What Can Canada Learn from Sentencing Reform Efforts in Other Countries?

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When we look at what is happening in other jurisdictions in any area of criminal justice, we tend, first, to look at "techniques" — means to accomplish certain goals. We seem to ignore the problems that many jurisdictions, including Canada, have in identifying exactly what it is that we want to accomplish.

Hence we focus on such phenomena as "family group conferencing" or "sentencing guidelines". We examine these techniques, and then we often come to conclusions as to whether they are "good" or "bad". We obviously have "goals" in mind when we come to such conclusions. My suggestion, however, is that when we look at what is happening in other jurisdictions, we should first focus on the goals that they have, and evaluate the "techniques" in terms of their ability to achieve various goals.

One of the concerns that many people have about apparently new techniques such as "circle sentencing" or "family group conferencing" is that they are sometimes sold as the "flavour of the month" as if they will cure the ills of criminal justice system. Such over-selling of these techniques will, in the end, undermine their legitimacy and the legitimacy of the criminal justice system that embraces them so uncritically. There are no "one size fits all" solutions for crime or criminal justice problems.

I do not mean to imply that talk about "means" and "techniques" is not important. It is. Understanding the other approaches that are being used elsewhere is important for two reasons :

1. Such discussions show us what can be done and what is acceptable in other places where the "criminal justice climate" may be different from our own;

2. Such discussions help remind us that many harms or disputes can be dealt with most effectively by using structures other than the criminal justice system.

But the critical issue we have to address first, when considering approaches like family group conferencing, is simple : What are we trying to accomplish? Then we can ask the secondary question : When would new approaches be appropriate? As was once said in a different context, "You have to know what you want before you can get it".

We already know that there are lots of ways in which disputes are dealt with. All we have to do is to look around this country to see the variation. When we look at what

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happens in the youth justice system, for example, we see that there is an enormous variation across provinces in the number of cases that are brought to court. This variation simply cannot be explained by differences in crime rates. Ontario and Saskatchewan, for example, bring dramatically more cases per capita to youth court than do British Columbia and Quebec.[1]

It is hardly likely that kids in B.C. — a province with more crimes per capita reported to the police than in Ontario or Saskatchewan — could really have kids who are committing fewer than half as many crimes as kids in Saskatchewan, and one third fewer crimes than are kids in Ontario. I have a hard time believing that our kids in Ontario are that much worse than the kids in B.C.

This variation must be due, in large part, to different ways of dealing with young people. We know, for example, that Quebec deals with young people who offend in a different way from the other provinces and territories. But the differences are obviously more widespread than just that. Understanding alternative approaches to justice matters, then, is crucial. I am arguing, of course, that we already have alternative approaches being used in Canada. We just don't advertise that fact.

For youth, the action turns out to be at the front door of the criminal justice system. Judges seem to put about 30% of the kids who appear before them into custody, whether the police have screened out large numbers or small numbers of kids.

The findings suggest that if we are interested in keeping kids out of custody, we have to keep them out of the court in the first place. But this is not a problem only for kids. For adults as well, we should think first about how we want to handle problems that *could* be dealt with as criminal matters, but need not be. In fact, if I were to identify one of the most important failings of our sentencing "system" (if it can be called that), it is that we haven't yet decided exactly what we want to accomplish. We may have started the process of identifying the goals of sentencing with the new Part XXIII (Sentencing) of the *Criminal Code*, but we certainly haven't finished the job.

All one has to do is to look at prison statistics for people in prison serving sentences in this country and we see that we have a serious problem. As we all know, we have 12 little criminal justice systems in Canada : one for each province and territory. When you look at imprisonment statistics for the ten provinces, as Jane Sprott has done,[2] it appears that the provinces actually represent separate sentencing cultures : the per capita imprisonment rates in some provinces (for example, Saskatchewan and Nova Scotia) are dramatically higher than those supposed hot beds of crime, Quebec, Ontario, and B.C.

Even when you look at the imprisonment rates "per person charged" we find enormous differences from province to province, just as we find enormous differences when we look at the rates "per 1000 criminal incidents" in each province.

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1. See A.N. Doob & J. B Sprott, "Interprovincial Variation in the Use of the Youth Court" (1996) 38 Can. J. Crim. 401.

2. J. Sprott, Centre of Criminology, University of Toronto, Toronto, Ontario. Work in progress.

We can probably learn a lot from an investigation of these inter-provincial differences. But there are also lessons to be learned from looking at what is happening in other countries :

1. We see that jurisdictions are "structuring" sentencing in a wide range of different ways. For example, when one looks at the United States, one finds that in 1975 all 50 states had indeterminate sentencing systems. Twenty years later, every state and the federal system had seriously considered changes; many had made fundamental changes. In fact there were in 1997 at least 22 states with formal sentencing guideline systems, though these systems vary considerably from state to state. Sentences have become "determinate" in other ways as well. It is not much of a caricature to point out that the United States, in the past 25 years, has gone from indeterminate to "three strikes" sentencing;

2. When jurisdictions in the U.S. and in Europe are explicit about what they are trying to do, they tend to be successful in accomplishing what they wanted.

The times when they are not successful are largely when they don't know what they wanted to do in the first place. As the legendary American baseball player, Yogi Berra, would tell you, "You have to be careful if you don't know where you're going, because you might not get there."

The other problem, of course, is that legislatures are not necessarily consistent in the messages that they give and the legislation that they pass. They often say one thing and do another. This is not solely a Canadian problem but we certainly have a serious case of this disease. So, we have another problem : legislatures often seem to act as if they are following the advice that "When you come to a fork in the road, take it".

In a sense, then, I am giving you a very optimistic view of the ability of the criminal justice system to change. When one reads material on sentencing reform efforts that have taken place across the United States, Europe, and elsewhere (for example, Australia and New Zealand), one gets the impression that every jurisdiction is different and every reform is unique. There are, however, some general lessons to be learned.

1. Change — in a progressive or a regressive direction — can and does take place in various jurisdictions in a very purposive fashion. Change does not require a particular form of sentencing structure. Numerical two-dimensional grids (with offence seriousness as one dimension and the offender's criminal record as the other) are popular in the U.S. but unused outside of that country. Sentencing systems can be effective or ineffective with and without numerical grids;

2. When clear messages are given on the nature of the change that is desired, and procedures are put in place to implement those changes, the changes can take place;

3. Weak, ambiguous changes where broad goals are expressed — but where the goals are expressed in such a vague manner that an individual decision cannot be evaluated against the goal — are ineffective;
4. For a change to be "effective", it does not necessarily mean that everyone will think that it is good.

Let's look at a few examples.[3] First let us look at an effective example, that, in later years, was hijacked by a legislature that "came to a fork in the road, and took it". The State of Minnesota is usually identified as being the first state to enact strong sentencing guidelines. We have all heard about the "success" of the Minnesota guidelines. These guidelines came into place in 1980 and, among other things, a decision was made to link sentencing policy to prison capacity. Early on, Minnesota's sentencing system was undoubtedly successful. They maintained a manageable prison size, they accomplished their sentencing goals (proportionality), and they changed quite dramatically who was incarcerated (more violent offenders, fewer non-violent).

Later on, prison populations increased for a number of quite separate reasons. There was an increase in the number of cases coming to court even though there was no increase in the number of cases being reported to the police. But also, the state legislature and the Sentencing Commission mandated that prison populations should increase. They raised the penalties for certain offences, in particular, certain drug crimes — largely those involving the street selling of drugs. And, finally, there were more parole and probation violations. This last factor can also be seen as a result of another policy : probationers and parolees were more likely to be monitored carefully and breaches were more likely to land the offender in prison. But the biggest influence on prison populations came from changes in policy : the guidelines commission simply increased the penalties. We should never underestimate the importance of the political process.

One can hardly use the evidence that prison populations increased as evidence of the failure of a "guidelines" system when, in fact, increases in prison capacity were completely predictable from the changes in sentencing policy that were brought in.

The increase in prison population that occurred in Minnesota turns out to illustrate an important characteristic of guidelines systems : the legislature, in fact, has the power to change things. But legislatures can give, and legislatures can take away. Since the increase has taken place, the guidelines commission has attempted to change the presumptive sentencing structure so as to reduce the use of imprisonment. It will probably be successful until the legislature panics again because of some dreadful crime.

The United States Federal Guidelines are, in a sense, a very similar story. The major difference is that the goals, though not explicitly stated, were quite different. The federal sentencing guidelines in the U.S. came into effect in 1987 as a result of work done by a commission appointed by the Republican administration in 1984. Although they did

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3. Most of the information that I have used for this "Cook's Tour of Sentencing" can be found in M. Tonry & K. Hatlestad, eds., *Sentencing Reform in Overcrowded Times : A Comparative Perspective* (New York : Oxford, 1997). Other relevant information is available in C. Clarkson & R. Morgan, eds., *The Politics of Sentencing Reform* (Oxford : Clarendon Press, 1995) and in the *Federal Sentencing Reporter* (1995).

not state their goals explicitly, one can infer from what was said and what was done that part of the goal of the commission was to incarcerate more people. In particular, although obviously neither the U.S. Sentencing Commission nor the government ever stated their goals in racial terms, it is clear that the goal was, in particular, to lock up more black offenders. The guidelines originally — and still — punished the street selling of crack enormously more harshly than the selling of pure cocaine, for example. Selling ten grams of crack leads to the same sentence as selling a kilogram of 100% pure cocaine. And, policy makers are aware, or should be aware, of data that shows that black defendants are more likely than white defendants to be brought to court on crack charges, and white defendants are more likely to be brought to court on powdered cocaine charges. In addition, a policy was created such that the small people in the drug chain were trapped in the guideline system, but the "big fish" could escape the system.

Under the Federal U.S. Guidelines, offenders are sentenced on the basis of what they are seen to have done ("relevant conduct") rather than on the basis of the offences on which convictions were entered.[4] Various other aspects of the guidelines ensured that people would spend a long time in prison. The guidelines have been interpreted as being "mandatory" rather than guidelines. Departures are not allowed simply because, given the actual facts, the sentence would be wrong. In fact, departures from the very narrow ranges that are specified, are almost impossible.

Most commentators, including many federal judges, have been extremely critical of the U.S. federal guidelines. Nevertheless, the federal guidelines do illustrate that sentencing guidelines can have a dramatic impact on the sentencing process, in fact, almost eliminating the importance of the judge in sentencing. If you look carefully at the U.S. federal guidelines, you may not like them, but you certainly cannot argue that they don’t "work".

Other countries, predictably, have had quite different goals. What seems to be important is that the goals are stated clearly, and the means to achieve these goals are provided. Finland, for example, in the mid-1970's, decided that its incarceration rate was too high. There appeared to be a shared understanding that crime rates and imprisonment rates were independent of each other. Hence they understood that reducing imprisonment rates would not cause more crime. This reduction was accomplished without any "American style" numerical guidelines.

The Finnish system appears to be based on the notion that "general prevention" of crime should be the goal of the criminal justice system. They distinguish this completely from notions of "general deterrence". Instead, the focus is on having an efficient and legitimate criminal justice system. The over-riding goal is to promote an acceptance and an internalization of the values which underlie the criminal law. The most important principle seen to accomplish this at the sentencing stage appears to be proportionality.

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4. The history and controversies around the United States Sentencing Commission and its guidelines are discussed in A.N. Doob, "The United States Sentencing Commission Guidelines : If you don’t know where you are going, you might not get there", in Clarkson & Morgan, eds., *supra* note 3 at 199.

The laws were changed in a manner that de-emphasized the use of prison — not by making broad statements about not using prison unless necessary, but by creating rather narrow ranges of sentences in the statutes. In particular, changes were made in some of the high-volume offences (like theft) which led to fewer people being imprisoned. Part of the change that occurred was to de-emphasize the importance of previous convictions by making them relevant only if it can be shown that they are similar and demonstrate a wanton disregard to the law.

Given the emphasis that was given to proportionality, it is not surprising that the imprisonment rate for serious violence went up, but the imprisonment rate for the high volume less serious property offences went down.

Again, the details are not important. What is important, is that there was an explicit goal : to reduce the use of imprisonment and to focus more on offence seriousness. A consensus existed that imprisonment was over-used for certain kinds of offences, and those offences were identified. Changes, then, were targeted toward areas where problems could be identified.

The result of all of this was that prison population was reduced by 30% at a time that reported crime was increasing. Politicians were consistent in the message they were giving the public : crime was a problem that had to be addressed, but judges could not be blamed for crime.

In this country, of course, most political leaders create strong links in their public statements between sentencing policy and crime rates; hence an approach like that of Finland would be impossible to achieve unless political leaders, the public, and judges stopped seeing judges' sentencing decisions as a major determinant of crime. In this country, however, we have not been so successful in educating the public, largely, I suspect, because criminal justice officials, including judges, often give the message that crime can be controlled by the sentencing judge.[5]

We have an additional problem : for some people "punishment" in the criminal justice system is synonymous with "prison". However, the question of what punishments can be used to accomplish the goals of sentencing is not a simple one. A study by Voula Marinos[6] suggests that for some offences, it may be difficult (if not impossible) for members of the public to accept the assertion that another penalty can accomplish certain purposes (for example, denunciation) as effectively as does imprisonment.

I will give one final example of a successful change in policy. Germany, like Canada, was concerned in the late 1960's that prison was being overused. Some of you

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5. For a discussion of this problem, and a presentation of Canadian data suggesting that fearful people in particular are critical of the criminal justice system, see J. Sprott & A.N. Doob, "Fear, Victimization, and Attitudes to Sentencing, the Courts, and the Police" Can. J. Crim. (in press).

6. V. Marinos, "Equivalency and Interchangeability : The Unexamined Complexities of Reforming the Fine" (1997) 39 Can. J. Crim. 27. A.N. Doob & V. Marinos, "Reconceptualizing Punishment : Understanding the Limitations on the Use of Intermediate Punishments" (1995) 2:2 The University of Chicago Law School Roundtable 413.

may remember that the Ouimet Committee report in 1969 here in Canada criticized the system for its over-reliance on imprisonment. We have a distinguished history of saying that we overuse imprisonment. For example, federal government reports in 1975 (Law Reform Commission of Canada), 1982 (Criminal Law in Canadian Society), and in 1987 (Canadian Sentencing Commission) to name but a few all said we imprison too many people.

The Germans in the late 1960's said the same thing. In 1968 about 136,000 people a year were sentenced to prison in Germany. But unlike us, they did something about it. Two years later 42,000 were sentenced to prison, a reduction in prison admissions of about two-thirds. The most important thing that they did was to determine which people they did not want to send to prison. In their case — and we might learn from this — it was the people being sent to prison for short periods of time. The German legislature decided that short terms of imprisonment did no good. Short stays in prison broke important ties that offenders had with the community; they provided no opportunities for the offender to receive any services that might reduce future offending. In short, sentences of a few days or weeks made no sense to them. The law was changed to make the imposition of sentences of less than six months very difficult. The new law stated that :

> *The court shall impose imprisonment below six months only if special circumstances concerning the offence or the offender's personality make the imposition of a prison sentence indispensable for reforming the offender or for defending the legal order.*[7]

This is a fairly tough standard to meet. The reduction that took place was dramatic — in terms of the number of sentences of imprisonment. There were other changes that took place as well.

But note that it takes a lot of short sentences to create much of a change in prison populations. Hence, although the number of people *entering* prison dropped considerably, the overall prison *population* did not change so dramatically (roughly a drop of about 10%).

Over the years since 1970, the prison population in Germany increased more or less to its original level for a number of reasons — some policy driven, some not. First of all, police reported crime increased. Second, the length of sentences increased in part because of an increase in drug-related offences. And, finally, they began to have a "fine default" problem.

The impression one gets from looking at the experiences of other countries is that the successes — whatever one might be looking for in sentencing policy — come from countries which have developed coherent expectations about sentencing and have developed a clear vision of what they want to accomplish.

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7. See T. Weigend, "Germany Reduces the Use of Prison Sentences" in M. Tonry & K. Hatlestad, eds., *Sentencing Reform in Overcrowded Times : A Comparative Perspective* (New York : Oxford, 1997).

Few countries outside of the English-speaking world blame judges, the way we do, for crime. In other words, talk about the "general deterrent" impact of sentencing does not seem to arise as much in Europe. They learned a long time ago that judges are not responsible for controlling crime.

This seems to open up the possibility for them to look at sentencing policy as an important policy on its own. They ask the question : "How can people be punished fairly and sensibly in such a way that the criminal justice system can be seen as acting fairly and resources will be used sensibly"? We, unfortunately, usually ask quite different questions, though some would argue that the recent amendments to our sentencing laws begin a new process of thinking about sentencing.

The most important lesson is a simple one : accomplishing one’s goal in sentencing is possible. Deciding what that goal should be, however, is the real challenge.