louisiana and the District of Columbia are in the process of writing guidelines.

4. Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Canadian Government Publishing Centre, 1987).

5. For an analysis of a sentencing commission's statutory powers, see von Hirsch, Knapp and Tonry, supra note 2, ch 4.

6. For fuller discussion of the structure and rationale of Minnesota's guidelines, see von Hirsch, Knapp and Tonry, ch 5.

7. For a fuller analysis and critique of the US federal guidelines, see von Hirsch, "Federal Sentencing Guidelines: The United States and Canadian Schemes Compared", Occasional Papers, Center for Research in Crime and Justice, New York University Law School, 1988, pp 2-12.

8. For further analysis of the proposed Canadian scheme, see von Hirsch, supra note 7, pp 12-17.

9. von Hirsch, Past or Future Crimes (New Brunswick, NJ: Rutgers University Press, 1985), ch 11.

10. See von Hirsch, Knapp and Tonry, supra note 2, ch 5.

11. For further discussion of this problem as it relates to the US federal guidelines, see von Hirsch, "Federal Sentencing Guidelines", supra note 7, pp 5, 18.

12. See Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", 82 Northwestern Law Review 19 (1987); von Hirsch, "Hybrid Principles for Allocating Sanctions: A Response to Professor Robinson", 82 Northwestern Law Review 64 (1987); Tonry, "Prediction and Classification: Legal and Ethical Issues", in Prediction and Classification: Criminal Justice Decision Making, DM Gottfredson & M Tonry eds. (Chicago: University of Chicago Press, 1987), 367-413.

13. von Hirsch, "Federal Sentencing Guidelines", supra note 7, pp 5-6.

14. R v Billam, [1986] 1 All ER 985.

15. Thomas, Principles of Sentencing. London, Heinemann, 1979.

16. For a criticial analysis, see, eg, Ashworth, "Techniques of Guidance for Sentencing", [1984] Criminal Law Review 519.

17. See Harvey and Pease, "Guideline Judgments and Proportionality in Sentencing", [1987] Criminal Law Review 96.

18. Canadian Sentencing Commission, supra note 4, 78-86.

19. Penal Code of Finland, ch 6. The Finnish statute provides that the sentence should be in "just proportion" to the harm caused or risked by the offense, and the guilt (ie, culpability) of the offender as manifested in the offense. For fuller discussion of the Finnish statute, see von Hirsch, "Principles for Choosing Sanctions: Sweden's Proposed Sentencing Statute", 13 New England Journal on Criminal and Civil Confinement 171, 177-78 (1987).

20. Fangesestraffkomitten, Pafoljd for Brott, Stadens Offentliga Utredingar 1986: 13-15.

21. The statute's sentencing provisions become Chapters 29 and 30 of the Swedish Penal Code. For an English translation of these provisions, see von Hirsch and Jareborg, "Sweden's Sentencing Statute Enacted", [1989] Criminal Law Review 275.

22. For an analysis of the Swedish statutes see von Hirsch, "Principles for Choosing Sanctions", supra note 19, or von Hirsch "Guiding Principles for Sentencing: The Proposed Swedish Law" [1987] Criminal Law Review 746.

23. von Hirsch, "Principles for Choosing Sanctions", supra note 19, 189-90.

24. von Hirsch, Knapp and Tonry, supra note 2, ch 5.

PART 4

TOWARDS GREATER CONSISTENCY IN SENTENCING

by

Andrew Ashworth

This part of the paper seeks to draw together the various approaches to achieving consistency, and to point up their relative advantages and disadvantages. It is in two parts - first, what consistency involves; second, ways of promoting consistency. The second part appears to have the greater practical relevance, but experience suggests that it would be a mistake to debate "methods" without having devoted detailed consideration to what consistency involves and why it is thought desirable.

I WHAT CONSISTENCY INVOLVES

1. The paradox of consistency

The ideal of consistency is usually placed alongside fairness and justice in sentencing. Behind it lie the "rule of law" virtues of clear and open decisions regulated by standards formulated in advance. Whilst these virtues command widespread acceptance, their application to sentencing is not a straightforward matter. On the one hand, an attempt to foster consistency by requiring courts to impose uniform sentences for a certain type of offence might be criticised for producing inconsistency, in the sense that cases which should be treated differently are treated in the same way. The ideal of consistency is that like cases should be treated alike, and different cases differently. Consistency can therefore only be achieved if there is agreement on what cases are sufficiently "alike", ie on the factors which ought and ought not to affect the sentence of the court. This shows how the apparently simple concept of consistency becomes extremely complex in its operation in a sphere of decision-making like sentencing, to which so many different factors relating to offence and offender may be relevant. Another paradox is that the public expects to see consistency in sentencing, yet they often have a relatively crude concept of consistency and rarely learn all the relevant facts about a case. Thus sentences which fairly reflect differences between cases may be regarded as inconsistent by some members of the public.

2. Sentencing as one part of a system

There can be little doubt about the public importance of sentencing, as a symbol of the community's rejection of crime. The sentence of the court is a public declaration of how wrong a certain form of offending is. Yet sentencing may be seen as only one stage in a process, a process which involves several earlier and later decisions which inevitably exert some influence on the sentence. Thus the early decisions of prosecutors about whether to prosecute and what charge to bring have implications for the sentencing court. Cases which are not prosecuted do not come to court. Those cases which do come to court result from a particular charge laid by the prosecutor, which may constrain the court's actions in certain ways. Moreover, the prosecution and defence may reach an agreement which results in a plea of

guilty by the accused; in that case, the court's actions may be limited in their scope. Another influence at this stage is the pre-sentence report, which may be more or less influential according to its style and content. Then there are influences subsequent to the court's passing of the sentence. Probation officers play a key role here too, in their supervision of non-custodial sentences and their decisions whether or not to bring back to court those offenders who deviate from the requirements of the court order. Another obvious influence is parole: where there is a discretionary parole system, its operation can materially alter the practical effect of custodial sentences imposed by the courts.

Another reason for regarding sentencing as part of a system is that it is not the only way in which governments can seek to prevent lawbreaking and thereby protect the public. There is now a wide range of crime prevention techniques being used or being tried experimentally in different jurisdictions, ranging from educational initiatives, through situational crime prevention, to social crime prevention.[1] Approaches such as these may have a far greater potential for altering behaviour than the sentences of the courts. There is no ground for believing that sentencing and crime rates have a hydraulic relationship, so that when sentences go up the crime rate goes down, and vice versa.[2] Indeed court sentences are imposed on only a small minority of lawbreakers, since many crimes go unreported, many that are reported are not traced to anyone, and many that are traced are the work of youngsters, to whom normal sentencing policy is rarely applied.[3]

Implications:

— it is dangerous to assume that changing sentencing practice will change outcomes, unless care is taken to prevent "neutralising" practices by, eg prosecutors and parole boards;

-- it may be possible to bring about changes in sentencing practice by altering the practices of others, such as prosecutors, probation officers and parole boards.

-- it is wrong to regard sentencing as society's foremost defence against crime: other methods may be more effective in terms of public protection.

3. The aims of sentencing

Consistency in sentencing really means the consistent pursuit of certain aims, principles and policies in relation to sentencing. As Doob and Brodeur argue in their paper above, one cannot judge consistency without knowing what the aims are. Proposals for the reform of sentencing in recent years have recognised this, and most of the reports, after thorough reviews of the alternatives, have selected proportionality ("just deserts")[4] as the leading aim. The Canadian Sentencing Commission took this approach, as did the Australian Law Reform Commission.[5] Thus

the guiding principle is that sentences should be ranged in proportion to the relative seriousness of the crimes and the culpability of the offenders. This does not mean that all decisions about sentencing are rendered simple, as deductions from the overall aim of proportionality. Far from it - there are lively debates about the seriousness of offences, the significance of previous convictions, and the determinants of culpability.[6] But it does mean that those who have to make the decisions - whether legislators, judges or others - have an overall aim to steer towards.

A more sophisticated approach is to declare an overall aim, but to allow it to be displaced by other aims in specified crimes or for specified types of offender. A good example of this is the newly-enacted Swedish sentencing statute, which declares proportionality as the leading aim but allows, for example, rehabilitative considerations to have priority in certain types of case.[7] This recognises that different aims of sentencing may be justifiable for different types of case.

Much less sophisticated is the approach of "descriptive guidelines", ie devising sentencing standards which attempt merely to reproduce past practice. This was adopted by the United States Sentencing Commission as the basis for the federal sentencing guidelines (in force since 1987),[8] and was once proposed in England.[9] It may appear to be neutral as between aims of sentencing. In fact it is based on an unconsidered amalgam of aims, which gives no indication to the legislator or judge about the standards to be adopted in decision-making. It comes close to the "cafeteria" approach to sentencing aims, which announces a menu of various possible sentencing aims (eg proportionality, deterrence, rehabilitation, incapacitation) and leaves open the choice between them. This is a recipe for inconsistency.

Implications:

-- an important first step towards fostering consistency is to settle the aim or aims which are to be the basis for decision-making.

-- if no clear aims are declared, this is likely to result in divergent approaches and hence inconsistency.

4. Principles of sentencing

Even when the aims of sentencing are clearly formulated, there remain problems of a more detailed nature which must be tackled at the level of principle, and not left to be resolved by the court in each case. Three may be mentioned here - assessing the relative seriousness of offences, assessing culpability and other factors personal to the offender, and identifying factors which should not influence decisions.

(a) **Offence seriousness:** any sentencing system which relies on proportionality needs to have a rough scale of the relative gravity of offences. It has sometimes been said that this is an unnecessary and academic exercise, on a topic which causes a few practical problems. Yet in the 1980s there have been marked changes in views about the seriousness of certain offences: for example, rape, drunk driving and financial misdealings are among offences which have tended to be viewed more seriously. To be able to make sense of these changes we need some standards of seriousness. Steps have been taken in this direction by giving legislative authority to the general principle that violent offences should be regarded as more serious than property offences,[10] and by seeking to reduce sentencing levels for offences which are "non-violent, non-sexual and non-frightening".[11] These are steps in the direction of consistency, whilst academic enquiry continues too.[12]

(b) **Factors personal to the offender:** there is also room for disagreement on the factors which should be taken into account as affecting the culpability of offenders, as Dressler points out above.[13] Unless there is clear guidance about the relevance of such factors as intoxication, family responsibilities and good deeds in the past, sentencers may take divergent views. The most significant factor is, however, the effect of previous convictions on sentence. There is scope for considerable disagreement on the proper relationship between convictions and sentences in the past and the sentence for the present offence. For example, a clear policy in favour of custodial sentences for violent offenders and non-custodial sentences for property offenders could be rendered ineffective if sentencers regarded previous convictions as a significant aggravating factor, since many property offenders have previous convictions. Some sentencing systems seek to place a distinct limit on the amount by which prior record can increase a sentence.[14] Those which do not are leaving considerable room for disparity.

(c) **Irrelevant factors:** studies of sentencing have shown that some factors influence sentencing decisions which ought not to do so. A society which is committed to racial and sexual equality will, for example, wish to ensure that no such bias enters into sentencing decisions. Differential sentencing based on employment status or marital status may also be regarded as improper. As Ekstedt and Jackson point out in their paper above, there is growing evidence of disparities in sentencing which relate to race, gender and employment status.[15a] Reforms of sentencing should recognise these dangers and should seek to eliminate them.

Implications:

-- a declaration of the overall aims of sentencing is unlikely to achieve consistency unless accompanied by clear statements on

assessing offence-seriousness, on factors personal to the offender (especially prior record), and on factors irrelevant to sentencing.

5. Criminal justice policies

The shape of the sentencing system depends on certain judgments about the ways in which the criminal justice system as a whole is to operate. Four possible policies deserve brief mention here - public protection, victim compensation, the use of imprisonment and the control of public expenditure.

(a) Public protection: there is no doubt that members of the public look to sentences as sources of protection of themselves and their families from criminals. There is equally no doubt that the sentencing system provides some protection: without police, courts and sentencing, there would surely be many more offences.[16] But, as we saw above,[17] there is substantial doubt about the idea that sentence levels have a hydraulic effect on crime rates, so that a government can reduce crime levels simply by increasing penalties for certain offences. Other approaches, such as crime prevention strategies, might be more effective. It is therefore necessary to be circumspect in claiming public protection as a major policy to be pursued through sentencing.[18]

(b) Victim compensation: a major feature of the 1980s was the increased understanding of victims' rights and needs. These go beyond sentencing to encompass other aspects of the criminal justice system and voluntary schemes for victim support. But it has come to be accepted widely that sentencing systems should pursue a policy of ensuring that offenders compensate their victims, so far as is possible.[19] In this connection, consideration may be given to requiring courts to impose compensation orders unless they give reasons for not doing so, and giving priority to a compensation order over a fine if the offender's means are limited.[20] Whether there should be further provision for victims to submit a "victim impact statement" to the court, or to be legally represented, remain matters for debate.[21]

(c) The use of imprisonment: one common feature of most new sentencing systems is a concern to reduce the use of custodial sentences. The conclusion that imprisonment is over-used - some offenders should never have gone there, and some of those who should are sent for unnecessarily long - has been reached in several committee reports (eg the May report in the United Kingdom, and the recent New Zealand report).[22] Several reports on sentencing declare a policy of restraint (parsimony, frugality) in the use of custody, and seek to incorporate this policy into practical sentencing.[23] The main reasons behind this are that prison has more negative

than positive effects on offenders and has a high reconviction rate, so that non-custodial measures may be more constructive and may demand more of the offender.

(d) Control of public expenditure: one further reason sometimes given for reducing the use of imprisonment is that it is highly expensive when compared with other forms of sentence. This reason, however realistic from governments' point of view, may tend to produce adverse reactions from sentencers, who may harbour the suspicion that economic constraints are preventing them from doing what is right and just. Since there are sound penological reasons for reducing reliance on imprisonment, it is unnecessary to bring public expenditure into the argument.

Implications:

-- there are good reasons for ensuring that sentencing gives priority to victim compensation and uses custodial sentences with great restraint;

-- care must be taken in advocating public protection as a major policy behind sentencing, and public expenditure is best left out of the matter altogether.

II WAYS OF PROMOTING CONSISTENCY

6. Authority and Constitutionality

Before any discussion of the various methods of formulating sentencing guidance, it is necessary to deal with the underlying constitutional issues. Recent years have seen considerable debate about the proper functions of the judiciary and the legislature in matters of sentencing. We begin by raising this constitutional question, and then look at three of the possible ways of dividing responsibility between legislature and judiciary.

(a) The constitutional position: it might seem strange to question the propriety of legislation on sentencing - surely legislatures are free to make laws on whatever issue they like, subject to constitutional restraints in those countries with a written constitution? The question has been raised, however, because there are some who regard the principle of judicial independence - accepted by most constitutions - as reserving the function of sentencing offenders to the judiciary. Both the High Court of Australia[24] and the Supreme Court of the United States[25] have rejected this view and have upheld the liberty of the legislature to make laws on sentencing, including laws which require courts to impose a mandatory sentence and laws which delegate the rule-making function to a Sentencing Commission. These decisions are surely right: the principle of judicial independence means that courts should be free to pass sentence without fear or favour, and does not mean that courts should have an unbridled sentencing discretion.

(b) **Direct legislative guidelines:** although the sentencing discretion does not belong constitutionally to the judiciary, most systems have conceded a wide discretion to courts. However, this need not be so, and one approach is for the legislature to lay down sentencing guidelines in primary legislation. An example of this is the California Determinate Sentencing Act 1976, which contains detailed sentencing prescriptions for most types of offence and leaves little discretion to the courts.

Advantage: the legislative process is "democratic", and this might maximise public support for the sentencing system;

Disadvantages: it allows sentencing policy to be amended for short-term political gains; it is unlikely to be grounded in principled and well-informed debate.

(c) **Legislative framework, Sentencing Commission, and residual judicial discretion:** in recognition of the difficulties and disadvantages of direct legislation, some jurisdictions have created or proposed a Sentencing Commission or Council (eg Minnesota, United States federal jurisdiction, Canada).[26] The legislature retains overall control, since it lays down the Commission's powers and accountability. The Commission accomplishes the detailed rule-making, creating guidance and guidelines on sentencing for the courts. Its membership would typically include not only judges and magistrates but also others involved in criminal justice, thus recognizing the place of sentencing within the whole criminal justice system. The guidelines created by the Commission usually leave the courts with some discretion, to take account of the varying facts of individual cases, and there might also be a system of appellate review. There is usually provision for the Commission to remain in existence and to revise the guidance in the light of experience.

Advantages: it ensures that a specialist body, with time, resources, and broad experience of criminal justice, formulates a coherent body of rules and principles on sentencing; this is likely to enhance consistency;

Disadvantages: it is a constitutional novelty; too much will depend on the choice of individuals as Commissioners; there may be little accountability.

(d) **Legislative framework, judicial self-regulation:** this is the traditional common law approach and it has, as the paper by Sheriff Principal Nicholson (above) shows, been followed in Scotland as well as in England and Wales. The legislature sets the outer limits to the courts' powers, and perhaps creates a few mandatory penalties and other requirements, but sentencing is left predominantly to judicial discretion. Reliance is placed on the appellate courts to develop a jurisprudence of sentencing. Several

jurisdictions adopt this approach, and in some of them "guideline judgments" have been handed down by appeal courts for certain crimes.[27]

Advantages: guidance prepared by judges for judges is more likely to be followed; the judiciary has long experience of sentencing; the judiciary is reasonably insulated from political pressure.

Disadvantages: such systems provide sentencing guidance on relatively few crimes, because appeal courts have limited time and resources; there is unlikely to be overall consideration of aims, principles and policies; the judiciary lacks the broad experience of criminal justice which is found among Sentencing Commission members.

7. Style of guidance

The next stage, after deciding on the authority which is to issue sentencing guidance, is to consider the most effective way of formulating the guidance so as to produce consistency. A whole range of possible approaches may be pursued, either singly or in combination, and six are selected here for brief discussion.

(i) **Presumptive sentencing:** the Californian system leaves the court with a choice among three sentences, once the court has decided the grade of the offence. The court may choose the normal sentence, the aggravated or the mitigated.[28]

Advantage: high degree of consistency within each offence-category.

Disadvantages: leaves little room for courts to reflect facts of individual cases; gives considerable power to prosecutor in selecting the charge.

(ii) **Numerical calculations:** the United States federal system requires the court to calculate the sentence by starting from the "offence level" applicable to the crime, and then making various additions and subtractions to reflect any aggravating and mitigating factors in the case. The court then matches the offence level with the offender's "criminal history score", and this indicates the guideline sentence. Courts retain a discretion to depart from the guideline sentence, subject to appellate review.

Advantages: relatively sophisticated method of guidance, whilst retaining judicial discretion for individual cases;

Disadvantages: in the US system, courts have relative freedom to depart from the guidelines, and there is no stated aim or priority of aims of sentencing to assist the sentencer to exercise discretion.[29]

(iii) **Presumed disposals:** part of the Canadian proposals is that offences should be divided into four categories of presumed sentence - "in (custody), out (community sanction), qualified in (custody unless it is a minor instance of the offence and the offender has no relevant criminal record), and qualified out (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record)."[30]

Advantage: it gives a clear indication to the court of the desired policy for such offences;

Disadvantage: it is unlikely to be effective unless combined with guidelines for custodial sentences (as proposed in Canada) and guidance on the choice of non-custodial sentences.

(iv) **Hierarchy of principles and policies:** a major feature of the new Swedish sentencing law is that it sets out the principles which courts should follow when calculating the seriousness of each crime and when choosing sentence, but contains no numerical guidelines. The law makes clear the aim of sentencing (proportionality), but also states the circumstances in which other aims such as deterrence or rehabilitation may play a part.[31]

Advantages: the law gives a clear framework for the exercise of discretion both by trial courts and by the appellate court;

Disadvantage: the success of the law in achieving its declared aim of consistency depends on the way in which the abstract laws are interpreted.

(v) **Narrative judicial guidelines:** the higher judiciary in both England and New Zealand have used appellate judgments to lay down some sentencing guidelines.[32] The result is much different from the mechanistic-looking guideline grids in the United States systems: in effect, the sentencing guidelines form part of ordinary, narrative judicial pronouncements. The court lays down sentencing levels or "starting points" for the particular type of crime, and indicates some factors which may aggravate or mitigate.

Advantages: their familiar form makes them more likely to influence judges, and to coincide with a judicial idea of "realistic" sentencing.

Disadvantages: if the guidelines are judge-made, they are likely to share the disadvantages of any system which relies heavily on the judiciary for sentencing guidance (see 6(c) above); but putting guidelines in a narrative rather than numerical form is a positive advantage.

(vi) **Legislation, reason-giving and appellate review:** before the advent of guideline judgments, the traditional common

law approach was to rely on appellate review and individual appeal court judgments. Such judgments may not achieve coherence and consistency if appellate courts do not look beyond each individual appeal (which is the main reason for the advent of guideline judgments), but the process may be assisted or shaped by legislation. One example of this is the Criminal Justice Act 1985 (New Zealand), sections 5 and 6. Another example, which has been particularly successful in shaping appellate and trial decisions, is section 1(4A) of the Criminal Justice Act 1982 (England and Wales), as amended in 1988. The Australian Law Reform Commission recommended that the common law approach of reason-giving and appellate review should be the mainstay of a reformed system.

Advantages: if there are specific requirements in the legislation, judicial interpretation of the law will help to concretise the legislature's principles and policies;

Disadvantages: in areas of sentencing where there is little legislative guidance, reliance on occasional appellate decisions (without guideline judgments) would mean that it may be many years before coherent guidance is developed.

8. Consistency without compulsion?

All the approaches considered above involve the use of legal authority to enforce certain sentencing practices. Legislation binds sentencers; sentencing commissions have delegated legislative authority, which also binds sentencers; and appellate courts have the doctrine of precedent to give authority to their judgments. In addition to these approaches, or possibly instead of them, it is worth outlining methods of improving consistency which involve no compulsion of sentencers.

(a) Information systems: there is a school of thought that sentencers would be more consistent if they were able to find out what other courts had done in similar cases. One way of furnishing this information is to build up a computerised index of all sentences passed since a certain date, suitably sub-divided according to type of offence and offender, which would be available to judges through computer terminals. Information systems of this kind have been developed in Canada[33] and in New South Wales,[34] where the system is now available to courts.

Advantage: it reduces a judge's sense of isolation and, if judges desire consistency, it could be effective in producing it.

Disadvantage: much depends on the usefulness of the data assembled; it is a voluntary system - the horse is taken to water, but not made to drink.

(b) Co-operative developments: if sentencers agree to co-operate with other criminal justice professionals in the

introduction and development of a new sentencing structure, this may give them a commitment to its success. This is thought to be a major reason for the success of the Intermediate Treatment scheme in reducing the use of custody for juveniles in England and Wales during the 1980s - magistrates were members of the local administrative committees, along with social workers and others.

Advantage: involvement in this way gives sentencers first-hand knowledge of what such schemes can achieve;

Disadvantages: some professional judges may be reluctant to become involved; it is unclear how effective such co-operation would be unless some new sentence is being introduced.

(c) **Judicial studies and training:** study courses for sentencers may be one way of improving consistency, if sentencers could be persuaded in an extra-curial context to adopt consistent practices in court. However, such courses would be limited in their impact unless there were some clear aims, principles and policies which could be used as a basis for the educational process: see 3, 4 and 5 above.

Advantages: study courses focus attention on the sentencing system as a whole, whereas judges might not otherwise get this overall view; discussion with other sentencers might spread knowledge of others' practices (see 8(a), above) and thereby aid consistency.

Disadvantages: the success of study courses in terms of consistency depends on the coherence of the sentencing system itself.

(d) **Tackling the context of sentencing:** sentencing is one stage in a lengthy criminal process and, as suggested in 2 above, there are ways of bringing about changes in sentencing without the direct involvement of sentencers. Guidance and guidelines for prosecutors would regulate the flow of cases into the courts; if prosecutors are allowed to address the court on sentence, that may influence sentencing decisions;[35] if certain sentences may only be passed after the court has received a pre-sentence report, that gives some authority to another source of influence; and parole systems can be amended so as to affect sentencing to different degrees.

FOOTNOTES

1. R Clarke & D Cornish, Crime Control in Britain (Albany, 1983); M King, How to Make Social Crime Prevention Work (HMSO, London, 1988); J Delatte and P Dole, La Recomposition du Chaup Social et des Pratiques de Prevention (Ministere de la Justice, Paris, 1987).

2. For analysis of the limitations of deterrence as a practical policy, see F Zimring & G Hawkins, Deterrence: the Legal Threat in Crime Control (Chicago, 1973); D Beyleveld, A Bibliography on General Deterrence (Saxon House, 1980); and L Ross, Deterring the Drinking Driver: Legal Policy and Social Control (Lexington, 1982).

3. Canadian Sentencing Commission, Sentencing Reform: a Canadian Approach (1987), p 119.

4. Ibid, chs 5 and 6; see the paper by Andrew von Hirsch, above.

5. Australian Law Reform Commission, Sentencing (Report no 44, 1988).

6. For further discussion see A von Hirsch, Past or Future Crimes (New Brunswick and Manchester, 1985).

7. An English translation of the text may be found in A von Hirsch and N Jareborg, "Sweden's Sentencing Statute Enacted" [1989] Crim L R 275.

8. United States Sentencing Commission, Sentencing Guidelines (1988), discussed in the paper above by Andrew von Hirsch.

9. Advisory Council on the Penal System, Sentences of Imprisonment: a Review of Maximum Penalties (HMSO, 1978).

10. Criminal Justice Act 1985 (New Zealand), ss 5 and 6; see the paper by Judge Henry.

11. The words of Lord Lane, CJ, in the guideline judgment on sentencing for social security fraud: Stewart (1987) 85 Cr App R 66.

12. See A von Hirsch, Past or Future Crimes, ch 6.

13. "Consistency in Sentencing, Just Deserts and Mercy", above.

14. This is a feature of the Minnesota system: for discussion, see A von Hirsch, K Knapp and M Tonry, The Sentencing Commission and its Guidelines (North Eastern, 1987), ch 5 and passim.

15. Ekstedt and Jackson (above) quote the findings of the Daubney Report (below, note 18) at pp 208 and 211 in Canada. For Australia, see K M Hazlehurst (ed), Justice Programs for Aboriginal and Other Indigenous Peoples (Australian Institute of Criminology, Canberra, 1985); I Crow, Unemployment and Sentencing (1989). Many systems, including Minnesota and the proposed Canadian system, include a list of factors not to be considered in sentencing.

16. For references, see A Ashworth, "Criminal Justice and Deserved Sentences", [1989] Crim L R 340.

17. Section 2 of this paper.

18. This note of caution was sounded loudly by the Canadian Sentencing Commission, ch 6.3, but public protection re-appears as a prominent element in the Daubney Report, Taking Responsibility (Report of the Standing Committee on Justice and Solicitor General, 1988, Ottawa), ch 5.

19. Australian Law Reform Commission, Sentencing, pp 191-195; for international declarations, see United Nations, Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).

20. Criminal Justice Acts 1982 and 1988 (UK); Daubney Report (above, n 18), ch 3.

21. Compare the Daubney Report, ibid, ch 3, with Australian Law Reform Commission, Sentencing, para 192.

22. Report of the Committee of Inquiry into the United Kingdom Prison Services (the May Report), Cmnd 7673 of 1989, HMSO, ch 3; report of the ministerial inquiry into the prisons system, Ministry of Justice, New Zealand.

23. Eg Canadian Sentencing Commission, p 113; Victorian Sentencing Committee Report (Melbourne, 1988), vol 1, para 3.15.

24. Palling v Corfield (1970) 123 CLR 52, especially per Barwick C J at p 65.

25. Mistretta v United States (1989) 109 Sup Ct 647, leading opinion by Blackmun J.

26. For Minnesota, see A von Hirsch, K Knapp and M Tonry, The Sentencing Commission and its Guidelines (1987); for the United States, see the paper by Andrew von Hirsch, above; for Canada, see Canadian Sentencing Commission (1987), ch 14, and the Daubney Report (1988), p 68 and Rec 11.11.

27. The English Court of Appeal has developed this technique in such judgments as Aramah (1982) 4 Cr App R (S) 407 on drugs and Billam (1986) 8 Cr App R (S) 48 on rape. There have also been guideline judgments in New Zealand, such as Puru [1984] 1 NZLR 248 on rape. For a general discussion of measures to reduce disparity in sentencing in Europe, see Council of Europe, Disparities in Sentencing: Causes and Solutions (Strasbourg, 1989).

28. For discussion, see D A Thomas, Equity in Sentencing (Pinkerton Lecture, 1977).

29. See the paper by Andrew von Hirsch, above.

30. Canadian Sentencing Commission, ch 11.5.2, supported by the Daubney Report, p 66 and Rec 11.5.

31. See note 7, above.

32. See note 27, above. Proposed legislation in Victoria, Australia, makes express provision for the Court of Criminal Appeal to lay down guideline judgments on sentencing: see the paper by Mr Justice Vincent, above.

33. A N Doob and N W Park, "Computerized sentencing information for judges: an aid to the sentencing process" (1987) Crim Law Q.

34. D Weatherburn et al, New South Wales Sentencing Information System Penalty Display and Sentencing Options Facilities (Judicial Commission of New South Wales, 1988).

35. See the paper by Ekstedt and Jackson, above. The roles of prosecutors vary among Commonwealth jurisdictions, and in some European countries prosecutors take a leading role in suggesting to the court the appropriate sentence: see D Downes, Contrasts in Tolerance (Oxford, 1988).