

The Purpose and Principles of
Sentencing: Have We Learned
Anything in the Past 25 Years?

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Overview

- Thinking about sentencing
 - Review of problems identified in 1980s
- Did we solve the 'purpose and principles' problem in the mid-1990s?
- Contrasts – changes in sentencing and imprisonment
 - Policy decisions
 - Legislation
- Change in the context of Canadian punishment culture

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Canadian Sentencing Commission, 1984-1987

- Presented a comprehensive examination of problems with sentencing.
- Immediate Context
 - *Criminal Law in Canadian Society* (1982)
 - *Sentencing* (1984)
- Changes since 1987
 - 1996 Part XXIII of the Criminal Code
 - Numerous specific changes
 - Largely unencumbered by principles
 - Few/ None addressing "What is sentencing about?"³

Justifications for Punishment

- Various ways of thinking about this
- Simple utilitarian approaches create false promises
- Need to think of the punishment system as a whole

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Purpose of Sentencing

S. 718:

"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...."

Problems:

- **Objectives that follow**
- **Promise: "Contributing to the maintenance of a just, peaceful and safe society..."**
- **What is a just sanction?**
- **Would a 'harsher penalty' contribute more to a peaceful and safe society?**

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An Existing More Modest Approach: The Youth Criminal Justice Act

- "The purpose of sentencing... is to **hold a young person accountable for an offence** through the imposition of **just sanctions** that have **meaningful consequences for the young person and that promote** his or her rehabilitation and reintegration into society, **thereby contributing** to the long-term protection of the public."

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Proportionality

718.1: A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Broadly accepted (but often seen, inappropriately as meaning 'tough')
Relationship to purposes in 718?

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Do We Take Proportionality Seriously?

- Mandatory Minimum Punishments.
 - Example: Punishment for Possession loaded restricted/prohibited firearm (s. 95)
- (2) Every person who commits an offence under subsection (1)
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a **minimum punishment of imprisonment for a term of**
- (i) **in the case of a first offence, three years**, and
- (ii) in the case of a second or subsequent offence, five years; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment **for a term not exceeding one year**.

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Purposes (s.718)... Promises?

Accomplish the purposes by "imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

How is the choice made?

Should it be made by judges? (in most cases)

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An example of a loud and clear false promise

- 718.01: ... sentence for an offence that involved the abuse of a person under the age of eighteen years, ... primary consideration to... objectives of denunciation and **deterrence** of such conduct.
 - 718.02a sentence for an offence [involving police officer, justice system participant] the court shall give primary consideration to the objectives of denunciation and **deterrence** of the conduct that forms the basis of the offence.
- What does this mean (for the sentence)?
 - Outside of, or within, proportionality?

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Some problems identified by the Canadian Sentencing Commission in 1987

- [Priority] of purposes
- Unrealistic maximum sentences
- Conditional release and sentencing
 - Indeterminacy
 - Shortest controlled re-entry to society for those most in need.
- Lack of ability to create sensible overall sentencing severity.
- Public expectation and evaluation of sentences. Unkept promises (e.g., crime control)
 - When deterrence and incapacitation mentioned, why not give the maximum sentence?

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The Use of Imprisonment Criminal Code (718.2)

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Do these give real guidance?

Generally, did the 1996 amendments make a difference?

How is the decision made on what is 'appropriate in the circumstances'?

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Concerns

- 1987 (Adults): "Over-reliance on imprisonment"
[Canadian Sentencing Commission]
- 1998 (Youth): "The [youth justice system] relies too heavily on custody as a response to the vast majority of non-violent youth when alternative....can do a better job of instilling social values such as responsibility and accountability..." [A Strategy for the Renewal of Youth Justice]

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Can Imprisonment be Controlled?

- Political decisions vs. judicial decisions
- Legislation vs. policy
- Lessons from well known progressive reformers of imprisonment policies

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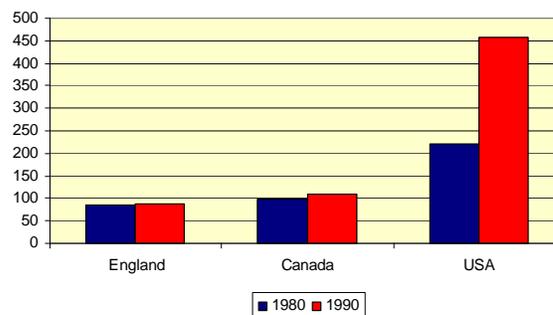
England & Wales: Margaret Thatcher

- Margaret Thatcher's policy proposals on imprisonment:

"Imprisonment restricts offenders' liberty, but it also restricts their responsibility... If they are removed in prison from their responsibilities...., they are less likely to acquire the self-discipline and self-reliance which will prevent reoffending.... It is better that people should exercise self control than have controls imposed on them...."

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**Imprisonment per 100K Residents
The Thatcher Years (1979-1990)**



California: Governor Ronald Reagan

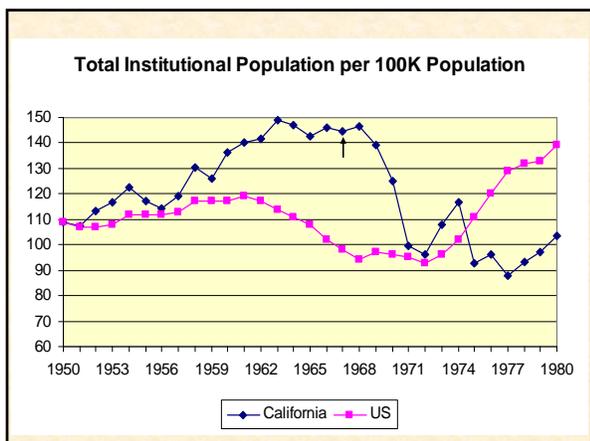
- [We must reject the] "rising tide of immorality responsible for terror...in our streets and parks and schoolyards"
- [California must] "reject the permissive attitude which pervades too many homes, too many schools, too many courts."

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Ronald Reagan, 2nd Inaugural address as California Governor, January 1971

"With the entire nation plagued by runaway crime rates and bulging prisons, our major California cities report a reduction in crimes of violence. Our rehabilitation policies and improved parole system are attracting nationwide attention. Fewer parolees are being returned to prison at any time in our history and our prison population is lower than at any time since 1963."

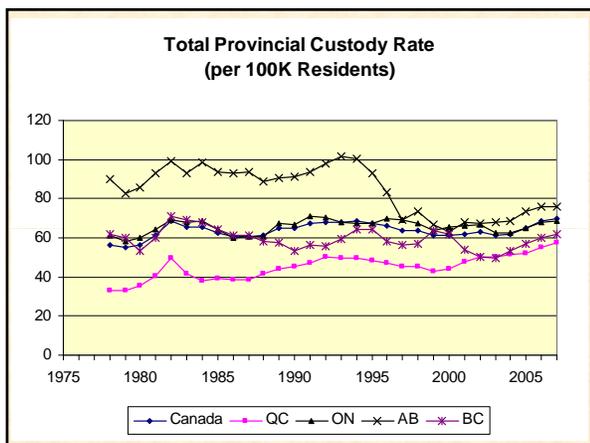
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Ralph Klein's Alberta

- " Non-violent provincial **inmates should be out of jail** and working in the community." (Brian Evans, Justice Minister, Alberta, February 1996)
- "I think that there are other ways of dealing with some of the criminal activity that goes on that are **more effective than putting a person in jail...**" (Brian Evans, Justice Minister, Alberta, February 1996)
- "Up to 15% of the 2700 criminals in Alberta's jails could be kept out of prison under **a new provincial plan to get tough on violent offenders**, says Alberta Justice Minister Brian Evans... The move will allow police and prosecutors to focus their attention on the most serious criminals, Evans said...." (April 1996)

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Structuring Sentencing: An example from legislation - The Youth Criminal Justice Act

Nothing 'trumps' proportionality (s.38)

- (c) the sentence must be proportionate....
- (d) all available sanctions other than custody... should be considered for all young persons....; and
- (e) **subject to paragraph (c)**, the sentence must
 - (i) be the least restrictive...
 - (ii) be the one ... most likely to rehabilitate... and reintegrate him or her into society, and
 - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

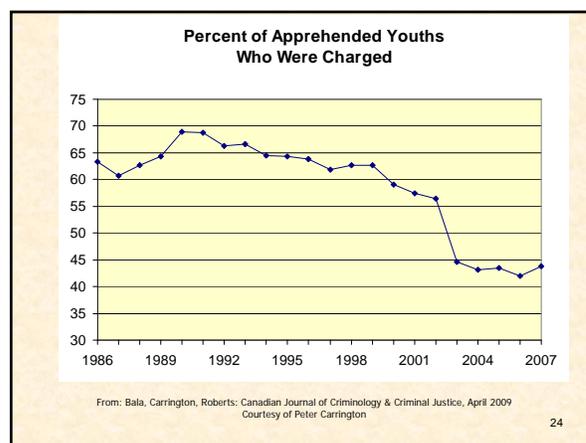
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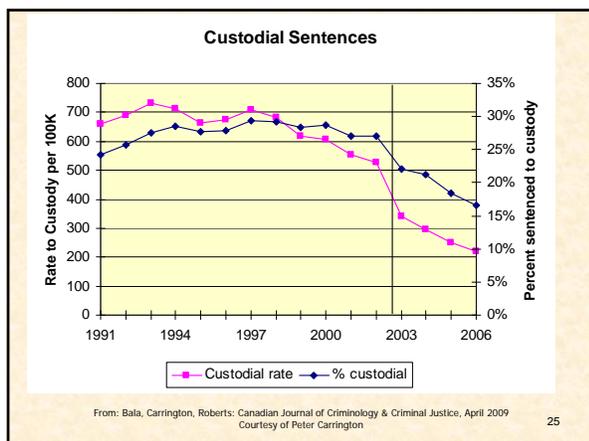
Restricting Imprisonment: An example from legislation

YCJA - S. 39(1)
 A...court **shall not** commit a young person to custody ... unless

- (a) the young person has committed a violent offence;
- (b) the young person has failed to comply with non-custodial sentences;
- (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt.... or
- (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

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Canadian Imprisonment Culture: An Incomplete List of Commissions, Committees, Reports, etc. 1965-onwards with the Theme of Restraint

- Committee on Remission Service... ("Fauteux report, 1956)
- ❖ Department of Justice, Canada: Report on Juvenile Justice (1965)
- Oulmet Committee "Canadian Committee on Corrections" (1969)
- Law Reform Commission (1976 and following)
- Sub-Committee on the Penitentiary System in Canada (the "MacGuigan Report) 1977
- *Criminal Law in Canadian Society* (1982)
- Sentencing (1984)
- Task Force on Program Review ("Neilson Task Force) 1985
- Canadian Sentencing Commission (1987)
- House of Commons Justice Committee – "Taking Responsibility" (1988)
- House of Commons Committee Report on Crime Prevention (1993)
- Federal-Provincial-Territorial Working Group on Corrections Population Growth (1996, 1997, 1998, 2000)
- Criminal Code Sentencing Provisions (1996)
- ❖ Strategy for Youth Justice (1998)
- ❖ Youth Criminal Justice Act (March 1999; became law April 2003)

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The Canadian Committee on Corrections (Oulmet Committee) 1969

"It is the Committee's view that in all cases where there has been no finding of dangerousness, sentences of imprisonment should be imposed only where protection of society clearly requires such penalty.... The Committee wishes to emphasize the danger of overestimating the necessity for and the value of long terms of imprisonment except in special circumstances" (p. 190).

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"Criminal Law in Canadian Society"

("Policy of the Government of Canada" 1982)

- "...the approach calls for restraint to be employed in the use of criminal law and the criminal justice system, on the basis of a conception of the criminal law as the ultimate point along the spectrum of society's informal and formal methods of dealing with conduct."
- "In awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances."

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Federal/Provincial/Territorial Committee on Provincial Imprisonment January 1995 - 2001

Purpose:

"...to identify options to deal effectively with growing prison populations" (1995)

"...concern was expressed that this growth threatened to outstrip available capacity and resources during a time when government resources continued to decline" (May 1996)

"... the eleven recommendations... were endorsed by all..." (May 1996) [including Ontario]

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Change?

- Realistic expectations on crime
- Re-embracing our (successful) skepticism about the ability of judges to save us from crime.
- Largely legislative?
- Possibly administrative?
- Unlikely to be individual actions of individual judges
- What kind of sentencing does Canada want?

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