

# Criminal Justice Reform in a Hostile Climate

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In the area of criminal justice policy, these are the days for politicians who model themselves after the lemming. All they need to do is to define their job as one where the public should be given "what they want" and the politicians can line up behind almost any member of the public and follow blindly. The fact that the politician might follow the public over a cliff into a sea of inhumane despair or may go directly into the land of fiscal irresponsibility may not be the politician's concern. After all, who in politics could be criticized for giving the public what they want?

I am going to suggest in this paper that politicians who take such an approach to criminal justice policy — in sentencing policy and elsewhere — are more deserving of criticism than are those who take principled positions that we disagree with. They should not, however, be criticized for what they are doing — listening to the public who elected them. They should be criticized for what they are not doing : leading. Few politicians, these days, ask the public to vote for them so that the politician can become their political follower. Few campaign speeches end with the suggestion, "Vote for me and I will follow you off the edge of a cliff." Instead, those wishing to be elected talk "leadership," but often provide nothing to the public in the area of criminal justice policy other than a rear guard following nervously behind a public that is quite sure where it wants to go, but does not know how to get there. I am not suggesting that there is no role for public opinion in guiding criminal justice policy. Instead what I am suggesting is that politicians — and other leaders — have a responsibility to educate the public and to explain the complexities of various issues including criminal justice policy. In short, they have a responsibility to provide leadership.

In this paper, I will examine a few attitudes about sentencing and other criminal justice matters that are probably fairly widely held. I will examine some of what is known — and what appears to be believed — about a few rather different topics :

- Sentencing severity. The public appears to believe that sentences in the criminal courts are "too lenient." Virtually every public opinion poll carried out in the past thirty years in Canada has found that the vast majority of adult Canadians think that criminal court judges are too soft on those who have been found guilty of crimes.
- Deterrence. The public appears to believe that heavier sentences would deter people from offending.
- Corrections. The correctional system — and, in particular, paroling authorities — are often seen as not having served the public.
- Criminal law and crime. The public is being encouraged to believe that through the passage of laws — in particular the passage of more criminal law — problems will go away.

## **I. THE PUBLIC AND LENIENT SENTENCES**

We know quite a bit about public attitudes concerning sentences. For thirty years Canadians have been telling public opinion pollsters that sentences are too lenient. The proportion of Canadians who indicate that they believe sentences to be too lenient varies slightly from time to time, but it would be fair to say that at any given time between two

thirds and four fifths of Canadians will answer "too lenient" to the question : "Do you think that the sentences handed down in criminal courts are too lenient, about right, or too harsh?"

The thoughtless politician, searching for people to follow, could then champion harsher sentences. However, if that politician happened to wish to be both honest and knowledgeable, he/she might wish to consider some of the following points.<sup>1</sup>

Members of the public are most likely to be thinking about violent offences or serious repeat offenders when they suggest that they think that sentences are "too lenient." They are not likely to be thinking about the vast majority of sentences handed down daily by the courts which do not involve violent, repeat offenders.

Second, members of the public are not likely to have much of an idea of the actual sentences that are handed down on a daily basis. They may have a generalized "belief" that sentences are too lenient, but this belief is not likely to be based on any systematic information. Part of the problem, of course, is that we do not, in Canada, have much systematic information about sentences. We have a little bit of data on sentences being handed down in provincial/territorial courts in six jurisdictions<sup>2</sup> but little systematically about sentences overall — especially those being handed down in Superior Courts in, presumably, the most serious cases.

But, more importantly, we know that the sentences being described to the public have a number of characteristics that make them unusual and it is this, among other things, that should raise doubts about how meaningful it would be to draw inferences about sentencing generally from those few cases reported in the mass media.

- First of all, the cases that make the news are, clearly, in some important way, likely to be "newsworthy." The importance of this truism should not be underestimated : most "routine" cases are never reported in a news story and most people do not know what happens in "normal cases." Some number of years ago, I looked at the kinds of crimes that were being reported in the Toronto newspapers. It was not surprising to find out that a dramatically disproportionate number of cases involved violence, and a highly disproportionate number of the cases of violence involved murder.<sup>3</sup> In this context, it is not surprising that when people are asked to think of a sentence that they thought was too lenient, 42% of those who could recall at least one lenient sentence indicated that it involved a

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1. Much of the research on which these assertions are based can be found in A.N. Doob & J.V. Roberts, "Public Punitiveness and Public Knowledge of the Facts : Some Canadian surveys" in N. Walker & M. Hough, eds., *Public Attitudes to Sentencing : Surveys From Five Countries* (Aldershot, England : Gower, 1988) at 111-133.
  2. Canadian Centre for Justice Statistics, *Sentencing in Adult Criminal Provincial Courts : A Study of Six Canadian Jurisdictions* (Statistics Canada, 1993).
  3. A.N. Doob, "The many realities of crime" in A.N. Doob & E.L. Greenspan, eds., *Perspectives in Criminal Law : Essays in Honour of John Ll. J. Edwards* (Aurora : Canada Law Book, 1985) at 61-80.

homicide offence.<sup>4</sup> This is, of course, particularly interesting in the context of mandatory sentences of life in prison for murder and the wide range of different circumstances that result in a conviction for manslaughter.

- We also have to be a bit concerned when we look to the source of most people's information about sentencing : 53% of a representative sample of Canadians, a few years ago, indicated that they receive their information about sentencing of offenders from television news.<sup>5</sup> This finding is important for two reasons : television rarely reports sentencing stories since few are newsworthy enough to qualify as one of the few stories that can be covered in a television news program. Second, a television report on sentencing does not have the time, typically, to do much more than cover the sentencing itself and perhaps two comments on the sentence : one on each of two "sides" of what, more properly, should be seen as a multiple-sided issue.
- In fact, an examination of newspaper reports of sentencing — reports which are likely to occur more often and to provide more "content" than television — is not reassuring. The Canadian Sentencing Commission studied over 800 newspaper stories appearing in nine Canadian cities involving the sentencing of offenders and discovered that over half of these involved violent offences, and over half of those (i.e., about a quarter of the stories overall) involved homicide offences. Equally important was the finding that in over two thirds of the stories the sentence was reported, but no reasons for the sentence were given. In about two thirds of the remaining stories only one reason for the sentence was reported.<sup>6</sup> Given that the stories involved some of the more serious cases before our courts, it seems plausible to suggest that more was being said in court that might explain (or justify) the sentence than was being reported. Canadians are aware of the paucity of information that they receive about sentencing : the majority of those who voiced an opinion suggested that the media were not, in their opinions, providing the public with adequate information about sentencing.<sup>7</sup>
- Clearly, the reports of sentences being handed down in court are not "complete" in any way. However, what is more important than whether they report every detail of the sentencing hearing is whether they "capture" the essence of what occurred. The data suggest that reporters are not successful in capturing the sentencing hearing in such a way that a member of the public who reads a report on the handing down of a sentence will understand the sentence in the same way as someone who was in court. In a number of studies,<sup>8</sup> Julian Roberts and I

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4. A.N. Doob & J.V. Roberts, *supra* note 1 at 125.

5. *Ibid.*

6. The Canadian Sentencing Commission, *Sentencing Reform : A Canadian Approach* (Ottawa, Minister of Supply and Services, 1987) at 95-96.

7. *Ibid* at 131.

8. A.N. Doob & J.V. Roberts, *An Analysis of the Public's View of Sentencing* (Canada, Department of Justice, 1983).

demonstrated quite clearly that the stories that we all read in the newspapers do not give the same impression of the sentencing proceedings that we would get if we were in court. In fact we demonstrated that the newspapers differed amongst themselves in the impressions that they gave.

The design of these studies was simple. We took the report of a sentencing hearing that appeared in the newspaper (or in more than one newspaper if there happened to be two "competing" accounts of a single sentencing hearing). We then attempted to get what might be called "court based documents" on the sentencing hearing. These documents were, as much as we could accomplish, a combination of documents that were filed with the court (e.g., pre-sentence reports, listing of the criminal record) and, most importantly, the transcript of the actual hearing where, typically, there was some discussion of the offender, the actual nature of the offence, and, usually, some discussion as to what the judge was trying to accomplish with the sentence.

When we had our two sets of materials compiled (the newspaper clippings and the "court documents"), we then took them to representative members of the public. One group of people would receive the original newspaper article reporting a sentencing that had taken place. Another equivalent group of people received the court based documents. The people can be assumed to be equivalent since we assigned them to one or the other of the two groups on a random basis. This means that differences between the groups cannot be attributed to pre-existing differences (e.g., whether or not a person normally voluntarily reads stories about sentencing hearings) since the people themselves did not choose which group they were in. The results were consistent and clear. People who got information about sentencing that was a closer approximation to what they would receive if they had been in court were more content with the sentence that was actually handed down.

One example of such a set of findings is reproduced in the two tables below.

**Evaluation of the severity of the sentence  
based on either of two types of information**

	Too harsh (%)	About right (%)	Too lenient (%)	Total (%)
Court-based documents	52%	29%	19%	100%
Newspaper story	13%	24%	63%	100%

**Evaluation — based on one of two types of information —  
of whether the judge considered all  
appropriate factors in handing down the sentence :**

Yes (%)	Cannot say (%)	No (%)	Total (%)

Court-based documents	59%	17%	24%	100%
Newspaper story	29%	25%	46%	100%

Findings such as these are important for those who legitimately want to consider public concerns when making policy. In this particular case, if one listened to those members of the public who got their information about the case from the newspaper — a group much larger, no doubt, than those who got their information directly from the courts — the implication would be that the public thought that sentence was too lenient. If the particular case were to be decided, then, in line with public opinion *based on what the public would normally know*, the sentence that had been handed down would have to be made harsher than that handed down by the trial judge. The public would be happy with a harsher sentence, presumably, but their happiness would be based on an inadequate picture of what took place in court.

However, these data show that the sentence that would result from slavishly following public opinion would not have satisfied those same members of the public if they had been privileged to have access to the full court hearing. Those members of the public who heard essentially what the judge did about the whole case would have believed that the original sentence handed down by the trial judge was, in fact, too harsh. Interestingly, the sentence was appealed — by the offender — and the Ontario Court of Appeal *reduced* the sentence (by about half). One suspects that the editorial writers who had already criticized the sentence handed down by the *trial* judge for being too lenient were not too pleased by the Court of Appeals' decision.

The data also illustrate a different but related point. People who were exposed to what they would have heard had they been in the court at the time of the sentencing also appeared to believe that the sentencing process was more appropriate. We asked both groups of people whether they thought that the judge had considered all appropriate factors in handing down the sentence. The data are, once again, quite clear : those who read what went on in court tended to believe that the judge had considered all appropriate factors in handing down the sentence; those who read only what the newspaper reporter had written, were much less confident that the judge had decided the case appropriately.

This one illustration is not the only set of data we collected. We ran a number of similar experiments — some contrasting different newspapers' stories on the same case, and some contrasting the impact of newspaper stories with court documents. Our data were consistent : newspapers appear to make sentences look more lenient than if members of the public had an account which was closer to that which they would get if they were in court for the actual case.

The findings in this series of studies are quite consistent with findings from research elsewhere. Researchers in the United States<sup>9</sup> have compared sentences handed down by judges in hypothetical cases to sentences that members of the public think would be appropriate. These studies come to a conclusion that is quite similar to that which Julian Roberts and I arrived at : the public and judges are fairly similar in the *average* sentences that they would hand down for particular cases.

If this is the case, then what does it mean when politicians agree with publicly stated concerns that sentences are too lenient? It is easy to say that they "represent" the public's views and, therefore, are not to be criticized. But what if our politicians were leaders and went back to the public and asked a simple question : What exactly is it that you want? What if our leaders tried to explain what happens in court? What if they tried to explain the limitations that exist in the courts' abilities to control crime? The problem, of course, is that the public wants *something* to change; they want sentences to be harsher than what they think they are. But they have no idea about what is actually happening in our courts. Furthermore, those of our "leaders" in public life who advocate harsher sentences never talk to the public about costs. They never talk about what additional imprisonment will cost the federal and provincial governments, nor do they ever talk about alternative uses of these funds.

## II. WHAT ABOUT YOUTH COURT SENTENCES?

It turns out that the story for youth court sentences is depressingly similar, but different in some important ways. Jane Spratt<sup>10</sup> has found, using a small, but apparently representative<sup>11</sup> sample, that people "want" harsher dispositions for young offenders as well. However, as with adults, when people say they want harsher dispositions for young offenders, they are really thinking about violent or repeat offenders. But, in addition, those who indicate that they think youth court dispositions are too lenient also seriously underestimate the severity of the actual dispositions being handed down. Very few people

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9. See L.J. Stalens & S.S. Diamond, "Formation and change in lay evaluations of criminal sentencing : Misperception and discontent" (1990) 14 *Law and Human Behaviour* at 199-214. S.S. Diamond, "Using psychology to control law : From deceptive advertising to criminal sentencing" (1989) 13 *Law and Human Behaviour* at 239-252. S.S. Diamond and L. Stalens, "The myth of judicial leniency in sentencing" (1989) 7 *Behavioural Sciences and the Law* at 73-89.
  10. J.B. Spratt, *Understanding public views of youth crime and the youth justice system*. (M.A. research paper, Centre of Criminology, University of Toronto, 1995) [unpublished].
  11. She sampled "ordinary" people in public places in Toronto during the summer of 1995. Although she clearly did not have a "random sample of Canadians", on various criminal justice attitudes — views of adult sentencing, estimates of the proportion of crime that involves violence, etc. — her sample appeared remarkably similar to national representative sample. It seems reasonable to assume, therefore, that her results would be similar to results on a national sample.



have accurate information about such matters as the *Young Offenders Act*<sup>12</sup> transfer provisions. However, knowledge about the *Young Offenders Act* did not relate in any important way to the evaluation of youth court dispositions.

Sprott also looked at information that was available to members of the Toronto public about the *Young Offenders Act* and youth crime. Previous studies have shown, not surprisingly, that most of us get almost all of our information about crime and the criminal justice system directly or indirectly from the mass media. When one examines what is available to most Canadians about youth court dispositions, it is rather surprising that very many Canadians hold *any* attitudes about the operation of the *Young Offenders Act*. During a two month period, the three major English language daily newspapers carried a total of 113 stories that related in some way to youth crime. Almost 94% of the stories had, as the most serious offence described in the story, a violent offence. In contrast, about 23% of the cases actually going to youth court during this period had a violent offence as the most serious offence. In the newspaper stories, a full half of the stories involved homicides. In contrast, about 0.03% of cases going to Ontario youth courts involve homicide. It is not surprising that most of Sprott's respondents overestimated the amount of violence in youth crime.

What is even more upsetting, if we want to have a public that is informed about dispositions in youth court, is that the public gets almost no information about youth court dispositions. During the two month period, there were only 12 stories in the three Toronto newspapers where a youth court disposition was even mentioned explicitly. Almost all of these, obviously, involved serious cases of violence. More important was a rather stark fact : in only one story was there *any* justification of the disposition given. And, in this one story, there was one sentence in which an explanation or justification for the disposition was given.

Put differently, if a resident of Toronto read every single story involving youth crime for a two month period, such a person would read about 12 dispositions and would be offered only one sentence of justification for only one of these dispositions. During this same period of time, Sprott points out that approximately five thousand cases would have received dispositions in Ontario's youth courts.

We should not be at all surprised, therefore, when we see that people do not have a lot of information about youth court dispositions. It simply is not available to them.

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12. *Young Offenders Act*, R.S.C. 1985, c. Y-1.

What, then, are the public's views of youth court dispositions based on? Sprott suggests that their views are best thought of as broad "beliefs" not linked to specific facts, but linked quite strongly with other beliefs about the criminal justice system. Thus, for example, those who view youth court dispositions as being too lenient also believe that adult sentences are too lenient. They also are much more likely to believe — incorrectly — that the amount of violence has increased dramatically.

Given that few members of the public have any information at all about youth crime, there is obviously a very serious flaw in the argument that people would be content if youth court dispositions were somehow made more harsh. Were this to occur, it is almost certain that nobody would even know it had happened.

If one is interested in looking for causes of the widely held view that youth court dispositions are too lenient, one only has to look at what is being said publicly about youth court. People are repeatedly told that youth court dispositions are too lenient. When did you last see a public figure — particularly an elected one — defend youth court dispositions? When, on the other hand, did you last hear them being attacked — without any systematic data being cited? Why do you think youth court dispositions were being attacked in this way?

### **III. A SOMEWHAT IRRELEVANT ASIDE ON PROVIDING MORE INFORMATION : TELEVISED TRIALS**

The studies on adult sentencing that I have described have, from time to time, been used to argue that public opinion would be more informed if criminal trials were televised as they are in many jurisdictions in the USA. The idea seems to be that television would "tell it as it is" whereas the newspapers, through some natural process, bias the story in some peculiar way. Alternatively, the suggestion is made that by having live (or at least unedited) coverage of a trial, people would be able to see a whole case and could then evaluate a sentence in the same way that they would if they were in court. Clearly, if the conditions could be met whereby people, through television, would see a trial and a sentencing hearing in its totality they would be in a better position to evaluate the outcome.

There are, however, some serious flaws in the logic of this argument in favour of televised trials as a way of educating the public and explaining the decisions of the court. The most important flaw is, of course, the notion that the majority of the public would, through this process, get a more complete — or at least a more representative — view of the court process.

Most Canadians will not watch whole trials. It is probably fair to say — without extensive research — that more people saw short news clips of the O. J. Simpson trial than watched the trial from beginning to end. Again, it would probably be fair to say that news editors would pick out those sections of a trial that were most dramatic. One could therefore argue since the issue is how the material is *selected*, not how much there is of it, but that television is unlikely to have any beneficial impact on people's understanding of a

whole case. If anything, since they will still be getting only a small portion of a real trial, they may believe that their information is more "representative" than the information they get from a newspaper account (or from accounts where the electronic media have to summarize events in the court rather than play clips of it). This may not be the case.

The issue of televising court proceedings is a complex one involving many values. Hence, a single consideration such as this one — whether people would be better informed about the basis of complex decisions such as sentencing — should be only one factor in many that should affect the development of policy in this area. My point is only that the idea that routine televising of trials (and sentencing hearing) will improve public understanding of the court process is an oversimplification at best, and most likely is simply wrong.

#### **IV. WOULD MORE PUBLIC EDUCATION ABOUT SENTENCING MAKE PEOPLE CONTENT WITH SENTENCING?**

Clearly, members of the public are not content with sentencing, as they presently know it, in Canada. It is just as clear that they would be more content *with individual sentences* if they had better information from the judges about how individual sentences were determined and what the nature of the case was. Although additional information representative of what actually happens in a case might deal with the public's view of individual cases, there is little doubt that in the long run it would have little impact on people's evaluation of sentences. I make this suggestion for two reasons :

- It is not possible, given current sentencing structure, for sentences to be fully explained.
- Members of the public believe that sentencing judges have the power to affect, in important ways, the level of crime in society.

We will now look at each of these problems.

#### **V. IS SENTENCING DEFENSIBLE?**

One of the most serious problems with sentencing is that sentences cannot be defended as being consistent with any specific set of goals. With five different purposes to choose from, and no coherent set of rules available to apply in arriving at a sentence appropriate for a particular case, it is inevitable that almost any legal sentence handed down by a judge could be justified, given a clear choice of purposes, facts which were described as being most relevant, and methods of achieving a goal.

This is *not* a criticism of judges. Judges, until recently, were given no guidance by Parliament on how to sentence. Guidance that judges are given by the Courts of Appeal is, understandably, rather incomplete. Bill C-41, which changes the sentencing landscape

somewhat, has already been criticized by others<sup>13</sup> for being too timid a first step into sentencing reform. Bill C-41 clearly has one very definite sounding statement about the sentencing of adult offenders : "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."<sup>14</sup> However, unfortunately, the bill did not stop there in presenting purposes and principles. Instead, it suggested, in the immediately preceding section, that "The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives...."<sup>15</sup> Then, unfortunately, we have a list of traditional goals of sentencing : denunciation, general and specific deterrence, incapacitation, along with "providing reparations to victims" and promoting "a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community."

Taking these two sets of statements together, the judges may be left with little more than they had before the bill was introduced into Parliament. They have a proportionality statement tacked onto everything else that was there. It is as if Parliament, or the Minister of Justice, was too timid to take a firm step and decide what could and could not be accomplished at the sentencing stage of criminal proceedings. Instead, things were left more or less as they had been.

This is not just a problem for academic purists who want nice clear statements of principles. It is a problem for any member of the public who wishes to understand a particular sentence. The problem with having a long list of "objectives" is that we leave it to judges to choose which ones are the most important for a particular case. Aside from the fact that achieving some of the objectives, such as general deterrence, is almost certainly unaffected by decisions at the sentencing process, there is a very serious problem in achieving multiple purposes. Put simply, one purpose may require one kind of sentence; another purpose may require another, incompatible, sentence.

An intelligent member of the public, then, who was interested in what kind of sentence could be expected to be handed down in a particular case could not, with any reasonable level of certainty, predict what that sentence would be. Researchers who have looked at sentencing exercises with adult<sup>16</sup> or with young offenders<sup>17</sup> have found that there can be a great deal of variation in the sentences handed down for identical cases. What is important about this variation, however, is that all of the different sentences can be justified by the judges and, after the fact, each sentence looks sensible, given the purpose

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13. See, for example J.V. Roberts & A. von Hirsch "Statutory sentencing reform : The purpose and principles of sentencing" (1995) 37 *Crim. L. Q.* at 220-242.
  14. Proposed s. 718.1 of Bill C-41 (First Session, thirty-fifth Parliament.) First reading : June 13, 1994.
  15. *Ibid.*
  16. See T. Palys, *Beyond the black box : A study in judicial decision making* (Ottawa : Solicitor General, Canada, 1982).
  17. A.N. Doob & L.A. Beaulieu, "Variation in the exercise of judicial discretion with young offenders" (1992) 34 *Canadian Journal of Criminology* at 35-50.

that the judge was addressing in doing the sentencing. If forty judges can give forty sensible and defensible but different sentences for a single case, then it is understandable that the public might be confused — and a bit dismayed — by the process. This does not mean, however, that the problem is with “lenient” judges. The problem, instead, may be with the policy — or lack of it — that judges are expected to follow.

## VI. DETERRING THROUGH HEAVIER SENTENCES

To a criminologist, it is rather strange that some people still apparently believe that through the imposition of heavier sentences, people will be deterred from committing crime. Criminologists have studied this question for decades and although the data are not *entirely* consistent, it would be fair to say that variation in the kinds of sentences handed down in criminal matters will be likely to have *no* measurable impact on the level of crime in society. This is *not* to say that punishments do not deter : if it is perceived that the likelihood of *apprehension* is low, some people may be more likely to misbehave. But it appears that it is the *likelihood of apprehension* that is important rather than the *level* of punishment that might be imposed by a court after apprehension.

Why is this? It may not appear to make sense at first. People are rational and if you increase the costs of illegality people will commit fewer offences and we will be more secure. The reason it doesn't work is not because the logic is wrong. It is that we cannot create the right conditions for deterrence in the area of crime. For deterrence to “work,” strict conditions need to be met.

The idea behind deterrence is that we have rational, thinking, thoughtful, calculating people making rational judgments. It assumes that people will examine the probability that they will be caught for what they are about to do, and determine that there is a reasonably high likelihood of being caught. It assumes that they know what the likely penalty would be and it assumes that they believe that if they are caught they will receive the penalty. Finally, when one looks to increased penalties to deter people, it assumes that people would be willing to commit the offence and receive the penalties currently being handed out, but they would not commit the offence if the penalty were harsher. These are the basic requirements for changes in penalties to have an impact.

But, people are not thinking about being caught. In many violent crimes, for example, offenders are not thinking about any consequences. If they are thinking about the consequences, it does not appear that they are assuming that they will be caught. They may be thinking about how not to be caught, but few people commit offences assuming that there is a high likelihood of being apprehended.

The problem is that for many crimes, if offenders were to calculate coldly and rationally what the probable penalty would be, they would realize that they have a very low likelihood of being apprehended. Let's look at robbery as just one example. In 1993, fewer than half of the robberies that took place where adults were the victims were reported to the police. And of those which were reported to the police, the police were only able to apprehend suspects in about 30% of the cases. Some of these are, of course,

found not guilty by the courts. This means that in only about 10 - 15% of robbery cases will anyone ever be punished by the courts. In other words, if you are thinking about robbing and you know the facts, the chances are very high — probably close to 90% — that you will not receive any punishment from the criminal justice system.

When the courts do get a chance to sentence robbers, they are — appropriately enough — quite harsh. Almost every convicted adult robber is sent to prison. A substantial portion are sent to penitentiary. Incidentally, research shows that most Canadians underestimate dramatically the severity of the sentences handed down for robbery. But those who suggest that the best way to reduce crime is to impose harsher penalties are also implying that potential offenders are deciding that the crime would be worth it for the present penalty (of two or three years in penitentiary, for example) but it would not be worth the risk if the penalty were four or five years.

There is no evidence that this process occurs. Even if it did, though, we would still have to ask whether it would be the most effective way of dealing with crime. We spend in Canada about two billion dollars a year on the imprisonment of adults and young people. If we were to increase the length of sentences by even as little as one third, we would be spending roughly an additional \$700 million per year. It would be irresponsible to advocate that we spend \$700 million to imprison offenders longer if we hadn't first determined that this was the most cost effective way of achieving security for Canadians.

When others in Canada suggest more use of imprisonment to make us safe, we should challenge them. We should ask them whether the \$200-\$300 per day that it would cost you and me to imprison a young person or the \$100-\$150 per day it would cost us to imprison an adult might be put to better use to make us secure. Should we imprison a young thief for two months or should we use that twelve thousand dollars to provide support in shelters for women escaping from abusive relationships with men they are otherwise dependent on?

Deterrence may be important in other ways. This is not to suggest that deterrence is not relevant. There are lots of examples when deterrence probably does work. In some cities, you can more or less assume that if you park illegally in certain situations, your car will be ticketed or towed. In those situations — where the perceived likelihood of receiving some punishment is high — the size of the punishment is likely to be important. But for normal criminal matters, the basic conditions for a general deterrence strategy of crime prevention simply aren't there.

Clearly, it is important that there be some punishment available for those who commit crimes. The question is not whether any punishment is necessary. The question is whether more punishment would be effective in reducing crime. Programs which have the effect of increasing the likelihood that those who commit crimes will be caught can be effective. The important point to remember, however, is that what is likely to be important in deterring people is the perception that they will be caught if they commit an offence.

## VII. CORRECTIONS, PAROLE, AND THE PUBLIC

Courts are not the only part of the criminal justice system that have been criticized in recent years. The parole boards — and the correctional system more generally — have been the subject of more than a few nasty words. Although I was part of a nine person commission that recommended the abolition of parole as we currently know it,<sup>18</sup> I find the current criticism of individual parole decisions — and of our current parole system — to be largely off the mark. Part of the problem for the parole boards can be traced to their legislative mandate. Section 102 of the *Corrections and Conditional Release Act* states that :

*The Board of a provincial parole board may grant parole to an offender if, in its opinion,*

*(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and*

*(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.*<sup>19</sup>

This is a tall order. But one thing is made clear to the parole board : its responsibility ends on the warrant expiry date. In other words, if a parole board were to believe — on good grounds — that granting parole would reduce the risk of serious reoffending in the long run (after warrant expiry), but incur a smaller risk in the short run (while on parole or statutory release), it may well feel enormous pressure to decide not to release exactly those prisoners who would benefit *most* from a structured life on parole. Those *least* in need of supervised living, then, would be released and those most in need of gradual reintegration would receive less of it (or, in some cases, none of it).

Release decisions will never be perfect — if perfect means that there will be no reoffending during the original period of sentence. One simply cannot release thousands of prisoners and expect that none of them will commit serious offences while on parole or statutory release.

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18. *Supra* note 6. The Commission recommended "the abolition of full parole, except in the case of sentences of life imprisonment" at 244. At the same time, however, the Commission recommended the retention of earned remission which could "reduce by up to one-quarter the custodial portion of the sentence imposed by the judge" at 248. More importantly, in this context, "the Commission recommends that *all* inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the requirements for withholding remission release" at 256.

19. *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 102.

In this context, the paroling authorities are still being criticized as a result of simplistic interpretations of a study carried out some time ago on people released from penitentiary on parole or (as it was then) mandatory supervision. The simplistic finding was summarized by a newspaper headline at the time the study was first released : "Study finds early-release prisoners killed 130 people in past 12 years."<sup>20</sup> The study was a simple one : from 1975 to 1986, there were 52,484 releases on full parole or mandatory supervision. One hundred and thirty of these people were readmitted to penitentiary for a homicide offence. About two-thirds of these 130 people had originally been released on mandatory supervision rather than parole. Taking the findings as a whole, it seems that about one quarter of one percent of those released from federal penitentiaries were readmitted for a homicide offence. They accounted for about 1.7% of the 7838 homicide offences in Canada that took place during this period. Most of the 130 people had been originally in penitentiary either for robbery (45% of the 130 inmates) or property offences (30%). Seven (only one of whom had been released on parole) had been serving sentences for manslaughter. Two of the 130 had been serving sentences for non-capital murder.

These findings have been cited, from time to time, to suggest that the paroling authorities are letting out the wrong people. No parole board critics whom I have heard have ever mentioned the fact that two-thirds of these infamous 130 people were not released on parole. No critic I have heard has mentioned that during this time 52,484 were released from penitentiary. And no critic has pointed out that all but two of these people had definite sentences that would expire on a known date. A murder committed after warrant expiry is not seen as the responsibility of the National Parole Board, whereas a murder committed before warrant expiry is seen as their responsibility. Critics seldom ask the question whether holding all 52,484 offenders until warrant expiry — at an obvious cost of hundreds of millions of dollars — would have possibly led to *more* murders, all of which would have been "nobody's" responsibility, since the ex-prisoners would not have been seen to have been under criminal justice control. We do not live in a perfect world. Are critics of the early release and supervision of possibly dangerous inmates whose past behaviour does not warrant imprisonment for life asking the question : "How do we best increase our *overall* long term security in society?" If they are, I've missed it. I hear people talking about "tightening up on parole" without asking whether that will be better for all of us, in the long run. Prison costs money. So do effective crime prevention measures. It would be nice to think that our politicians were asking the difficult questions about how best to improve the security of Canadians with limited resources.

I cite this one example of the failure to address the important questions in this area not, obviously, because I am a fan of discretionary early release. Rather, I cite it to suggest that if we were seriously interested in improving the manner in which we deal with those who have committed offences, the public debate — led by our political leaders — would address complex questions such as how to best use expensive prison facilities to increase the security of Canadians.

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20. *Globe and Mail* September 1987.



## VIII. CRIMINAL LAW AND THE SECURITY OF CANADIANS

One of the most attractive myths about crime is that a sensible way to deal with it is through more criminal law. In contrast, a few years ago, a House of Commons Committee looking into crime prevention noted that :

*In recognition of the inherent inadequacy of the criminal justice system as a response by society to crime and the fear it inspires, and in response to public appeals for preventive action, the Standing Committee on Justice and the Solicitor General unanimously agreed [...] to commence a national study on crime prevention [...].*<sup>21</sup>

In recognition of the problem that they were facing, they cited imprisonment statistics from a number of western countries, pointing out that,

*If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world.*

*In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.*<sup>22</sup>

The problem is that most of the messages given by political leaders to Canadians are inconsistent with these statements from Parliamentarians who decided to look seriously at crime prevention efforts. I will give one rather straightforward example of how we deal ineffectively with a real problem, waste resources, and give the wrong message to the Canadian people about how we might address the problem of crime in our society.

## IX. MANDATORY MINIMUM SENTENCES AS INEFFECTIVE "QUICK FIXES" TO CRIME

Part of Bill C-68 — the "gun control" bill — is a provision to create mandatory minimum sentences of four years for long lists of serious violence offences (including robbery, extortion, sexual assaults) "where a firearm is used in the commission of the offence." I have already discussed some of the problems with general deterrence, and, therefore, I do not need to repeat them here. The arguments against mandatory minimum

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21. Standing Committee on Justice and the Solicitor General, *Crime prevention in Canada : Toward a National Strategy* (twelfth report) (1993) at 1 (Chairman : Dr. B. Horner, M.P.).

22. *Ibid.* at 2.

penalties have been made by many individuals and commissions (such as the Canadian Sentencing Commission), but it is instructive to repeat a few of them here :<sup>23</sup>

- a) Mandatory minimum sentences will not make Canadians any safer. The evidence does not support the view that legislating mandatory minimum sentences will deter people either from committing an offence or from using a firearm while committing an offence.
- b) Mandatory minimum sentences are likely to create distortions in the trial process as judges and lawyers (for both the Crown and the defence) try to ensure an appropriate and fair sentence rather than the prescribed mandatory minimum sentence.
- c) Mandatory minimum sentences are also likely, in other instances, to create sentences which will be seen as inappropriate by those involved in the trial and by the general public, given the seriousness of the particular offender's conduct and the particular offender's role in the offence.
- d) If the goal of the mandatory minimum sentence is to make a denunciatory statement through the sentencing of those who have used a firearm during the commission of an offence, there are other more effective approaches which are available to Parliament which can accomplish this goal. These other approaches — which will send the same strong message about the seriousness of offences carried out with firearms — can be implemented without the distorting effects on sentencing which will inevitably occur if Parliament were to create these mandatory minimum terms of imprisonment. One such approach would be to create a *presumptive* minimum sentence that would be imposed unless there were compelling reasons to do otherwise.

The Government of Canada, in proposing mandatory minimum sentences, clearly communicated to the Canadian public the view that such approaches would help make them safe. In doing so, the Government ignored not only what had been written by many commissions in the past, and a vast array of academic literature, but it also ignored the report of independent consultants hired to examine the success, or lack thereof, of the mandatory penalty contained in Section 85 of the *Criminal Code* of Canada. This section contains a mandatory minimum sentence for the use of a firearm during commission of an offence.<sup>24</sup> This report was released by the Department of Justice in December 1994 and was obviously available to the Department of Justice policy makers. Rather than summarize that report, I will simply quote verbatim some of the points made in the

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23. Parts of this section are taken from a brief prepared by A.N. Doob, J. Roberts & J.P. Brodeur for the House of Commons Justice and Legal Affairs Committee for their examination of Bill C-68.

24. C. Meredith, B. Steinke & S.A. Palmer, *Research on the application of Section 85 of the Criminal Code of Canada*, Research, Statistics and Evaluation Directorate, (Department of Justice, Canada, 1994).

executive summary about mandatory minimum sentencing provisions, generally. That report echoes many of the points made by the Canadian Sentencing Commission in 1987.

- Charges for offences which are the subject of mandatory minimum sentences are frequently the subject of plea negotiations.
- The public is largely unaware of which offences are covered by mandatory minimum penalties.
- Police, lawyers and judges may alter their behaviour in a variety of ways aimed at mitigating the impact of mandatory minimum penalties on accused for whom the mandatory penalty is perceived to be unduly harsh.
- Mandatory minimum penalties are seen as shifting discretion from the impartial judiciary to the adversarial prosecution.
- Mandatory minimum penalties are associated with lower overall probabilities of conviction for the target offence, but longer sentences when convictions are obtained.
- As a means of incapacitation, mandatory minimum penalties are estimated to have no more than a modest impact on crime rates for the target offence.
- Implementation of mandatory minimum penalties will increase prison [or in this case penitentiary] populations.
- Juries may be less willing to convict if they know that the charge being tried is covered by a mandatory minimum penalty.
- Mandatory penalties may increase trial rates.

## **X. QUICK FIXES SUGGESTED BY OTHERS : THE CALIFORNIA "THREE- STRIKES" LAW**

We certainly have not gone as far as others have in terms of fooling the public with attractive sounding, but ineffective, criminal justice "solutions" to the problems of crime. Perhaps the best contemporary example of a quick fix comes from the State of California — a jurisdiction known to be at the cutting edge of many strange phenomena. The California "three-strikes" law requires a sentence of 25 years to life in prison for any offender convicted of *any* felony — no matter how minor — following two prior convictions for "serious crimes." It has other, less publicized, aspects as well : the sentence for the second felony is automatically double the sentence that would have been given a first time offender. It requires consecutive sentences when a person is charged with more than one serious felony, and the amount of "good time" that can be subtracted from the sentence is reduced to 20% of the sentence.

Clearly, locking up large numbers of people who have committed three felonies will reduce the amount of crime they can commit on the street. If they are in prison, they aren't on the street committing crimes. The question, then, is not whether "one crime would be avoided" by some incapacitation strategy; the questions are "What is the cost?" and "Would some other strategy for the use of scarce resources be *more* effective in saving lives?"

The Rand Corporation, the California think-tank not known for its left wing approaches to social policy, carried out a detailed and sophisticated analysis of this new law.<sup>25</sup> It makes sobering reading. I will quote various passages since the original words do not need clarification.

*Like many states, California began toughening its sentencing policies and adding prison capacity in the early 1980s, just as crime rates began a modest five-year decline. In fact, California was the leader among states in this trend, tripling its prison population in the decade since 1982. Between 1984 and 1991, more than 1000 bills were passed by the California legislature to change felony and misdemeanor statutes. Virtually none of these bills decreased sentences. Many lengthened them.*<sup>26</sup>

It should be noted that the California (reported) violent crime rate, during this enormous increase in prison population, started going up in 1986 and has continued going up since.

The authors of the report explain their methods in detail and note that :

*One consequence of [the particular approach they take] is that the model [by which the estimates that follow] may overestimate the benefits to be gained from the various alternative laws we evaluate.*<sup>27</sup>

Deterrence, the authors note, is not enhanced by increasing sentence length. They indicate that in their calculations, they "assume that the various [changes in the laws] reduce crime by removing criminals from the streets, not by deterring criminals on the street from committing further crime. This assumption is consistent with recent research".<sup>28</sup> Later in the report, the authors note that their model "did not account for any deterrent effect, i.e., that longer sentences would deter offenders on the street from committing crimes. Researchers have found little to no evidence that such deterrence occurs... but such an effect is alleged by proponents of the new law".<sup>29</sup>

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25. P.W. Greenwood *et al.*, *Three strikes and you're out : Estimated benefits and costs of California's new mandatory sentencing law* (Santa Monica, California : Rand, 1994).

26. *Ibid.* at 5.

27. *Ibid.* at 13.

28. *Ibid.* at 16.

29. *Ibid.* at 20.

On the surface, the benefits of the law look impressive :

*We estimate that over the next 25 years, the [...] three-strikes law will reduce the annual number of serious crimes in California 28% on average below the number that would have been committed under the previous law. It will also increase the costs of California's criminal justice system by an average of \$5.5 billion per year over the same period. That works out to a 122 percent increase over the \$4.5 billion per year estimated for the previous law.*<sup>30</sup>

They note that in the next seven years, the population of the California prisons will more than double from their 1994 levels :

*Another way to look at this is that each million dollars extra spent under the new three-strikes law will prevent 4 rapes, 11 robberies, 24 aggravated assaults, 22 burglaries of a serious nature and one arson. [...]*

*We thus see that effects on the number of serious crimes will be dominated by decreases in assaults and burglaries (not the murders, rapes, and robberies that many people may believe to be the law's principal targets).*<sup>31</sup>

The authors estimate that the three-strikes law will cost about \$16,000 per serious crime prevented.<sup>32</sup> Earlier they noted that "the property loss and medical costs associated with the average robbery or assault (the most common types of violent crime) are estimated to be less than \$1000. Depending on how they are estimated, the pain and suffering costs could be much larger".<sup>33</sup>

In determining whether the three-strikes law is worth it, they suggest that :

*some perspective can be gained on the issue of 'worth' by asking two questions : First are there other ways in which \$5.5 billion per year could be spent that would reduce crime by more than 28%? Second, what must be given up to spend an additional \$5.5 billion annually on crime reduction? [...]*

*By redirecting [\$5.5 billion] from implementing the... three-strikes law to funding police protection, California could [...] double the number of police officers in every jurisdiction in the state.*<sup>34</sup>

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30. *Ibid.* at 18.

31. *Ibid.* at 19.

32. *Ibid.* at 31.

33. *Ibid.* at 14-15.

34. *Ibid.* at 31.

It should be pointed out, of course, that the authors are not advocating this alternative. In fact, the evidence of more modest increases in police strength is that it will have little impact on crime rates :

*Our analysis suggests that there may be as many as one million felons on the street in California. At some point, these individuals will stop committing crimes and will be replaced by another million felons. The typical criminal career lasts roughly a decade. This implies that something on the order of a million California children under the age of ten will become felons. The new three-strikes law does little or nothing to change that prospect.... It works by transferring felons from the street to prison; it does not act to shut off the supply. [...]*

*The root causes of much serious crime are well known [...] Can money spent combating these causes be as effective as the three-strikes law? To be so, \$5.5 billion would have to persuade 28,000 children who would have become felons not to take up a criminal career. [Over the long run the law's effectiveness can be equaled if 28% of those who would have become felons are persuaded not to. One year's share of the million felons replaced every ten years is 100,000. Twenty-eight percent of that is 28,000.] The question can thus be rephrased : Can \$5.5 million be targeted to environments in which children have a high propensity for crime in such a way as to keep 28 children [in a hundred children] who would otherwise have become criminals from doing so?<sup>35</sup>*

Later in the report, the authors note that due to various constraints on the California budget and the reluctance of taxpayers to increase their taxes, there is no place to find the \$5.5 billion to pay for new prisons other than to take *all* of the California post-secondary education budget and a range of other services such as pollution control, park and natural resource management, workplace safety and insurance regulation. If the law is fully implemented and nothing else changes, this will occur seven years from now.

The point of all of this is that "quick fixes" — or the "get tough and ignore the cost" approaches — are irresponsible in that they may not provide the most effective way of achieving security.

## CONCLUSION

Where does all this leave us? I would suggest that there are a few very simple lessons that can be learned.

First, we should be careful in how we interpret public opinion about crime and the criminal justice system. Much of the information that we give to ordinary members of the public does not allow them to evaluate the nature of crime in our society or the

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35. *Ibid.* at 32.

operation of the criminal justice system. At the same time, many of the views expressed by members of the public about crime and the operation of the criminal justice system are likely to come from various "opinion leaders" (political leaders, criminal justice officials, spokespeople for various groups).

Second, we should be very cautious about accepting quick fixes — whether these fixes are legislative or administrative. The criminal justice system has a very limited capacity to do anything about crime. Those who suggest, therefore, that through changes in the criminal laws or through changes in the administration of the justice we can address the fundamental problems of crime are, unfortunately, wrong.

Determining who to hold accountable for crimes, and determining what kinds of penalties to hand out, are each very important functions for the criminal justice to perform. It is counterproductive to look to the criminal justice system as the primary institution in our society to do something about crime. The House of Commons Committee I referred to earlier, in its 1993 report, summarized these matters very effectively :

*The Committee accepts that crime will always be with us in one form or another, and will require police, court, and correctional interventions. At the same time, it believes that our collective response to crime must shift to crime prevention efforts that reduce opportunities for crime and focus increasingly on at-risk young people and on the underlying social and economic factors associated with crime and criminality. This comprehensive approach involves partnerships between governments, criminal justice organizations, and community agencies and groups. And it situates the crime problem in a community context and sees its solution as a social question.*<sup>36</sup>

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36. *Supra* note 21 at 2.

