

# The Integration of Sentencing Principles and Release Mechanisms

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## INTRODUCTION

There are three phases to a sentence of imprisonment: sentencing, implementation and release. Over the years much has been written about the principles of sentencing. Some sentencing systems have adopted expressly a principle or set of principles intended to shape the sentences actually imposed. There is also a rich body of literature about the pains, exigencies and legal implications of the implementation of sentences of imprisonment. However, we cannot find a similar body of literature that deals with the mechanisms employed to effect release from a sentence of imprisonment. The limited sources usually relate to the legal structure underlying a particular release mechanism without much, if any, regard to the principles upon which it is based. Certainly, the statutory structures of release mechanisms only rarely make any reference to underlying principles. This may be a function of the simple historical fact that many release mechanisms have evolved incrementally to deal with pragmatic concerns. Or perhaps legislatures have just not given any thought to the matter of principle. Still, it is possible to examine a release mechanism with the goal of discerning what principles or objectives constitute its rationale.

In this paper I consider whether an effective and fair criminal justice system needs to provide some degree of integration between the principles which motivate its sentencing system and the principles which underlie its release mechanisms. The first two parts of the paper discuss the evolution of principles of sentencing and models of release mechanisms. Then, the focus will turn to the theoretical question: is integration important to the development of a fair and effective criminal justice system?

## I. PRINCIPLES OF SENTENCING

For centuries philosophers, sociologists, and lawyers debated whether punishment ought to be based on a retributive or utilitarian rationale. The debate seemed endless and intractable. While it ensued, many jurisdictions had, by the beginning of the 20<sup>th</sup> century, embraced a rehabilitative rationale for imprisonment which led to a profusion of indeterminate sentencing schemes. By the latter half of the 20<sup>th</sup> century, particularly in the United States, those involved with criminal justice began to see that indeterminacy was producing large highly-racialized prison populations accompanied by discriminatory and sometimes corrupt release practices.

Coincident with this dissatisfaction with the indeterminate model, a major change took place on the theoretical scene. The age-old debate between utilitarians and retributivists was re-directed, or perhaps even liberated, by H. L. Hart. His contribution has been described by Nicola Lacey as “an elegant way out of the apparent impasse.”<sup>1</sup> Hart’s important insight was that one can distinguish between the “General Justifying Aim” of a punishment system and the principles which bear on the issue of distribution of punishment.<sup>2</sup> Distribution involved both the questions of whom to punish and how much to punish. With respect to the latter question, the domain of sentencing, Hart argued that principles of distribution such as parity, proportionality, and mitigation, “may qualify the General Aim” but are not “deducible from it.”<sup>3</sup> Here, it is useful to note that Hart is not speaking of mitigation in the broad sense in which it is now used but rather in the more limited form where “the situation or mental state” of the offender suggest an unusual or specially great temptation “or an impaired or diminished ability to control one’s actions not attributable to the offender such that conformity with the law was a matter of special difficulty compared to normal persons.”<sup>4</sup> Hart’s lead was soon followed by the theorists Andrew von Hirsch and Norval Morris. Von Hirsch’s work, beginning with his initial conceptualization of just deserts, led to the development of what is now referred to as proportionality theory. Morris, on the other hand, had a vision of

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<sup>1</sup> Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) at 220.

<sup>2</sup> H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968) at 8–10.

<sup>3</sup> *Ibid.* at 25 and also 15.

<sup>4</sup> *Ibid.* at 15.

sentencing in which proportionality was used as a brake rather than an engine. As well, he argued the importance of the principle of parsimony (restraint) and the rejection of dangerousness as a source of long terms of confinement. His early writing has now evolved into what is called limiting retributivism. Over the decades since von Hirsch and Morris began thinking about sentencing, their theoretical premises have been nurtured with the help of new sentencing scholars. Those who subscribe to limiting retributivism now conceive of proportionality providing a band or range of sentencing options which can be mitigated by relevant factors including undue hardship to the offender or others, or even demonstrable rehabilitative prospects. Pure proportionality theorists now argue that age, infirmity, youth, and other mitigating equity factors, can properly affect proportionate sentencing. From a pragmatic perspective, the distinct original conceptions may now tend to produce more convergence in actual outcomes.

With these theoretical influences, more and more western sentencing systems are explicitly stating the operative principles and objectives. Proportionality is quickly becoming a fundamental principle. However, statements of multiple principles and objectives can impair their operative effect if there are no indicia of priorities between the stated principles and objectives. Some systems also deal in specific terms with applicable mitigating and aggravating factors. We also see examples of expressed limits on the availability of specific options. These can appear in various forms: criteria for availability, preclusion for certain categories of offences, or mandatory sentences. These kinds of limits can reflect stipulated principles or undermine them. Limits on the availability of imprisonment, for example, promote restraint. Conversely, precluding community options for specific offences and the use of mandatory sentences both undermine proportionality and parity. All of these situations bear on the scope of judicial sentencing discretion and the extent of principled guidance provided by the statutory requirement that a sentencing system, in practice, actually reflect those principles or uses stipulated objectives in a fair, explicable and rational manner.

Where does this bring us in the early part of the 21<sup>st</sup> century? First, we see that most western countries have embraced proportionality as a fundamental principle of sentencing.<sup>5</sup> Secondly, through concerns about certain mitigating circumstances, such as youth, old age, infirmity, and mental disorder, there is a need to modify strict proportionality

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<sup>5</sup> For Canada, see *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.1.

theory. Thirdly, in countries like Canada that do not have a formal sentencing guidance scheme, an amalgam of potential sentencing objectives increase the scope of judicial discretion but also operate to diminish the impact of proportionality. While some courts might disagree, this has been cemented by the repeated assertion by the Supreme Court of Canada that sentencing is “individualized.” However, a better interpretation of individualization is that it encompasses the principle of parity: like cases should be treated similarly and unlike cases treated differently. When combined with the principle of restraint, which the Supreme Court has confirmed is an essential aspect of Canadian sentencing, we have the “three P’s” of sentencing principles: proportionality, parity and parsimony [i.e. restraint].

## II. THE ORIGIN AND HISTORY OF RELEASE MODELS

The roots of modern penitentiary systems reach back into the late 18<sup>th</sup> and early 19<sup>th</sup> century when countries began reducing the enormous array of capital offences and replacing them with sentences of imprisonment. European colonialism permitted the use of transportation and penal colonies. While these adventures began to diminish in the 19<sup>th</sup> century, some penologists have pointed to them as the precursors to parole, along with the role of executive pardons, since they provided mechanisms for the mitigation of sentences.<sup>6</sup> With the advent of imprisonment as the major tool of sentencing, two new and related issues entered the landscape. One was we would now call classification. The early penitentiaries confined all sorts of offenders: men, women, children, and the mentally disturbed. By the end of the 19<sup>th</sup> century, it was common across most western countries that these groups be separately confined. As well, rudimentary forms of classification began to develop within institutions. That is, prisoners passed through stages of confinement with progressively increased “privileges.” This progression led to the second major development—the question of release.

Historically, Maconachie and Crofton are credited with developing models of classification and release that were based on accomplishment. Prisoners earned credits learning skills and accepting

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<sup>6</sup> See David Cole & Allan Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990) at 160–162; David Dressler, *Practice and Theory of Probation and Parole*, 2d ed. (New York: Columbia University Press, 1969).

responsibilities within the institution. Eventually, a prisoner might earn sufficient credits to justify release. These schemes were entirely in the hands of the prison administrators and resulted in “tickets of leave.”<sup>7</sup> They also resulted in the development of rudimentary remission schemes whereby a prisoner could earn a reduction of sentence through “good behaviour, diligence and industry.”<sup>8</sup> These led to release without conditions. Also in the 19<sup>th</sup> century, many European countries established forms of release usually relying ministers of the government to make release decisions. What one can see from these early examples is the recognition of a central consideration: the risk to re-offend. Whether this was determined by an administrative evaluation of rehabilitative progress or by the exercise of executive discretion, the objective was the same. In Canada, our current system had similar origins initially with “tickets of leave” granted arbitrarily by the executive, followed by a more structured approach handled by the Remission Service of the Canadian Penitentiary Service<sup>9</sup> and then, in 1959, the establishment of the National Parole Board which was given formal authority over release decisions, the imposition of conditions, and the possibility of suspension and revocation for breach of conditions or re-offending.<sup>10</sup>

Returning briefly to the rejection of indeterminacy in the United States and the acceptance of “just deserts” in the latter half of the 20<sup>th</sup> century, we started to see major changes in American release practices. “Just deserts” and proportionality led to sentencing reforms that focused on determinate sentences and, in many American jurisdictions, sentencing commissions and guidelines. However, these changes did not occur without controversy and criticism. Cullen and Gilbert observed:

There can be little dispute that the rehabilitative ideal has been conveniently employed as a mask for inequities in the administration of criminal penalties and for brutality behind the walls of penal institutions. Yet as our analysis of the realities of the current swing toward determinate sentencing has revealed, the existence of inhumanity and injustice in the arena of crime control does not depend on the vitality of rehabilitation. Indeed, a punitive “just deserts” philosophy would serve the purposes of repressive forces equally well, if not with greater facility. It would

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<sup>7</sup> See Cole & Manson, *ibid.* at 163–164.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 163–167.

<sup>10</sup> *Ibid.* at 167–178.

thus seem prudent to exercise caution before concluding that the failure of the criminal justice system to sanction effectively and benevolently is intimately linked to the rehabilitative ideal and the ills of the system will vanish as the influence of rehabilitation diminishes. As Francis Allen has recently observed, “the contributions of the rehabilitative ideal to these failures has been peripheral.”<sup>11</sup>

But the acceptance of proportionality and the move to determinate sentencing continues to march forward.

Given the criticisms of pre-existing release schemes, it is easy to understand how the combination of proportionality and determinate sentencing would lead some to question the efficacy of any early release scheme, especially a discretionary one. By 2002, 16 states had abolished discretionary early release.<sup>12</sup> More significantly, data reported by Joan Petersilia, a leading scholar in the field of parole and probation, show a dramatic shift occurred from 1977 to 1999 in how prisoners were released through discretionary decisions. By 1999, that had dropped 24%. Releases on mandatory non-discretionary parole had taken over moving from about 5% to 41%. Releases at the expiry of the sentence comprised 19% of released prisoners in 1999. Exactly what these changes demonstrate is hard to determine due to the complex factors at play in American penal policy, including the controversial rejection of rehabilitation as an over-arching aim, as well as the politically motivated “law and order” momentum which included “truth in sentencing” advocates. We can, however, observe that the wind was clearly blowing strongly away from discretionary parole, even though as Petersilia has observed:

“Recent research shows, however, that inmates actually serve longer prison terms in states retaining discretionary parole, and those states have higher success rates.”<sup>13</sup>

By the early 21<sup>st</sup> century, while early release continues to be controversial, in its myriad forms it continues to play a major, yet under-

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<sup>11</sup> Francis T. Cullen & Karen E. Gilbert, *Reaffirming Rehabilitation* (Cincinnati: Anderson Publishing, 1982) at 246–247.

<sup>12</sup> See Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Re-entry* (New York: OUP, 2003) at 55.

<sup>13</sup> *Ibid.*



theorized and under-scrutinized, role in criminal justice systems around the world.

Any criminal justice system which contemplates the issue of early release needs to make several policy decisions before deciding on the appropriate model. The most basic question is whether to permit early release and, if so, should it be determined by the exercise of some discretion or at a stipulated date. A subsidiary matter is whether release, if available, should be accompanied by conditions. Assuming a discretionary model, the next issue is who should be entrusted to make the relevant decisions and upon which criteria. This includes the imposition of conditions. From surveying various release schemes in North America and Europe, one also sees myriad hybrid models that involve different combinations of mandatory and discretionary release. Often these hybrid schemes involve elements which seem mutually contradictory. Usually, this is the result of a particular history which has managed to entrench certain mechanisms for pragmatic reasons and without regard to internal consistency. A further dimension is necessary for any release model that includes release on conditions. That is, how should the release be supervised and which authority should be responsible for dealing with alleged breaches of conditions or re-offending?

One could construct a basic typology of release models as follows:

A. Mandatory Release

- No release until warrant expiry.
- Mandatory release automatically after a stipulated fraction of the sentence has been served.

B. Discretionary Release

- Discretionary release arising at stipulated times within a sentence, based upon stipulated or unstipulated criteria.
- Release based on earned remission determined by prison administrators.

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.

The federal Canadian release system is a hybrid model involving various key elements. Release decisions are made by the National Parole Board [NPB], an autonomous administrative body with its own statutory structure. Leaving aside murder convictions, discretionary release on full parole can be granted after one-third of the sentence has been served.<sup>14</sup> Mandatory release, also on conditions, is achieved after two-thirds of a sentence has been served. This is known as statutory release. It can be nullified by a detention decision of the NPB which can result in continued confinement until warrant expiry. Detention is premised on a finding that the offender, if released, would be likely to commit another offence involving death or certain stipulated modes of serious harm. Other important aspects of this scheme are that, once released, the prisoner is supervised by a branch of the Corrections Service of Canada who can suspend a parole or statutory release pending a finding by the NPB that the release should be revoked by reason of breach of condition, including a new offence. Revocation results in a return to penitentiary confinement.

### III. THEORIZING RELEASE MODELS

This is an intrinsically difficult exercise and cannot be accomplished without a careful examination of the particular model in question. Moreover, it cannot be conducted without regard for the other parts of the process: sentencing and the administration of the sentence of imprisonment. Other than a scheme which denies early release entirely, a model can only be based on a combination of utilitarian premises and the denunciatory or “censure” aspect of retribution. Thus, we need to ask which principles and objectives of the sentencing process are motivating the release decision and which aspects of imprisonment are encouraged by it.

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<sup>14</sup> For the most part, day parole can be granted six months earlier than the full parole eligibility date.

The usual response involves a statement about the interaction of rehabilitation and the diminution of future risk to society; that is, protection. The interaction is based on the argument that rehabilitation enhances successful re-integration after release and, hence, diminishes the risk of a new offence. We can find these justifications in the historical roots of Maconachie and Crofton both of whom permitted release after an accumulation of “marks” resulting from accomplishment and the absence of disciplinary problems. Both of these factors are problematic. A test of accomplishment is inherently discriminatory in that it privileges those with social and vocational skills. While a good internal discipline record has some attributes, it also occurs within the artificial confines of a prison. In modern schemes, we see the continued presence of the two justifications but tested by more refined means. Accomplishment is shown by success with internal treatment or behavioural modification modalities. These would include cognitive skills, sex offender treatment, anger management, substance abuse treatment, etc. On the risk side, we have seen within the past thirty years a proliferation of actuarial risk prediction methods with varying claims about their efficacy in predicting relative levels of risk between offenders. Regardless of the refinements, using these criteria for release decisions might show what rationales underlie the model, but their usefulness and fairness depend on available resources, equality of access, and the effectiveness of the particular treatment or prediction technique.

A further claim as a potential justification is the goal of denunciation. One could argue that a release model which either mandates or permits release after a particular portion of a sentence has been served reflects the period of confinement needed to achieve appropriate denunciation of the offence. For discretionary release, this would then need to be combined with criteria that look to rehabilitation, risk, or both of them, to produce early release. Without repeating the problems of relying on rehabilitation and risk, this argument also raises a question about the relationship between denunciation and proportionality. If denunciation is satisfied by only a portion of a sentence, how can it be said the sentence is proportionate? What justifies the remainder of the sentence?

Of course, there are pragmatic justifications, as well. In some European jurisdictions early release can be justified by the need to care for dependents. This is a pragmatic consideration, not a philosophical one, but one can appreciate its utility especially when children are concerned and there is evidence of good parenting. Another pragmatic

factor might be the opportunity to make reparations but any link to early release is much more tentative and difficult to justify. A further pragmatic consideration that bears no relationship to any recognized principle objective of sentencing is the ability to reduce prison overcrowding through early release. Examples are evident in American jurisdictions. More interesting, is the related issue of whether sentencing guidelines ought to take into account states of over-crowding when articulating severity guidelines.

The relationship between an early release model and the administration of a sentence of imprisonment raises other pragmatic considerations. One commonly hears from prison administrators the claim that the absence of any potential for discretionary release removes an essential tool for good order and discipline. This seems self-evidently true. As a result, they are keen supporters of relying on successful demonstrations of rehabilitation and internal disciplinary records as criteria for early release. Clearly, these views are not generated by a concern for linkages with the principles of sentencing but, nonetheless, they need to be taken into account.

And what about the “three P’s” of sentencing as recognized in most jurisdictions, although sometimes with varying importance: proportionality, parity and parsimony? The most prominent advocates of proportionality theory, Von Hirsch and Ashworth, argue that it encompasses all three of these principles. That is, a proportionate sentence must treat like cases alike and distinguish between different cases, and should also reflect restraint in the use of hard punishment. Unlike some American examples of “just deserts” sentencing, in their recent work they argue that certain situations of mitigation do not undermine proportionality. Certainly, this is clear when the mitigation relates to culpability, since the parity principle requires legitimate differentiation. With respect to personal factors unrelated to culpability they argue that moderate mitigation, from 10 to 15%, does not undermine proportionality. This suggests that a release model that permitted a similarly small reduction of actual confinement would also not undermine proportionality. However, if this is true, it provides no answer to what criteria might be used to determine an early release decision. Any of the rationales discussed above would suffice.

In respect of all three of these sentencing principles, one might argue that a release model should consider disparate impact of imprisonment. This raises some difficult questions. Unequal impact can

flow from idiosyncratic personal factors that ought to play no role in a sentencing decision, for example a prisoner's passion for fine wine. On the other hand, one can easily conceive of conditions like health problems and old age which will create unequal impact. As well, recent research into the effects of imprisonment on recidivism has shown that some offenders are more vulnerable to the negative exigencies of the prison environment. There may be controversy over whether these kinds of issues can be encompassed by proportionality theory: systems will rely on parity and parsimony to factor in these situations of unequal impact that arise from personal factors beyond the prisoner's control.

#### **IV. THE INTEGRATION OF SENTENCING AND RELEASE PRINCIPLES**

Originally, I had planned to survey various release models to evaluate the extent to which they showed integration. This project has proven to be intractable. Almost never do statutory release models explicitly state underlying rationales in terms used to describe sentencing principles. Accordingly, to the extent that this is intended, one needs to interpret the criteria for release and conditions in order to extrapolate any links to sentencing. As well, when we look at models from different jurisdictions, we find that there is often little commonality in terminology making the exercise more complicated. Finally, when we come to the question of evaluation, we find a dearth of useful systematic data both with respect to the practice of linking release decisions with sentencing principles and objectives, and in terms of the efficacy of doing so.

Faced with this dilemma, I decided to conduct a thought experiment. I imagined a release model which had absolutely no relationship, conceptually or pragmatically, with any accepted principles or objectives of sentencing. Before one dismisses this as fanciful, let me explain how such a model might work. An authority would be given power at some stage of a term of imprisonment to consider whether a prisoner should be released. The power might not be completely arbitrary. Conversely, the releasing authority might be directed to take into account matters that cannot be linked to an accepted sentencing principles or objective. For example, prisoners between the ages of 20 and 40 who agreed to join the armed forces. Another example might be a direction to take into account the existence of non-dependent adult co-workers who would be assisted by the prisoner's release.

What would be the implications of a model such as this? It seems to me that we would have created a chaotic crucible that would turn the experience of imprisonment into what might be described as a penal control frolic. The attention and the resources of prison administrators would be directed entirely to issues of security and discipline. I say this because we can make some assumptions about priorities and context. The first responsibility of a prison administrator is to ensure that prisoners are confined. That is, the regular counts need to confirm that all prisoners on the books still remain in confinement. This means tight perimeter security. It also means restrictive use of any temporary absences whether for compassionate, rehabilitative or work release purposes. The next priority for a prison administrator is to ensure good internal order and discipline, with a minimum of confrontations both between prisoners and staff, and also between prisoners. Reducing the opportunity for confrontations can be achieved by reducing internal movement and opportunities for prisoners to congregate. However, a reduction in programming has an advantage beyond cutting down on movement. It also reduces costs both in terms of the resources needed to mount programs and as a consequence of increasing individual cell time. Especially in times of fiscal exigency, when budgets are always being scrutinized, one of the largest components of a prison budget is labour costs. Greater periods of internal cell confinement can reduce staffing needs and alleviate budget pressures.

Since we often hear rhetoric about how much it costs to confine an individual prisoner on a yearly basis, one might argue that the prison administrator has an interest in facilitating early release to reduce the prison population. Thus, there is a countervailing influence which the role of internal programming. However, most costs are fixed. That is, they only vary marginally with the number of prisoners. Accordingly, our hypothetical astute prison administrator would pay attention to how the early release mechanism views prisoners' eligibility for release, but the advantages of reducing movement, congregation and programs would win out. These priorities not only reduce direct costs, they would also reduce collateral costs because they would notionally produce an environment with fewer assaults, less opportunity for the distribution of contraband, and greater ability to control infectious diseases and other illnesses. Even if our prison administrator has pragmatic and ethical concerns about risks to society after release, surely those are systemic issues determined by the policies that produce the penal framework. And our assumption is that the statutory framework does not require any integration between the

sentencing principles and release principles. So why would the people responsible for the implementation of sentences of imprisonment take it upon themselves to fill that gap? It seems to be a very unlikely occurrence unless their statutory obligations require it and why would this be the case in a regime that has already decided that there is no need to link sentencing principles to release principles.

And what can we surmise about the release model itself? Without a link to sentencing principles, the architects of the model would be on their own both with respect to the granting process and the potential for subsequent suspensions and revocation. Certainly, risk would be a major consideration but would the responsible agency be more concerned about risk during a period of release or after warrant expiry? Granting release creates accountability during the period of release and even, to a lesser extent, afterwards. But denying release removes any accountability. It shifts the risk directly on to the community without, in most regimes, any tools for post-sentence supervision. So we can imagine a very high threshold for the release decision followed by very intrusive supervisions techniques and a quick hand on the suspension/revocation trigger. Perhaps one could argue that these are desirable objectives but they clearly undermine the principles of parity and parsimony. Moreover, by placing all eggs in a risk basket, they undermine proportionality by enhancing the role of integrative prospects like family support, employability, and pre-offence skills and training. The model can operate but it will not be part of a fair and equitable process that treats like cases alike and focuses on desert. As well, if protection of the community is an important goal, a release model that tilts in favour of denial rather than granting leaves the community without the benefit of post-release supervisions.

The conclusion of this thought experiment suggests to me that a failure to integrate principles of sentencing with the principles that motivate an early release would necessarily have two implications. First, release with community supervision would become less frequent. Secondly, it would produce a model of prison confinement that is antithetical to what we consider in 2011 to be fair, constructive, healthy and humane. If we take account of any international minimum standards for imprisonment, the model would fail to measure up on various counts. If we take seriously the role of human rights in shaping the minimum norms of penal regimes, the model would again fail.

## CONCLUSION

I have tried to make a case for greater integration of the principles of sentencing and the principles that govern release, with concomitant obligations on the authority that implements the sentence to promote and facilitate those principles. Where does Canada fit into this discussion? As a result of serious inquiries into sentencing and release<sup>15</sup> that took place in Canada in the 1980's, the enactment of the *Corrections and Conditional Release Act* in 1992<sup>16</sup> seemed to reflect some attempt at integration. At least some of the statutory provisions suggested a potential role for integration:

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.

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(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;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

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<sup>15</sup> See Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Queen's Printer, 1987); Report of the Standing Committee on Justice and Solicitor General, *Review of Sentencing and Conditional Release: Taking Responsibility*, Minutes of Proceedings and Evidence, 33rd Parl., nd Sess., 1986-87-88, Issue No. 65, August 16-17, 1988; Solicitor General of Canada, *A Framework for the Correctional Law Review*, Working paper No. 2, June 1986.

<sup>16</sup> S.C. 1992, c. 20.



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

Notwithstanding these principles, since 1992, the National Parole Board has made risk the primary consideration in its decision-making. The statutory phrase is cast in terms of “by reoffending, present an undue risk to society before the expiration according to law of the sentence...” This criterion is part of the statutory basis for granting parole and the sole basis for deciding not to revoke a parole or statutory release. A perusal of the Policy Manual of the National Parole Board makes it clear that risk is the singular and predominating issue in all decisions. Any statutory references to rehabilitation, reintegration, or least restrictive determination are all subsumed under an over-arching focus on risk.

Some might argue that this attachment to risk is inevitable given the basic concern about public protection. However, this argument assumes that there is no integration between sentencing principles and release models. An integrated view of sentencing and release would provide a mechanism where the principles of proportionality determines the sentence and the applicable release eligibility periods reflect the objectives of denunciation and general deterrence. Thereafter, the actual release decision would encompass the objectives of incapacitation, rehabilitation and individual deterrence within a rubric where eventual productive integration becomes the predominant goal. Here, attention would need to be paid to a broader conception of protecting the community which would recognize the roles of rehabilitation and community supervision while on release. Currently, we have in Canada a scheme in which the least safe prisoners are detained until warrant expiry and then released without supervision or conditions. This is the result of making risk the singular focus.

As a final note, Bill C-10,<sup>17</sup> which was recently enacted by Parliament, will set back any optimism about integration. The current statement of principles will be replaced by new provisions that can only tilt the release model farther away from sentencing principles and objectives. The relevant provisions will read:

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<sup>17</sup> See Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1<sup>st</sup> Sess., 41st Parl., 2011 (assented on 13 March 2012). At the time of writing, this bill had passed through the House of Commons on December 5, 2011 and was being considered by the Senate.

100.1 The protection of society is the paramount consideration for the Board and provincial parole boards in the determination of all cases.

101. The principles that guide the Board and the provincial boards in achieving the purpose of conditional release are:

(a) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;

(b) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;

(c) parole boards make decisions **that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release** [emphasis added];

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As far as the current government is concerned, the principle of restraint embedded in sentencing provided and currently reflected by the “least restrictive” concept in Section 101(d) will be replaced by “necessary and proportionate.” One can only speculate about how this will affect release decision-making. One thing, however, is clear. For anyone who accepts the value of integration, that goal is not close at hand.