

## The Integration of Sentencing Principles and Release Mechanisms

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## The Question?

Does an effective and fair criminal justice system need to provide some degree of integration between the principles which motivate its sentencing system and the principles which underlie its release mechanisms?

## Sentencing Principles

H.L.A Hart's "elegant way out of the apparent impasse"

Proportionality Theory and Just Deserts

Limiting Retributivism

## Practical Sentencing Issues

- Demise of indeterminate sentences
- Disparity
- Discrimination [ Sentencing and Release]
- Over-crowding

## Sentencing Responses

- United States:
  1. Parole Guidelines
  2. Sentencing Commissions and Sentencing Guidelines
  3. ALI Draft Code
- Europe:
  1. Statutory Principles
- United Kingdom:
  - Advisory Panels

## Canada: From Amalgam of Objectives to Cafeteria of Principles

- Sections 718, 718.1, 718.2
- Proportionality
- Parity
- Parsimony
- Totality

## Individualization

Sentencing is an inherently **individualized** process, and the search for a single appropriate **sentence** for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction..... the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred: R. v. M(C.A.) [1996] 1 S.C.R. 500,para.92

## Release Models: In Practise

## European Sample

- Belgium
- England and Wales
- Finland
- France
- Germany
- Netherlands
- Scotland

## Analysis

- Statements of Principle or Purpose
- Eligibility
- Discretionary or Mandatory Release
- Nature of Decision-maker
- Criteria for granting decisions
- Criteria for revocation

### A. Mandatory:

- no release until warrant expiry
- mandatory release automatically after a stipulated fraction of the sentence has been served

### B. Discretionary Models:

- discretionary release arising at stipulated times within a sentence, based upon stipulated or unstipulated criteria
- release based on earned remission

### C. Hybrid Models

- combination of discretionary and mandatory release with different eligibility dates
- combinations of discretionary and/or mandatory mechanisms distinguishing between types of offences, length of sentence, prior record
- mandatory release automatically after a stipulated fraction of the sentence has been served, subject to the discretion of an appropriate authority to deny release according to stipulated criteria

### Interesting Features

- Treatment of Short Sentences (Belgium)
- Mandatory Pre-expiry Release (Finland)
- Serving Full Sentence (Finland)
- Judicial Releasing Authority (France, Germany, Netherlands)
- Release as subjective right (Belgium)
- Specific risk assessment criteria (Netherlands)
- Eligibility defined by length of sentence or prior convictions (numerous examples)

### Release Models: In Theory

Principles and Purposes?

R,R,R,R

Release=Risk, Re-integration, Rehabilitation

### Eligibility

- Nature of Offence
- Length of Sentence
- Offender Characteristics (recidivist)

How does eligibility relate to sentencing principles?

### Criteria

- Compliance
- Re-integration plan
- No finding/indicia of risk to re-offend

How do criteria relate to sentencing principles?

## Nature of Decision-Maker

- Judicial
- Quasi-judicial
- Administrative
- Executive

Does nature of decision-maker promote sentencing integrity?

## INTEGRATION?

Are there any examples? [i.e. to what degree do we see there integration]?

Does integration matter?

## Linkage to Sentencing Process

- Eligibility?
- Criteria?
- Decision-maker?
- Revocation process and criteria?

## Canada

- Corrections and Conditional Release Act, Part II
- Regulations
- National Parole Board Policy Manual
- Appeal Board Decisions
- Judicial Review Decisions

## CCRA: Purpose

**100.** The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens

## CCRA: Principles

100. (a) that the **protection of society be the paramount consideration** in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, **including the stated reasons and recommendations of the sentencing judge**, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(d) that parole boards make **the least restrictive determination consistent with the protection of society;**

### CCRA: Accelerated Parole

126. (2) Notwithstanding section 102, if the Board is satisfied that there are no reasonable grounds to believe that **the offender, if released, is likely to commit an offence involving violence before the expiration of the offender's sentence** according to law, it shall direct that the offender be released on full parole.

### CCRA: Detention

- 130(3)(a)... that **the offender is likely, if released, to commit an offence causing the death of or serious harm to another person or a sexual offence involving a child before the expiration of the offender's sentence according to law,**

130(3)(c)...That the offender **is likely, if released, to commit an offence causing the death of or serious harm to another person, a sexual offence involving a child or a serious drug offence before the expiration of the offender's sentence according to law.**

### CCRA: Revocation

(a) cancel the suspension, where the Board **is satisfied** that, in view of the offender's behaviour since release, **the offender will not, by reoffending before the expiration of the offender's sentence according to law, present an undue risk to society;**

### CCRA: Long-Term Supervision

(8) If in the Board's opinion it is necessary and reasonable to do so in order to protect society or to facilitate the reintegration of the offender into society, the Board, when it cancels a suspension of the long-term supervision order of an offender, may...**(c) order the cancellation not to take effect until the expiration of a specified period that ends on a date not later than the end of the ninety days referred to in subsection (2), in order to allow the offender to participate in a program that would help ensure that society is protected from the risk of the offender reoffending.**

## Policy Manual

When considering release on full parole, Board members must take into account **the need for the offender to have a demonstrated change in behaviour and attitudes.** Program completion alone should not be relied upon as evidence of change. Rather Board members should focus on observable and measurable results derived from interventions.

Offenders, particularly those who have been convicted of a violent offence, who have been incarcerated for a significant period of time; served more than two distinct penitentiary terms; repeated or multiple convictions and charges; and/or previously failed on conditional release; shall not normally be granted full parole without having had previous successful experience on unescorted temporary absence and/or day parole. **This period of gradual and slowly expanded releases allows offenders to demonstrate a capacity to reintegrate into society as law abiding citizens.**

## Integration?

To what degree is there integration?

## Analysis

- How does integration [or the lack thereof] enhance/undermine sentencing principles?
- How does integration [or the lack thereof] enhance/undermine release models?

## Observations?

- Rare for release mechanism to state its principles or purpose
- Most common criterion is risk
- Few models have clear linkages to sentencing process
- Most release mechanisms evolved incrementally, not as coherent model

## Observations for Canada

1. Risk trumps proportionality, parity and parsimony
2. Eligibility reflects denunciation [Code, 743.6]
3. Detention to WED undermines proportionality and parity
4. Rehabilitation only relevant in relation to risk
5. Incapacitation is rarely a sentencing objective, but commonly a release feature
6. No legal obligation to provide programs linked to release obstacles

## Back to the Integration Question

- Canada demonstrates little integration
- BUT
- Does Integration matter?

## Imagine A System Without any Integration

Sentencing [based on articulated criteria]

SJ= Penal Architect

S=Penal Design

C/RM=Penal Contractors

## Without Integration?

Your contractors throw away your blueprints, [they have their own criteria]

and they commence

[insert drum roll]

## A Penal Control Frolic

- External security
- Internal Discipline
- Risk-dominated release

The New Penal Architecture without integration

## Let's take a serious look at integration

Doesn't "release" always undermine proportionality?

Depends on how we conceive a "proportionate sentence":

- precise sentence
- aggregate

## Aggregate?

What about: denunciation [eligibility] plus sentence-related release criteria

**Sentence-related criteria:** linked to a sentencing objective relevant to the offender [more to come]

### Doesn't "release" always undermine parity?

Depends on how we define like/similar for release purposes

What about disparate release only justified by legitimate sentence-related criteria

### Parsimony?

Least intrusive points to presumptive release: Is this feasible?

Can be denied by showing of legitimate sentence-related criteria

### Individualization?

Not really a principle but a methodology

Requires offender-specific release processes

### New Hybrid Model

A. Discretionary Release based on relevant sentence-related criteria

1. Presumptive release at 1/x of sentence subject to showing of legitimate sentence-related criteria

2. Sentence-related criteria must be linked to a sentencing objective relevant to the offender **as determined by sentence.**

That is, to what extent was sentence, beyond proportionality determination, influenced by incapacitative or rehabilitative concerns.

3. Personal criminogenic characteristics only relevant sentence-related criteria **if intrinsic to sentence** [e.g. substance abuse, violence/anger control, mental health] or directly related to offence

4. Risk assessments, as limited by 2 and 3, cannot address personal characteristics not intrinsic to sentence, or unrelated to offence

B. Mandatory Release:  
  
- at  $1/y$  of sentence [ where  $y > x$  ]  
- remainder of sentence on supervision

C. Revocation of Release:  
  
-breach of conditions or new offence that warrant return to custody **to complete original sentence**

Therefore, state must show "sentence related" concern to justify return to custody

**Major Implications**

- Must be accompanied by positive duty to provide resources to address personal characteristics/vulnerabilities
- Must include effective mechanism for monitoring these resources

**Where Does This Lead?**

- Permanent Sentencing Commission with mandate to guide sentences, shape links to release, and monitor prison and supervisory resources