Barriers to Conditional Release

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Professor Manson's paper and presentation asks us to consider the linkages between sentencing and conditional release principles and their practices, both in Canada and internationally. I concur with Professor Manson's primary conclusion that there appears to be little integration between sentencing and release principles, a finding that seems to hold for Canada as well as a number of other jurisdictions.

I suspect that there are many reasons for this lack of integration, not least of which includes how we assess, perceive and balance the risk that an individual offender presents against broader public safety and sentencing objectives, including deterrence, incapacitation, proportionality and/or denunciation. As Allan Manson observes, "incapacitation is rarely a sentencing objective, but is commonly a release feature."

That said, there is an over-riding and organizing "guiding" principle that runs through sentencing, custodial and parole decision-making practices at the federal level. That principle, or test if you will, is the "least restrictive" measure consistent with the protection of society.

In sentencing, Section 718.2 of the *Criminal Code* provides that: "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."

In federal corrections, Section 4 of the *Corrections and Conditional Release Act* contains the reference: "that the Correctional Service of Canada use the least restrictive measures consistent with the protection of the public, staff members and offenders."

And in parole decision-making, Section 101 of the *CCRA* states: "that parole boards make the least restrictive determination consistent with the protection of society."

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So, while in practice there appears to be little integration between sentencing and parole principles (and I would add, custodial practices), in theory coherence is provided for by the common reference to apply the "least restrictive" measure or principle in all three areas. The common inclusion of the least restrictive principle in sentencing, parole and custodial decisions surely is meant to mean something; it was not by mistake that our *Criminal Code* and federal correctional law refers to this organizing principle.

Since I am far from an expert in sentencing theory, I will restrict my comments to addressing some of the challenges that the federal Correctional Service faces in preparing offenders for gradual, safe and timely reintegration to the community. In other words, my intervention will focus on the administration and management of the prison sentence, particularly those aspects that relate to principles of offender rehabilitation and community reintegration.

As it currently stands, Canada's conditional release system focuses on assessment of risk. It is a highly individual process, and one that is also very narrow. It has been criticized for being largely insensitive to contextual influences on behaviour, such as culture, gender, psycho-socio (e.g. trauma as a criminogenic factor), or environmental factors. It fails to fully account for non-treatable disorders, such as organic brain disease or injury.

In Canada, the law provides for safe, gradual and timely release of offenders to the community. As Professor Manson has reminded us, section 100 of the *CCRA* states: "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."

COMMUNITY REINTEGRATION AND PAROLE

According to CSC's Community Reintegration Branch website, "the public is best protected when an offender is gradually released into the community, adhering to conditions of release and supervised by a Parole Officer."

It is important to remember that the vast majority of offenders are eventually released back to the community. It is therefore appropriate that they receive the services and supports, including correctional programming, along with skill-building opportunities necessary for reintegration success.

We also know that it costs significantly less per year to maintain an offender on parole in the community. According to the latest figures from the Parliamentary Budget Office, it costs $39,000 annually to maintain an offender on parole compared to over $220,000 per year for a male offender in maximum security and $340,000 for a woman offender. Full and day parolees have consistently high successful completion rates. For day parole, the figures are 80% successful for males and 85% success rate for women. For full parole, 73% are successfully completed by male offenders and 75% for women.

Despite consistently high rates of success, offender access to the community has been significantly tightened over the past decade. Statistically, there are significantly less offenders being granted day and full parole now than 10 years ago. Although parole grant rates have stabilized over the past couple of years, they are well below rates of the early part of this decade.

In fact, statutory release has now become the number one form of release for federally sentenced offenders. In 2008–09, there were 5,807 statutory releases (56%), compared with 3,073 day paroles (30%) and 1,440 full parole releases (14%). In other words, a majority of offenders now gain their release from a federal correctional facility by statute.

These are concerning developments. My Office continues to observe a number of issues that effectively act as barriers to offenders' access to the community in support of their gradual reintegration to the community as law-abiding citizens. They include: security classification, access to programming, case management and case preparation concerns, and access to discretionary releases, such as temporary absences and work releases.

SECURITY CLASSIFICATION

Many offenders are not effectively and efficiently moving down to lower security levels (especially minimum security institutions). Offenders are supposed to receive programming prior to their conditional

release eligibility dates, however, we continue to see cases where offenders are not receiving programs until just prior to their statutory release date.

In 2009–2010, over 690 inmates were released directly to the community from medium security institutions. The vast majority of these releases were supported by the Service, and the Parole Board has independently determined that they do not represent an undue risk to society. It is not clear why so many offenders are being kept in medium security institutions when their risk profile, release eligibility and sentence management do not warrant that degree of security classification.

DISCRETIONARY RELEASE

We know that the Parole Board often prefers to see offenders spend a period of time in a minimum security institution before being considered for release on day parole. Offenders need to demonstrate that they are ready and prepared to return to society. A period of gradual and slowly expanded releases (permission to be slightly free) allows offenders to demonstrate a capacity to reintegrate into society as responsible and law-abiding citizens. The nature and gravity of the offence, time served, repeated or multiple convictions, number of penitentiary terms, correctional programs taken and previous experience on conditional release are all factors considered by the Parole Board in granting or denying conditional release.

It is not surprising to find that the period corresponding to declining full and day parole grant rates coincides with a dramatic decrease in the use of temporary absences and work releases. Temporary absences and work releases are exclusively concerned with the reintegration and rehabilitation of offenders. This form of conditional release is overwhelmingly successful; completion rates for work releases, escorted and unescorted temporary absences are consistently over 99%.

A temporary absence allows an eligible offender to be away from the normal place of confinement for medical, administrative, community service, family contact, and personal development reasons, or on compassionate grounds, including parental responsibilities and attending the bedside of terminally ill loved ones.

The number of offenders receiving escorted temporary absences has decreased by 34% from 1999–2000 from 3,500 offenders to 2,308

offenders in 2008–09. The number of offenders receiving unescorted temporary absences has decreased by 62.7% from 1999–2000 (1,161offenders) to 2008–2009 (433 offenders).

The same downward trends are observed for work releases. A work release is a structured program of release for a specified duration for work or community service outside the penitentiary, under the supervision of a staff member of other authorized person or organization. The number of offenders receiving work releases has decreased by 74% from 1999–2000 (822 offenders) to 2008–2009 (214 offenders).

ACCESS TO PROGRAMS

A 2009 research study by the National Parole Board found that just over 1 in 4 cases of waivers, postponements, and withdrawals for a parole review were due to an offender being "waitlisted" for a program. The same study found that 11.4% of waivers, postponements, and withdrawals were due to "program required not available." A further 6% of waivers, postponements, and withdrawals for a parole review were due to: "case preparation incomplete—pending psychological assessment, pending program performance report, other missing or incomplete documents."

It is troubling to find that case preparation is not thorough or completed in a timely fashion. Incomplete case preparation delays program enrolment/completion, and effectively stays any conditional release applications.

Program availability may be limited by demand (not enough offenders to justify running the program at a particular site), capacity (no staff available to deliver the program) or because that program is run at sites other than the offender's home institution. A data query made on September 27th, 2010 indicated that there were 91 pending voluntary transfers in which the reason for the transfer request was "access to programs."

Day or full parole hearings may be postponed and applications withdrawn because required risk assessments are missing or not completed in time for parole board hearings. A reported vacancy rate of 20% for psychological staff will only exacerbate delays in case management and assessment.

On any given day, one-in-four incarcerated offenders will be doing their required correctional programming—be it violence prevention, sex

offender treatment, substance abuse counselling or other reintegration activities. Six out of every ten of the incarcerated population will be past their day parole eligibility date and half will be past their full parole eligibility. Another sizable portion will be wait-listed for their program, as priority is typically reserved to those serving sentences of less than 4 years or in the later stage of their sentence. Long-serving offenders typically do not get access to their programs until well into their sentence.

CONCLUDING THOUGHTS

Combined these factors—lack of capacity to efficiently and effectively move offenders down in security levels, program access and availability, restricted access to discretionary and conditional releases, delays in case management and case preparation—point to some very significant barriers to releasing offenders in a safe, timely and gradual manner. As access to the community is restricted, as statutory release eclipses all other forms of conditional release, a greater proportion of the offender population than ever before is serving their sentence in a manner that does not maximize their potential for success upon release.

The disproportionate number of Aboriginal offenders under federal sentence, and their differential correctional outcomes—longer time served before first release, tendency to be incarcerated at higher security levels, lower parole grant rates, higher failure rates on conditional release—suggests that current sentencing practices leading to disproportionate incarceration rates and release practices with a narrow focus on individual risk combine to fail Aboriginal people.

This type of environment, where incapacitation through custody effectively becomes the purpose of incarceration is a breeding ground for hostility, contempt and hopelessness. Projected increases in the offender population, particularly rising numbers of Aboriginal and mentally disordered offenders, will only intensify these pressures.

In terms of practical suggestions, it seems to me that we could at least think about a few simple things. For instance, why not ask judges to:

- Clearly articulate how the sentence is the “least restrictive” measure necessary for the protection of society and how it is in the best interests of the offender;

- Provide guidance to the correctional authority on fulfilling expectations for rehabilitation and safe reintegration, and;
- Relate their expectations regarding application of *Gladue* factors in the administration of an Aboriginal offender's sentence.

This information would provide insight to guide decision-makers at appropriate points in the administration of the sentence.

I will conclude with a few thoughts that were originally conveyed in the 1969 Report of the Canadian Committee on Corrections, commonly referred to as the *Ouimet Report*. In Chapter 11 of that report, the esteemed Committee summarized its findings in matters of sentencing using the following language:

> Segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career, only when no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.

We are 40 years removed from the wisdom contained in the Committee's reflections. We would do well to heed its advice.