Conditional Sentencing : Sword of Damocles or Pandora's Box?

Professor Julian V. ROBERTS[*] [**]

---

[*] Professor, Faculty of Law, University of Ottawa, Ottawa, Ontario.

[**] The author is grateful to Judge David Cole for extensive comments on an earlier draft of this paper. An earlier version of this paper was delivered to the annual meeting of the Canadian Institute for the Administration of Justice in Montreal, April, 1997.

The Sentencing reform *Bill C-41* introduced in September 1996 created a new disposition for Canada. According to section 742.1 of the *Criminal Code* :

> *Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court*
>
> *a) Imposes a sentence of imprisonment of less than two years; and*
>
> *b) Is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing as set out in sections 718 to 718.2;*
>
> *the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.*

Section 742.3(1) sets out the compulsory conditions of a conditional sentence order, which include remaining within the jurisdiction of the court and reporting to a supervisor when required. Section 742.3(2) specifies additional conditions that also may be imposed, including abstaining from the consumption of alcohol or other intoxicating substances, abstaining from owning, possessing or carrying a weapon, performing community service and attending a treatment program.

Although variations on conditional sentencing exist in other jurisdictions, this disposition is new to Canada and has the potential to make a significant contribution to reducing Canada's reliance on incarceration as a sanction. In the most recent year for which sentencing statistics are available, over 100,000 custodial terms were imposed across Canada.[1] Assuming that one custodial term in ten is henceforth made conditional,[2] the savings in human and economic terms are likely to be considerable. The disposition has proved to be popular with the judiciary; thousands of conditional sentences have been imposed in the few months since *Bill C-41* was proclaimed law.[3]

At the same time, the new sanction creates a number of problems and poses several challenges to the sentencing process. These will have to be addressed if conditional sentencing is to make an effective and principled contribution to sentencing reform in this country. Judges will wish to avoid drawing more, rather than fewer offenders into the correctional system. This well-known problem, known as "widening the

---

1. In fact this figure underestimates the number of custodial terms imposed for three reasons. First, the study was restricted to provincial courts. Second, only nine jurisdictions were included, and third, the analysis is restricted to cases in which an offender was sentenced for a single charge (approximately 25% of offenders face multiple charges, which are more likely to result in a term of imprisonment). See A. Birkenmayer & J.V. Roberts, (1997) *Sentencing in Adult Criminal Provincial Courts*, Juristat, vol. 17, no. 1, tbl. 3.

2. This estimate is based on the early experience with suspended terms of imprisonment in England and Wales. For recent trends, see "Home Office" *Information on the Criminal Justice System in England and Wales* (London : Home Office, 1993) digest 2.

3. Preliminary statistics collected by the Federal Department of Justice show that over 2,000 conditional sentences were imposed in Quebec alone within six months.

net" is discussed and documented elsewhere.[4] In this article I draw attention to some problems relating to the use of conditional sentences, principally the relationship between conditional sentencing and the purposes and principles of sentencing[5] as well as social reaction to the sanction. At the conclusion, some ways in which the use of conditional sentences could be improved are advanced.

I. AMBIT OF THE CONDITIONAL SENTENCE

Which kinds of offenders are "eligible" for a conditional sentence? In the *Wismayer* decision, the court noted that "[i]t must be borne in mind that for the most serious offenders the conditional sentence is simply not an available option because the offender will have been sentenced to the penitentiary".[6] However, Parliament has set such a high threshold (up to two years less a day) that many of the most serious crimes are included within the ambit of the conditional sentencing regime. Appendix A shows a list of offences, and the percentage of cases that resulted in a sentence of imprisonment of under two years over the most recent period for which statistics are currently available. As can be seen, almost all convictions for these offences result in sentences of less than two years. According to section 742.1, all these offenders are within the statutory limit of a sentence of less than two years.

II. DISTINGUISHING THE CONDITIONAL SENTENCE ORDER FROM A TERM OF PROBATION

One problem is that a conditional sentence order is not necessarily more onerous, or may not be perceived by offenders or members of the public to be more onerous than a term of probation. As a judgment of the Ontario Court General Division noted : "A conditional sentence order must be, and must be seen to be, more onerous than suspended sentence by way of probation".[7] Without reliable statistics on the number and nature of conditions imposed in conditional sentence orders, it is hard to know how much more onerous they are than terms of probation. However, it is worth comparing the conditions and the consequences of conditional sentence orders and probation orders. Let us begin with the conditions attached to a conditional sentence order.

---

4. See J. Gemmell, "The New Conditional Sentencing Regime" (1997) 39 *The Criminal Law Quarterly* at 334-362; A. Manson "Finding a Place for Conditional Sentences" (1997) *Criminal Reports* (in press); A. Bottoms, "The Suspended Sentence in England, 1967-78" (1981) *British Journal of Criminology* at 21.

5. There are important administrative problems as well with the new conditional sentence, although I shall not deal with these in this article. See for example, the submission on *Bill C-41* by the National Criminal Justice Section of the Canadian Bar Association, 1994, which opposed the creation of the conditional sentence.

6. *Wismayer*, Ontario Court of Appeal, February 28, 1997 at 25 (unreported decision).

7. *R.* v. *K.R.G.*, judgment delivered October 18, 1996, [1996] O.J. No. 3867 at par. 30.

The conditions of a conditional sentence order do not differ substantively from the conditions of a probation order. Modeled closely on section 732.1, there are only two principal differences. First, according to section 742.3(1)(d), the condition to remain within the jurisdiction of the court unless written permission is obtained is a compulsory, rather than optional condition as it is with a probation order. Second, according to section 742.3(2)(e), the court may order the offender to attend a treatment program approved by the province. Under the terms of a probation order, section 732.1(3)(g) states that the court may order the offender to actively participate in a treatment program, but only "if the offender agrees". These distinctions are unlikely to be perceived by the offender as substantively different, and this may well undermine the credibility and hence the utility of conditional sentencing. This brings us to the second issue which may distinguish a conditional sentence from a probation order : the consequences of a breach of conditions.

The metaphor of the Sword of Damocles has been used to describe the suspended sentence of imprisonment in England and Wales[8] as well as the conditional sentence in Canada.[9] Damocles, it will be recalled, was immobilized with fear by awareness of a sword suspended over his head and which was hanging by a single horsehair. In order to serve as an effective specific deterrent, the punishment which follows a breach must be certain, swift and severe. The threatened consequences of a conditional sentence order are none of these. In fact it is no more certain or severe than a probation order. It has been argued that the threat of execution of the sentence of imprisonment makes the conditional sentence order more onerous than a suspended sentence accompanied by a probation order.[10] However, incarceration in the event of default is not mandatory.

According to section 742.6(9) :

Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

a) Take no action;

b) Change the optional conditions;

---

8. A. Ashworth, *Sentencing and Criminal Justice* (2d ed.) (London : Butterworths, 1995) at 284.

9. See G. Renaud, "*To 'Appear before the court when required to do so by the court' : The Impact of Sentencing Reform*", discussion paper, Ontario Judges Association, 1996.

10. See N. Walker, *Sentencing. Theory, Law and Practice* (London : Butterworths, 1985) at 139.

c) Suspend the conditional sentence order and direct :

i) That the offender serve in custody a portion of the unexpired sentence; and

ii) That the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

d) Terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

Violation of a conventional probation order may also lead to the incarceration of the offender. In fact, breach of a probation order, but not a conditional sentence order, constitutes a fresh offence. If a conditional sentence is supposed to be more severe than a probation order, is this not paradoxical? To summarize, the statutory conditions of a conditional sentence order are not more onerous and the consequences of breach no more severe than those associated with a conventional probation order. In practice, judges may distinguish between the two orders by adding more onerous optional conditions, or by incarcerating immediately for most breaches. We shall have to await the results of empirical research to know whether this is in fact the case. To summarize, if the conditional sentence order is not clearly distinguishable from a probation order, problems will arise in terms of offender and public perceptions, as well as a conflict with the principle of proportionality, an issue that will be explored later in this article.

III. CONDITIONAL SENTENCES MAY GENERATE CONFLICTS WITH THE PURPOSES AND PRINCIPLES OF SENTENCING

If the conditional sentence is significantly less onerous than a term of imprisonment, then a potential conflict between the conditional sentence and the purposes and principles of sentencing may arise. At the heart of the issue is a dichotomy which has always permeated the sentencing process. When imposing sentence, should the court focus on the past — that is the seriousness of the criminal conduct — or the future, namely the likelihood that the offender will re-offend? Two clear schools of sentencing philosophy exist; both are explicitly acknowledged by section 718 of the *Code Criminal* which specifies the purposes and principles of sentencing. On the one side are desert theorists, for whom the seriousness of the offence and to lesser extent, the offender's criminal record are primordial considerations. Mitigating and aggravating factors must relate to the gravity of the offence or the extent of the offender's responsibility for the act. Sentencing theorists from the alternate perspective argue that the purpose of sentencing is to effect reductions in the crime rate, through mechanisms such as general and specific deterrence, or incapacitation. The conflict between these two theoretical orientations is most apparent when one follows the logic suggested by the *Code* to be followed by a court before imposing a conditional sentence order.

The original wording of section 742.1 created a significant potential for conflict. It suggested that the imposition of a conditional sentence order follows a two-step procedure, with different criteria relevant to each stage. First, the court must apply the statement of purpose and principles to determine the nature and severity of the sanction. Since section 718.2 (e) specifically enjoins judges to consider "all non-custodial sanctions

other than imprisonment that are reasonable in the circumstances", if a judge imposes a sentence of imprisonment is it presumably because no community-based disposition is appropriate. Central to this decision will be the fundamental principle of sentencing. According to section 718.1, "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". The principle of proportionality is associated with sentencing according to a just-deserts orientation. According to the desert model, legal punishment expresses censure, and this takes precedence over utilitarian sentencing goals that aim to prevent crime.[11] Once the decision to incarcerate had been taken, the court should proceed to the second stage, namely whether the offender's presence in the community would endanger the safety of the community. At this point, different criteria (relating to risk rather than desert) will apply.

The justification for the two-stage approach is clear. It ensures that the imposition of a conditional sentence order does in fact replace a sentence of incarceration rather than a non-custodial sanction (which would lead to "net-widening", or an increase in admissions to custody). This logic is followed in the British context involving the suspended term of imprisonment. However, it has its problems, not the least of which is the difficulty for a sentencing judge to separate in his or her mind the question of whether the sentence of incarceration is appropriate and if so, whether it need be executed immediately. After all, during the sentencing hearing, judges are likely to be sensitized to the possibility of a conditional sentence by submissions from defence counsel. A two-stage model assumes that the court can lay aside such appeals unless and until the necessity for a custodial term has been established.

A. Undermining the Fundamental Principle of Sentencing

Perhaps the most obvious conflict which can arise when a two-stage approach is used involves the principle of proportionality, identified by section 718.1 as the fundamental principle in sentencing. Let us assume that a judge follows the purposes and principles articulated in section 718 and sentences an offender to six months in prison, guided primarily by the principle of proportionality, which is central to desert-based sentencing. In other words, the severity of the sentence is determined primarily by the seriousness of the crime. However, if the court believes that serving the sentence in the community would not endanger public safety, the six-month term may be converted into a conditional sentence order. In other words, some of the offenders for whom imprisonment is inevitable will now receive a non-custodial option. The logic is that desert considerations have determined that imprisonment is a necessity, while an evaluation of the offender's dangerousness may then remove the necessity for incarceration.

---

11. See A. von Hirsch, "Proportionality in the Philosophy of Punishment : From "Why Punish?" to "How Much?"" (1990) 1 *Criminal Law Forum* at 259-290.

After having been guided by considerations relating to crime seriousness, the judge has shifted to evaluating the issue of risk to the community. This evaluation will reflect different criteria, such as the offender's age or criminal history, to determine if the 18-month term should be made into a conditional sentence. The two-step process, then, with the two stages using different criteria can generate different results. A proportionate sentence may involve custody, while the absence of evidence that the offender is a risk may argue for a conditional sentence.

With these arrangements, the conditional sentence will inevitably undermine the principle of proportionality in sentencing.[12] This will be effected in two ways. First, two equally culpable offenders, convicted of the same crime and sentenced to comparable periods of custody, may receive very different treatment if one of them is made the subject of a conditional sentence order. The principle may also be violated in another manner. Consider two offenders convicted of assaults which differ markedly in their seriousness. Offender A has committed the more serious assault and is accordingly sentenced to six months in prison. Offender B receives a six-month term of probation for a less serious assault. However, what if the court in case A makes the term of imprisonment conditional? Many people, including and especially offender B, are going to regard the two dispositions as being comparable in severity. This, too, is a violation of the principles of proportionality and equity, since these offenders convicted of dissimilar crimes are receiving penalties of comparable severity.

The principle of proportionality could be violated across offences. Most crimes of violence are perceived to be more serious than property crimes (although the two categories can overlap). Accordingly, crimes of violence are generally punished more severely. This is consistent with the principle of proportionality. If risk assessment is allowed to determine whether a term of imprisonment will be made conditional, proportionality will be affected. The reason for this is that violent offenders tend to have shorter criminal histories, and are less likely to re-offend than property offenders.[13] This may encourage judges to use conditional sentences more often for offenders convicted of crimes of violence.

This phenomenon, of risk affecting proportionality, was documented with regard to the effect of parole on sentences of imprisonment. The Canadian Sentencing Commission found that the more serious crimes (such as manslaughter and attempted murder) attracted higher grant rates than less serious crimes (such as theft and fraud). Research cited by the Commission found that parole release rates for manslaughter were between 51% and 64%. This rate is 10% higher than the less serious offence of robbery and 30% higher than break and enter.[14] One possible explanation for this effect is that

---

12. The same undermining of proportionality is achieved by the influence of parole on terms of imprisonment. The problem is exacerbated by conditional sentences however, since the *whole* sentence can be served in the community, not just a fraction as with parole.

13. See G. Campbell, *An Examination of Recidivism in Relation to Offence Histories and Offender Profiles* (Ottawa : Statistics Canada, 1993).

14. See Report of the Canadian Sentencing Commission, 1987 at 240. These data are somewhat old now, but there is no evidence that this phenomenon, described by the Commission as "sentence equalization" is no longer present.

offenders convicted of a crime of violence such as manslaughter have a lower recidivism rate, and are accordingly better risks than offenders convicted of burglary. Since these statistics are a decade old now, it is impossible to know whether this is still the case. Applying this logic to conditional sentences, it is possible that offenders convicted of personal injury offences will be more likely to benefit from a conditional sentence order than property offenders who might be perceived to be more likely to re-offend.

B. Conflict with Secondary Principles of Sentencing

After the fundamental principle of sentencing, section 718 specifies several other, secondary principles to be taken into account. For example, section 718.2(a)(iii) states that "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances". What effect is such a principle to have on the decision as to whether a term of custody should be made conditional? The *Scidmore* decision by the Ontario Court of Appeal illustrates the difficulties that arise.

In *Scidmore*,[15] the appellant was a teacher who was convicted of sexual misconduct involving an eleven-year-old pupil. There was a clear breach of trust over a two-year period. The majority of the Court of Appeal concluded that the imposition of a conditional sentence would not endanger the community, and was therefore appropriate. The minority's view was that the statutory aggravating factor (breach of trust) should be considered *before* a term of imprisonment is made conditional. Thus the statement of principle argues for a harsher than average penalty, while the invocation of the conditional sentence provision resulted in a less serious disposition. Should the conditional sentence be allowed to "trump" the statutory statement of the principles of sentencing in this way?

C. Conflict with the Objectives of Sentencing

Another potential conflict arises with respect to the purposes of sentencing identified by section 718, of which denunciation is a good example. Denunciation is the first sentencing objective identified by section 718. Advocates of conditional sentencing argue that the sentencing purpose of denunciation is served by the imposition of the sentence of custody. This having been accomplished, another objective — namely reducing the use of incarceration — can be achieved by making the term of custody conditional. Is this naive? How much denunciation can be conveyed by what is essentially an enhanced probation order backed up the threat of incarceration?

Consider applying the logic of a conditional sentence to another disposition. (In fact, the first proposal for a conditional sentence, contained in *Bill C-19*, which died on the order paper in 1984, envisaged a provision which would apply to any disposition, not just a term of imprisonment.[16] This is consistent with the nature of conditional sentences

---

15. *R.* v. *Scidmore* (1997), 112 C.C.C. (3d) 28.

16. *Bill C-19*, s. 661, first reading February 7, 1984.

in other countries[17]). Imagine that a court imposes a fine of ten thousand dollars, the amount reflecting the purposes and principles of sentencing as well as the offender's ability to pay. The offender duly pays the fine. Now the court converts this fine to a "conditional" fine. This means that certain conditions will be imposed on the offender for a period of six months. If, at the end of the six months the offender has abided by these conditions, he will receive his money back. Denunciation is served, we are told, by the imposition of a significant fine. But how much denunciation can be achieved with such a system?[18]

IV. RESOLVING CONFLICTS BETWEEN SECTIONS 718 AND 742

These conflicts arise if the decision as to whether the sentence should be made conditional is not guided by the other purposes and principles of sentencing. More recent Ontario Court of Appeal decisions in *Pierce*[19] and *Wismayer*[20] as well as a legislative amendment to section 745 take a different approach, and close somewhat the door that was opened wide by *Scidmore*. In *Pierce*, the court rejected a rigid two-step process, and suggested that the principles of sentencing should determine not just the length of the term of imprisonment but also whether it should be conditional in nature. The judgement in that appeal notes that "the new guidelines for sentencing, while largely a codification of existing principles, are nowhere in the Code stated to be restricted to being used in what the appellant submits is the first stage".[21] In *Wismayer*, the court also rejected a strict separation between the decision to incarcerate and the decision regarding whether the term could be made conditional, noting at 17 that :

> *The principles and objectives of sentencing as they have been developed by the courts and as expressed in the* Criminal Code *are not wholly exhausted once the decision has been made to impose a term of imprisonment of less than two years.* These principles and objectives must also be brought to bear on the decision whether or not to impose a conditional sentence [emphasis added].[22]

However, the judgment continues to suggest that "the primary consideration in determining whether the conditional sentence should be imposed must be the expressed

---

17. See *Alternatives to Imprisonment and Measures for the Resettlement of Prisoners*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (Milan, 1985).

18. If a conditional sentence carries a degree of denunciation under these conditions, how does it differ from a Bail decision, in which certain restrictions are imposed on the accused, who also pays a surety, which is later returned to him?

19. Ontario Court of Appeal, March, 1997 (unreported judgment).

20. *Ibid.*

21. Ontario Court of Appeal, February, 1997 at 14 (unreported judgment).

22. Ontario Court of Appeal, March, 1997 (unreported judgment).

statutory factor of danger to the community".[23] The reasoning behind this is that "it stands to reason that the fact that Parliament has specifically referred to only one factor, that serving the sentence in the community would not endanger the safety of the community, must mean that this factor is entitled to more weight than certain other factors of more general application".[24]

In *Macdonald*,[25] the majority decision of the Saskatchewan Court of Appeal was in a similar direction. A conditional sentence had been imposed in a case of criminal negligence causing death. The court concluded that a conditional sentence order violated the principle of parity in sentencing, and was not proportionate to the gravity of the offence. In short, the decision to make the sentence of imprisonment had to be consistent with the principles of sentencing, even if the presence of the offender in the community would not endanger the community.

Prior to the legislative amendment, assuming the first two statutory prerequisites had been met (no minimum punishment; sentence of imprisonment of less than two years), the court needed to be satisfied of only a third requirement, namely that the presence of the offender in the community would not endanger the safety of the community. Now a fourth condition is present. The court must also be satisfied that serving the sentence in the community "would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2".[26]

This additional requirement will inevitably mean fewer conditional sentence orders will be handed down than if the *Scidmore* reasoning had been followed. If the purpose and principles are to play a role, a higher threshold will have to be met before a term of imprisonment can be made conditional. Before a court may impose a conditional sentence, it will henceforth have to be satisfied not just that the offender's presence in the community poses little risk to that community, but also that the conditional sentence order is not inconsistent with the sentencing purposes such as denunciation, or sentencing principles such as proportionality or the statutory aggravating factors. Although there may be fewer conditional sentences imposed, they will be less likely to generate conflicts with the purpose and principles of sentencing contained in section 718.

Finally, the language used in section 742.1 suggests that the more circumscribed reasoning found in *Pierce*, *Wismayer* and the revised wording of section 742.1(b) is closer to Parliament's intention. The original wording of section 742.1(b) stated that if "*the court is satisfied that serving the sentence in the community would not endanger the safety of the community, the court may* [...] *order that the offender serve the sentence in the community*" (emphasis added). If risk is the only consideration, and if the court is satisfied that community safety is not endangered, what other considerations can there be apart from sentencing purposes such as those found in section 718?

---

23. *Wismayer* at 39.

24. *Supra* note 21 at 18.

25. Saskatchewan Court of Appeal, March 5, 1997 (unreported judgment).

26. Section 742.1(b).

If Parliament had wished the court to impose a conditional sentence in every case in which the three conditions obtained (no minimum punishment; sentence of less than two years; no threat to community safety), surely the language of the provision would have been "the court shall order that the offender serve the sentence in the community". The use of the more permissive "may" suggests that Parliament envisaged cases in which these conditions would be met, but which still should not result in a conditional sentence. The seriousness of the offence would appear to be the most likely candidate for consideration which would exclude the imposition of a conditional sentence even when the three conditions stipulated in section 742.1 had been met.

The consequence of these decisions and the legislative amendment would appear to be that courts should adopt a more integrated approach to the decision as to whether a term of imprisonment can be made conditional.

V. CONDITIONAL SENTENCING AND THE PRINCIPLE OF RESTRAINT IN THE USE OF IMPRISONMENT

At the heart of the matter lies a weakness of section 718, and the entire sentencing reform initiative. Conditional sentences are a solution to the problem of an excessive reliance on incarceration as a sanction. But they are a post-hoc solution, in the sense that they are activated once the court has decided a term of custody is appropriate. There is a parallel with parole. Reducing the carceral population by increasing the parole rate is also a post-hoc solution. A better approach would be to have shorter sentence lengths in the first place. So it is with conditional sentences. Which brings us to the statement of purpose, which entered the *Criminal Code* in 1996.

Section 718 is simply too permissive in terms of the use of incarceration. The principle of restraint in the use of imprisonment is embodied in section 718.2(e) which states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered". This language is far from forceful, and is unlikely to constrain judges.

Bill C-41 should have restricted judges from imposing a sentence of imprisonment unless specific conditions were met. This point was made in several submissions to the parliamentary committee that reviewed the *Bill* and its predecessor *C-90*.[27] It is curious that the final formulation now found in the *Criminal Code* is a significant dilution of the original proposal made by the Department of Justice in its 1990 blueprint for the reform statute. That earlier version laid down specific conditions that had to be fulfilled before a sentence of imprisonment could be imposed. Stronger language is to be found in statements in other jurisdictions. For example, section 1(2) of the English *Criminal Justice Act, 1991* states that a court *shall not* pass a custodial sentence on the offender unless it is of the opinion :

---

27. See for example the brief of the Canadian Bar Association "Submission on C-90", May 1993.

a) That the offence, or the combination of the offence and one or more offences associated with it, was so serious that only such a sentence can be justified for the offence; or

b) Where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him.[28]

If this kind of language had been adopted in the statement of purpose, the need for conditional sentences would be greatly diminished, as fewer sentences of imprisonment would be imposed in the first instance.

VI. PUBLIC REACTION TO CONDITIONAL SENTENCING

Polls have for many years shown that most Canadians are dissatisfied with sentencing patterns.[29] There is a danger that this innovation will make matters worse. The sentence may be seen as another manifestation of leniency in sentencing. There will be a perception that a conditional sentence is a non-sentence. This has been the experience with the suspended sentence of imprisonment in the United Kingdom. The British public perceived the suspended term of imprisonment as a "let-off" for the offender. The Canadian public will have difficulty accepting what is a paradox for all but criminal justice professionals : a sentence of imprisonment which the offender spends at liberty. Consider the following analogy. Imagine being told that you have won a February vacation in the Caribbean. The only problem is that you will spend the week in frigid Ottawa. If you're not in the South, it's not a Caribbean holiday. Members of the public are likely to reason that if you're not in custody, then the sentence cannot reasonably be described as a term of imprisonment.

It may be naive to expect that the public will willingly embrace the paradox of a sentence of imprisonment in which the offender may never enter custody. Counsel for the appellant in *Pierce* was of the view that the public would appreciate that the offender serving a conditional sentence is "still serving a substantial sentence but just not in a conventional custodial setting".[30] Serving a sentence in the community is likely to be seen as something more lenient than an "unconventional custodial setting". The only way in which the public are likely to accept a conditional sentence as a legitimate variation on, rather than a lenient replacement for imprisonment, is if the conditions imposed are sufficiently onerous as to be distinguishable from a probation order, and therefore to be perceived as a legitimate penalty.

---

28. *Criminal Justice Act*, 1991 (amended) 1. (2) (emphasis added).

29. For example, a nationwide poll conducted in 1994 found that 82% of Canadians feel that sentences are too lenient. This is consistent with the results of surveys posing the same question over a decade earlier. See J. V. Roberts, *Public Knowledge of Crime and Justice* (Ottawa : Department of Justice Canada, 1994); A.N. Doob & J.V. Roberts, *An Analysis of the Public's View of Sentencing* (Ottawa : Department of Justice Canada, 1983).

30. Cited in *Pierce*, Ont. Court of Appeal, at 18 (unreported judgment).

With regard to conditional sentencing, public anger will focus on the judiciary under one of two conditions. First, if a conditional sentence order is revoked when the offender is charged with a fresh offence. With the judiciary imposing many conditional sentence orders, this will one day occur. The resulting headlines will be reminiscent of the treatment accorded parole boards when a parolee commits a crime prior to the end of his period of supervision. The other circumstance likely to generate public opposition is when an offender convicted of a serious personal injury offence receives a conditional sentence order because the court believes he is not a threat to the community. The first issue relates to risk; the second to proportionality. This problem is likely to be particularly acute for the more serious cases involving violence.

Truth in Sentencing

The second source of public dissatisfaction with conditional sentencing is that the public may regard a conditional sentence as undermining the concept of truth in sentencing. This notion lies at the heart of lay conceptions of sentencing.[31] It is seen most dramatically in public opposition to section 745.[32] The public favor a sentencing process in which the sentence of imprisonment bears a close (or at least closer) resemblance to the sentence that was imposed in court. For this reason, public hostility is frequently directed at the parole authorities for undermining the sentence of the court.[33] Some of this resentment will now be directed at judges, for in a sense a conditional sentence will be viewed by the public as a form of "judicial parole".

The importance of public reaction should not be overstated. Misperceptions of the sentencing process abound, and there is research evidence that members of the public are less critical of sentencing decisions when they have more information than is usually contained in a newspaper account of a sentence.[34] However, it is worth noting that according to section 718, the fundamental purpose of sentencing is "to contribute, along with crime prevention initiatives, to *respect for the law* and maintenance of a just, peaceful and safe society" (emphasis added). Conditional sentences clearly have the power to undermine public respect for the law in general and in particular the institution of the judiciary.

---

31. See J.V. Roberts & R. Gebotys, "The Purposes of Sentencing : Public Support for Competing Aims" (1989) 7 *Behavioral Sciences and the Law* at 387-402.

32. Section 745 provides many inmates serving mandatory life terms with the right to a judicial review of their parole ineligibility after having served 15 years in prison. Recent reforms to this section were prompted in large measure as a result of public opposition founded upon the perception that the provision undermined the concept of a life term of imprisonment. Public opposition is also related to misinformation on this topic; the public fail to appreciate that a life term can mean (and for certain cases, very probably will mean) custody for a period well beyond 25 years.

33. For example, a recent headline in the Toronto Star stated "Swindler Gets 6 Months, But in Jail for Just 12 Days".

34. See A.N. Doob & J.V. Roberts, "Public Punitiveness and Public Knowledge of the Facts : Some Canadian Surveys" in N. Walker & M. Hough, eds., *Public Attitudes to Sentencing* (Aldershot : Gower, 1988).

What can be done to assuage public apprehension surrounding conditional sentencing? A public legal education initiative is clearly needed. Such a campaign should attempt to convey a sense of the onerousness of a conditional sentence order in comparison to a probation order. As well, the low rate of default to date will reassure many people who are concerned about recidivism rates. Finally, judges will have to make an extra effort to explain the reasons[35] why a term of imprisonment is being made into a conditional sentence. This is particularly true when a conditional sentence is imposed for the more serious personal injury offences. Even then there is no guarantee that the news media will convey this judicial reasoning to the public. If news reports continue to stress the leniency of conditional sentences, it will be hard indeed for the new disposition to achieve the goal of reducing the use of incarceration.[36] The task of educating the public on this issue is not impossible, but nor will it be easy.

VII. IMPROVING THE CONDITIONAL SENTENCE

The twin issues of a loss of public confidence and a weakening of proportionality can be addressed simultaneously. There are several possible solutions. First however, it is instructive to consider the way that comparable sanctions are imposed in other jurisdictions.

Conditional Sentencing in America

The state of Minnesota is generally considered one of the models of sentencing reform in the United States. Sentencing guidelines were adopted in 1978, and evaluation research several years later[37] showed that significant changes had been made to the sentencing process in that state, including a reduction in disparity. Minnesota employs a two-dimensional sentencing guidelines grid (offence seriousness and criminal history) as can be seen in Appendix B. The grid contains presumptive sentence lengths below the so-called dispositional line. Boxes above the line contain stayed sentences, which correspond fairly closely to the conditional sentence in Canada. Thus, for example, an offender with a criminal history score of 2, who is convicted of residential burglary will receive a stayed sentence of 27 months duration.

There are several ways in which the use of stayed sentences in Minnesota is superior to the current conditional sentence regime in Canada. First, *all* sentences above the dispositional line are stayed. This introduces an element of equity which is lacking in a system in which the decision to make a sentence conditional rests with the individual judge's perception of the offender's risk to the community. Second, since all cases receive

---

35. According to section 726.2, when imposing sentence, the court must provide reasons. This requirement was also part of *Bill C-41*. It is not clear at this early stage whether it has changed judicial practices regarding the provision of reasons for sentence.

36. See discussion of this point in K. Jull, (1997) *The Brave New World of Sentencing : A Principled Approach to Bill C-41*.

37. See Minnesota Sentencing Guidelines Commission, *The Impact of the Minnesota Sentencing Guidelines* (St. Paul Minnesota, 1984).

this disposition (and not just certain offenders as in Canada), the effect on prison admissions is that much greater. Third, since the decision to stay is not a product of a risk-assessment by individual judges who are working within a framework of proportionality, there is no inconsistency or conflict with the purpose of sentencing. The offence/offender combinations that result in stayed sentence (see Appendix B) reflect the just-deserts sentencing philosophy which guides the Minnesota sentencing process.

For example, criminal vehicular homicide resulting in death is considered to be too serious a crime for the offender to receive a stayed (that is, conditional) sentence. Accordingly, it is assigned a severity score which places it in the immediate imprisonment area of the sentencing grid. (The equivalent offence in Canada can result, and in fact has already resulted in a conditional sentence). Likewise, offenders with the most extensive criminal histories (that is, those in the highest criminal history category) are also denied stayed sentences (see Appendix B). The guidelines manual makes this policy explicit.[38] In short, the selection of offence/offender combinations that can result in a stayed sentence is determined *a priori*, by the Guidelines Commission, in a way that is consistent with the sentencing philosophy underlying the guidelines. Of course, judges in Minnesota are always free to ignore the presumptive sentence contained on the grid. They may impose an alternate sentence, but this will be considered a "departure" from the guidelines.

The Minnesota guidelines also recognize what is obvious, namely that a conditional sentence is a less severe sanction than imprisonment.[39] In order to increase the onerousness of the conditional sentence (to preserve some parity between the stayed sentence and the disposition it replaces) the guidelines permit the judge to exceed the period of imprisonment that would have been served. In fact, periods of supervision under the stayed sentence can last as long as the statutory maximum. As well, the guidelines allow the judge to attach any conditions to a stayed sentence which are permitted by the law, and which he or she deems appropriate.[40]

These arrangements have not resulted in an increase in incarceration rates, or a high imprisonment rate as a result of violations of conditions of the stayed sentence. In fact, the guidelines are clear that the decision to imprison an offender following revocation of a stayed sentence should not be undertaken lightly. According to the Minnesota Guidelines Commission, commitment to custody of an offender who initially received a stayed sentence is only justified when :

1. The offender has been convicted of a new felony for which the guidelines would recommend imprisonment; or

---

38. See Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (St. Paul Minnesota, 1993) at 36-37.

39. This is recognized in other jurisdictions as well. In Sweden, the conditional sentence consists of the passing of a sentence of imprisonment together with the suspension of its enforcement. It is regarded as a measure between probation and imprisonment.

40. *Supra* note 38 at 37.

2. Despite prior use of expanded and more onerous conditions of a stayed sentence, the offender persists in violating conditions of the stay.[41]

How then, might the conditional sentence regime in Canada be improved, to avoid some of the problems identified here? It is the government's hope that the revised wording of section 742.1(b) will eliminate conflicts between the statement of purpose and section 742. It will undoubtedly help, but it is by no means the most forceful way of resolving the problem. There are several possibilities, although all raise additional problems and complexities. In the course of this paper it will only be possible to describe some of these alternatives in outline.

1. Lower the ceiling of custodial terms which may be made conditional

First, the ambit of sentences which may be converted to a conditional sentence could be reduced. The high ceiling of two years less a day — which encompasses such a large percentage of custodial terms — could be lowered. The most apparent violations of proportionality, and the cases likely to provoke the greatest degree of public disapprobation are to be found at the "deep end" of seriousness. A sentence of 18 months which becomes conditional is likely to prove far more controversial than a sentence of two months. Reducing the ceiling to one year would avoid the most egregious conflicts with the principle of proportionality or the sentencing purposes.[42]

41. *Ibid.* at 38.

42. Another way of restraining the use of conditional sentences would be to employ the maximum penalty structure. Conditional sentences could be restricted to offences whose maxima do not exceed some threshold, say five years. The problem with this approach is that the current maximum penalty structure is the result of ad hoc historical amendments, and lacks a rational, proportional structure. This is why the Canadian Sentencing Commission called for a thorough revision of the current statutory maxima. See Canadian Sentencing Commission, *Sentencing Reform : A Canadian Approach* (Ottawa : Supply and Services Canada, 1987).

2. Restrict the use of conditional sentences to certain offenders

A second possibility would be to restrict the use of conditional sentences to certain categories of offenders, perhaps non-violent offenders or first offenders. Public opposition is likely to be far more muted if the only offenders whose terms of imprisonment becomes conditional are those convicted of crimes involving property, or were first offenders. Advocates of the current conditional sentence provisions might argue that these changes would defeat the whole purpose of conditional sentencing, namely to reduce the use of incarceration. However, it should be recalled that significant percentages of property offenders are currently imprisoned, and could benefit from the conditional sentence. Crimes of violence account for only a small proportion (17%) of the provincial court case load.[43] Eliminating these offenders from consideration for a conditional sentence order would still leave much room for reducing the use of incarceration.

Alternatively, restricting the use of conditional sentence orders to first offenders would be consistent with the spirit underlying the use of a suspended sentence, namely that of a judicial warning. This restriction is used in other countries such as Italy.[44] It is also the route taken in several American states. In the state of Washington, for example, non-violent offenders without prior felony convictions and who are being sentenced for an offence other than sex offence or certain drug crimes receive what is termed a First-Time Offender Waiver (FTOW).[45] This is effectively a stayed sentence which involves up to two years of community supervision and several conditions such as a requirement to receive treatment. A conditional sentence, in other words. The Washington criteria may seem too narrow, but the underlying principle may have some merit.

3. Increase the "penal bite" of a conditional sentence order

A third possibility may at first seem anathema to advocates of conditional sentencing. It consists of following the English model and permitting the court to activate the sentence in full, not just the remaining portion prior to warrant expiry. In fact, in seventy percent of breaches of suspended terms of imprisonment in England and Wales the full prison term is implemented.[46] Jack Gemmell describes this as "substantially more mischievous than the conditional sentence regime".[47] But is it? An offender sentenced to one year in prison, made conditional, is relieved of the pains of imprisonment unless and until he violates the conditions of the conditional sentence order. If those conditions are

---

43. See A. Birkenmayer & J.V. Roberts, (1997) "Sentencing in Adult Criminal Provincial Courts", Juristat, vol. 17, no. 1.

44. See *Alternatives to Imprisonment and Measures for the Social Resettlement of Prisoners*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, Italy, 1985).

45. See Sentencing Guidelines Commission, State of Washington, *Implementation Manual* (Olympia, Washington, 1992) at I-17.

46. See M. Wasik, *supra* note 46 at 52.

47. J. Gemmell, "The New Conditional Sentencing Regime" (1997) 39 *The Criminal Law Quarterly* at 334-362.

not particularly onerous — and according to sections 742.3(1) and 742.3(2) they need not be — the offender can avoid incarceration.

There is one other justification for following the route taken in England and Wales and activating the entire custodial term. Central to the notion of a conditional sentence is the threat implied by the sentence. Offenders are effectively told that in the event of breach, the consequences are more onerous than with a suspended sentence. Martin Wasik notes that :

> *Deterrence theory assumes that the conditional sentence will be the more effective where the sanction to be visited upon breach is known by the offender to be severe and where the chances of the court imposing these consequences are perceived by him to be high.*[48]

This raises the notion of deterrence : the offender is deterred from breaching the conditions of the conditional sentence order by fear of imprisonment. Specific deterrence is clearly a principal goal of the conditional sentence. This is apparent from the language of section 742.3(2)(f), which states that the offender "*must comply with such other reasonable conditions as the court considers desirable* [...] *for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence of the commission of other offences*" (emphasis added). As noted earlier, under the present conditional sentence provisions, the offender does not know how long will be incarcerated in the event of a breach, or even if he will be imprisoned at all. Making the consequences of breach more certain and severe will enhance the deterrent effect of the conditional sentence.

4. Develop penal equivalences

Perhaps the most fruitful approach to reforming the conditional sentence involves developing penal equivalences. The idea would be to create a conditional sentence order that is as punitive as the term of imprisonment that it replaces. As noted earlier, under the current legislation, the conditions associated with a conditional sentence order need not be more, or even as onerous as those associated with a standard probation order. The only difference may be the threat of imprisonment in the event of a default, but it is only a threat, and not a particularly certain one at that.

Little attention has been paid by scholars to the question of penal equivalences.[49] The advantages of having such equivalences are clear. They would permit the court to devise a conditional sentence order that would have the penal equivalent of a period of

---

48. See M. Wasik, *supra* note 46.

49. See for example, N. Morris & M. Tonry, *Between Prison and Probation : Intermediate Punishments in a Rational Sentencing System* (New York : Oxford University Press, 1990); M. Tonry, *Sentencing Matters* (New York : Oxford University Press, 1996) at 130-132. In one analysis it has been suggested that sanctions be ordered in terms of the extent to which they intrude on a person's living standard. See A. von Hirsch, M. Wasik & J. Greene, "Punishments in the Community and the Principles of Desert" (1989) 10 Rutgers Law Journal 595-618.

imprisonment, with the exception that the offender would remain in the community. The offender would avoid incarceration, but not punishment. This would permit the sentencing process to reduce the use of incarceration without disturbing the proportionality principle which requires that the severity of sanctions be commensurate with the seriousness of the crimes for which they are imposed. Equivalence of impact is difficult but not impossible to achieve.[50] In fact, this route has been adopted in England and Wales, where the imposition of a suspended term of imprisonment is accompanied by a number of immediate non-custodial penalties which would not have been imposed had the term of imprisonment been immediate. As Martin Wasik notes, this strategy has been endorsed by the 1991 *Criminal Justice Act*.[51] Parity could be maintained in the following way.

Consider two co-accused being sentenced for serious robbery. Let us assume that on grounds of the seriousness of the offence, both individuals merit a term of imprisonment. Differential risk factors associated with the two offenders may suggest that one can serve his sentence in the community under a conditional sentence order without endangering the safety of the community. However, in order to preserve parity, the conditional sentence should carry the same penal bite as the period of imprisonment. This would include the addition of other sanctions, and/or the extension of the period of community supervision beyond the duration of the term of imprisonment of the incarcerated offender. Another means by which a conditional sentence order could be made more onerous would be in combination with a probation order. As the Hon. Judge Cole notes,[52] section 731(1)(b) permits the court to impose a term of probation to follow the expiry of the conditional sentence order. Thus a six-month term of imprisonment might be made conditional and followed by a six-month term of probation.

---

50. For Canadian research on this subject, see P. Tremblay, "Les fondements de la métrique pénale" (1989) 31 Canadian Journal of Criminology 117-144.

51. See M. Wasik, *supra* note 46.

52. See Judge D. Cole, Memorandum dated September 10, 1996.

5. Split sentences

Finally, another possibility that is unlikely to prove popular with advocates of the current conditional sentence provisions involves the creation of split sentences. Under the terms of a split sentence, a term of custody would be divided between a period of immediate imprisonment to be followed by a period served in the community. The custodial term would give the offender a clear idea of the consequences of breaching the subsequent conditional sentence order, and would prevent the total sentence from seeming like a variation on a term of probation. At the same time, the fact that the offender might serve as much as three-quarters of the sentence in the community would mean that the principle of restraint in the use of imprisonment was followed. Split sentences of this kind are also used in a number of other jurisdictions. Assuming no net-widening took place, split sentences would also have a significant effect on the custodial population. Of course, the split sentence will make the notions of conditional sentencing and parole even harder to disentangle.

Alternatively, it has been suggested that a conditional sentence order could have two components. First, there would be a fixed period in which the offender would be required to serve under nightly house arrest, with release allowed for the purposes of work or to perform community service. This would comprise the denunciatory period of the sanction. Second, this period would be followed by a period in which the conditions would be less onerous, conforming perhaps, closely to the current conditions of a conditional sentence order.[53] The advantage, it is argued, is that a denunciatory period is maintained.

CONCLUSION

Canada's high rate of incarceration has been noted by several commissions of inquiry[54] and acknowledged by the Federal Department of Justice. The recent sentencing statistics alluded to earlier in this article show that many minor property crimes result in terms of custody.[55] Reducing the number of custodial terms imposed is an explicit policy goal of the sentencing reform initiative which gave rise to *Bill C-41*. Accordingly, the question is no longer *whether* we should imprison fewer offenders, but *how*. What is needed however, is a principled approach to decarceration. If imposing fewer terms of custody were the *only* goal, we could just flip a coin each time an offender was sentenced to prison. Heads would result in a conditional sentence, tails would mean that the offender was admitted to custody. This too would generate a reduction in the use of custody, but in an unfair, unprincipled way.

---

53. This suggestion was made by Judge D. Cole of the Ontario Provincial Court.

54. See for example the Canadian Sentencing Commission, *Sentencing Reform : A Canadian Approach* (Ottawa : Supply and Services Canada, 1987).

55. For example, fully 7,353 offenders were incarcerated for theft under $1,000 (the monetary limit at the time these data were collected); for further information see J. Roberts & A. Birkenmayer, "Sentencing In Canada : Recent Statistics Trends" Canadian Journal of Criminology (forthcoming).

The goal of the conditional sentence is to reduce the use of incarceration in a way that preserves the integrity of the sentencing process. This means imposing conditional sentences without violating the purposes and principles of sentencing mandated by Parliament and now contained in section 718 of the *CriminalCode*. The most important, indeed the fundamental sentencing principle identified by section 718 is proportionality, and conditional sentences need to be utilized without doing harm to this principle.

Conditional sentencing needs to be seen as part of a wider attempt to constrain the use of imprisonment as a sanction. The broader initiative should include the increased use of sentencing alternatives, diversion programs and the de-criminalisation of certain offences. These require a rational implementation policy and coordination by a permanent sentencing commission.[56] In this respect, it is important to add that the ability of the courts to reduce the use of incarceration is limited to the resources provided by governments, particularly provincial governments. If the resources saved by a reduction in the use of incarceration are not used to enhance and expand the alternatives to incarceration, and to ensure that conditional sentence supervision is effective, then little real progress will be made.

The new conditional sentence may prove to be of considerable use to judges in terms of reducing the use of incarceration. However, in order for this to be accomplished in a principled way, and in a manner that does not arouse public antagonism, this will require additional guidance from courts of appeal across the country, and perhaps eventually from the Supreme Court itself.

---

56. It will be recalled that creation of such a commission was first mooted by the Law Reform Commission in 1985 and subsequently endorsed by the Canadian Sentencing Commission in 1987, as well as the House of Commons Standing Committee on Justice and Solicitor General in 1988. The Federal Government's Reform Initiative which began in 1990 and culminated in the passage of *Bill C-41* in 1996 originally contained plans for creation of such a commission, although no progress on this matter appears to have been made.

APPENDIX A
USE OF INCARCERATION, Nine Jurisdictions, 1993 & 1994

Offence	% of admissions to custody under two years	Maximum Penalty
1. Sexual assault (s. 271)*	89%	10 years
2. Aggravated assault (s. 268)	82%	14 years
3. Assault with a weapon etc. (s. 267, 269)*	98%	10 years
4. Assault (s. 265, 266)*	100%	5 years
5. Forcible confinement (s. 279)	86%	10 years
6. Sexual touching child < 14 (s. 151, 152, 153)*	94%	10 years
7. Robbery (s. 343, 344, 345)	66%	Life imprisonment
8. Break and enter (s. 348, 349)	95%	Life Imprisonment
9. Sexual assault with a weapon/ aggravated sexual assault (s. 272, 273)**	51%	Life imprisonment/ 14 years
10. Trafficking (NCA 4)	95%	Life Imprisonment
11. Procuring (s. 212)	71%	14 years
12. Obstruct Justice (s. 139)*	100%	10 years
13. Forgery (ss. 366-371, 372(1), 374-378	100%	14 years
14. Impaired operation causing bodily harm (s. 255)	99%	10 years

Notes to table :

1. Source : A. Birkenmayer, *Sentencing in Adult Provincial Courts — A Study of Nine Canadian Jurisdictions : 1993 and 1994* (Ottawa : Statistics Canada, 1997) tbl. A-7.

2. * Denotes hybrid offence.

3. ** These offences were combined in the analysis on account of small numbers.

APPENDIX B
SENTENCING GUIDELINES GRID
Presumptive Sentence Lengths in Months

CRIMINAL HISTORY SCORE

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		0	1	2	3	4	5	6 or more
Sale of Simulated Controlled Substance	I	12	12	12	13	15	17	19 *18-20*
Theft Related Crimes ($2,500 or less) *Check Forgery ($200 - $2500)*	II	12	12	13	15	17	19	21 *20-22*
Theft Crimes ($2500 or less)	III	12	13	15	17	19 *18-20*	22 *21-23*	25 *24-26*
Nonresidential Burglary *Theft Crimes (Over $2500)*	IV	12	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Residential Burglary *Simple Robbery*	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Criminal Sexual Conduct, 2nd Degree (a) & (b)	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	48 *44-52*	58 *54-62*	68 *64-72*	78 *74-82*	88 *84-92*	98 *94-102*	108 *104-112*
Criminal Sexual Conduct, 1st Degree *Assault, 1st Degree*	VIII	86 *81-91*	98 *93-103*	110 *105-115*	122 *117-127*	134 *129-139*	146 *141-151*	158 *153-163*
Murder, 3rd Degree *Murder, 2nd Degree (felony Murder)*	IX	150 *144-156*	165 *159-171*	180 *174-186*	195 *189-201*	210 *204-216*	225 *219-231*	240 *234-246*
Murder, 2nd Degree (with intent)	X	306 *299-313*	326 *319-333*	346 *339-353*	366 *359-373*	386 *379-393*	406 *399-413*	426 *419-433*

Source : Minnesota Sentencing Guidelines Commission, Minnesota Sentencing Guidelines and Commentary, 1993.