Transforming the Punishment Environment: Understanding Public Views of What Should be Accomplished at Sentencing

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Some recent history

Thirty years ago, the Canadian Committee on Corrections (the "Ouimet Committee"), in its report entitled *Toward Unity: Criminal Justice and Corrections* started off its chapter on sentencing with the words:

> "A unity of purpose and philosophy is essential to any system of criminal justice which purports to deal in a meaningful way with an offender against the criminal law […]. The greatest obstacles to the development of a unified system of criminal law and corrections have been the absence, to date, of any clearly articulated sentencing policy and the inadequacy of the services and facilities available to a judge responsible for the key operation in the entire process." (p. 185)

It would be nice to be able to report that in the thirty years that have passed since these words were written we had overcome the obstacles that the committee had identified. Unfortunately, the situation has not changed.

Seven years after the Canadian Committee on Corrections submitted its first report to the Solicitor General of Canada, the Law Reform Commission of Canada submitted its first report to the then

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Minister of Justice. Entitled *Our Criminal Law*, the report contained a plausible attempt to define at least the start of a sentencing policy. Suggesting that we need to have restraint in the sentencing process just as there should be restraint in the use of the criminal law, generally, the Law Reform Commission of Canada wrote that:

> "The major punishment of last resort is prison. This is today the ultimate weapon of the criminal law. As such it must be used sparingly. We would restrict it to three kinds of cases: (1) for offenders too dangerous to leave at large; (2) for offenders for which, as things are now, no other adequate denunciation presently exists; and (3) for offenders willfully refusing to submit to other punishments […]. Restricting our use of imprisonment will allow more scope for other types of penalties […]. Positive penalties like restitution and community service orders should be increasingly substituted for the negative and uncreative warehousing of prison." (p. 24-25).

Six years after the Law Reform Commission of Canada submitted its report, the Government of Canada, above the signature of the then Minister of Justice, the Honourable Jean Chrétien, issued what is described as "the policy of the Government of Canada with respect to the purpose and principles of the criminal law" in a short booklet entitled *The Criminal Law in Canadian Society.* This statement of policy noted that:

> "The most significant concerns in sentencing can be grouped into three categories: First, there are no clear policies or principles of sentencing in Canada. Second, there is an apparent disparity in the sentences awarded in similar [cases]. Third, while little is really known about the effectiveness of various sentences, what is known suggests that the present sentencing options and practices leave considerable room for innovation and greater effectiveness." (p. 33)

Things became slightly more muddied a couple of years later (1984) when the government published a "policy statement on sentencing" (Government of Canada, 1984, Preface) suggesting that:

> "Protection of the public has been identified as the overriding purpose of sentencing […]. A number of means of protecting the public through sentencing are identified in the statement [of the purposes and principles of the criminal law articulated in *The Criminal Law in Canadian Society*] including: the imposition of

> just punishment; incapacitation; deterrence; restitution; and rehabilitation." (p. 34)

The clearest statement of purposes and principles to be articulated in an official document coming out of Ottawa is to be found, not surprisingly, in the report of the Canadian Sentencing Commission (1987) which stated that:

> "[T]he fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions […]. [T]he sentence to be imposed [shall be imposed] in accordance with the following principles:
>
> a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence […]." (p. 154)

The "usual" list purposes of sentencing (denunciation, deterrence, incapacitation, rehabilitation, etc.) were listed as factors that the court "may give consideration to" in applying the basic principles. Clearly, however, the Commission's proposal was that proportionality should dominate the process. This proposal went nowhere.

In fact, when Parliament did, finally, enact a statement of purpose and principles as part of "Bill C-41" which came into force in September 1996, the traditional list of purposes (and a few more) were listed as "objectives" where the judge would emphasize one or more of them but still, miraculously, be within the "fundamental principle" that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility." The bill that became law in 1996, then, did not really take us much further, in the area of purpose and principles, than a bill ("C-19") which had died on the order paper when an election was called in mid-1984. What goes around, comes around.

The history of our somewhat incoherent sentencing policy illustrates that many groups and individuals, in the past 30 years, knew what was needed. Parliament, however, either did not listen or was uninterested.

The current situation

This short and very selective history is important for one reason: In Canada, Parliament has not yet decided what sentencing is all about. Some would argue, no doubt, that the new Part XXIII of the *Criminal Code*, and in particular Sections 718 to 718.2 creates principles of sentencing that are binding on the sentencing court. I am, however, more inclined to accept the assessment of Roberts and von Hirsch (1999) who are much less optimistic about how useful these are to the judge who reads these sections of the *Code* and tries to take them seriously. They suggest that:

> "From the very outset of the statement [of purpose in Section 718] judges might well be confused. When determining the nature and severity of the sanction, are judges supposed to be assisting in crime prevention or imposing proportionate punishments? The difference is important. Should sentences be looking ahead, to crimes that might be prevented, or should they be looking backward at the seriousness of the crimes already committed? […].
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> The language of the fundamental purpose reflects the dual nature of the whole statement, which incorporates elements of both utilitarian and retributivist traditions. By referring to 'crime prevention initiatives' the statement raises the notion that a particular sentencing policy can have a significant impact upon crime rates. This can only lead to false expectations, since shifts in sentence severity are unlikely to affect the overall crime rate." (p. 52-3)

At the same time, sentences are supposed to have, as Roberts and von Hirsch point out:

> "at least one of ten sentencing objectives […]. Since judges may pick and choose from among this menu of sentencing purposes, the result is little more than a legislated statement of the status quo." (p. 53)

Sentencing "reform", when it did occur, did not really change anything.

Where does this leave the public?

It is unlikely that ordinary intelligent members of the public have the any idea whatsoever that the law of sentencing is confused and confusing. When asked about "sentencing" they are most likely to be asked whether they think it harsh enough and, not surprisingly, most answer that it is not. For example, a 1993 Statistics Canada poll (the General Social Survey) found that approximately 77% of respondents indicated that they thought that sentences were too lenient (Doob and Sprott, 1997). A 1997 Ontario poll showed found similar a similar result for adults (Doob, Sprott, Marinos, and Varma, 1998, p. 10).

The answer to a "severity" question does not, however, tell the whole story. As I have argued elsewhere (See, for example, Doob and Roberts, 1988; Doob, 1996), the meaning of public statements that "sentences are not tough enough" is complex: the public knows little about what actual sentences are, seldom has enough information on which to base an assessment of a particular sentence, and seldom has been encouraged to think about the implications of favouring particular kinds of sentences.

People have views about severity of sentences for two reasons: Sentences *do* vary significantly in severity and severity is undoubtedly the most salient characteristic about sentences for most people. Furthermore, we know about the public's views of severity because we ask about that, and, often, ask no more.

The public, then, is upset with sentencing and this gets expressed in terms of sentence severity. Severity may not, however, be the issue.

What do people think should be accomplished at sentencing?

The public appears to believe, as apparently our political leaders do, that many things can be accomplished at sentencing. In an Ontario survey (Doob, Sprott, Marinos, and Varma, 1998) we asked a representative sample of adult residents[1] to indicate how important each of five purposes of sentencing was to them. The results are shown in Table

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[1] The research was supported by funds from Operation Springboard, an Ontario community corrections organization with funds they received from the Trillium Foundation and Bell Canada. Goldfarb Consultants carried out the research at a much reduced cost.

1, where a "10" indicated that it was a "very important purpose" and a score of "1" meant that it was "not at all important." Approximately 500 people were asked about adult sentencing and an equal number were asked about youth sentencing.

Table 1: Importance of various purposes of sentencing for adult and young offenders (importance rating: high = very important)

Purpose:	Adult offenders	Young offenders
Expressing the community's disapproval of the crime	7.38	7.69
Deterring the offender and other persons from committing offences	8.16	8.19
Separating offenders from society	7.07	6.21
Assisting in the rehabilitating of offenders	7.77	8.10
Compensating victims or the community	7.64	7.63

Note: 1 = "Not at all important" 10 = "very important"

Probably the most important point that can be made about these data is that for all purposes except incapacitation ("separating offenders from society') the average ratings were very high. In fact, for the four purposes other than incapacitation, more than three quarters of all respondents listed each of the purposes as being on the "important" part of the continuum. For the public, then, nearly "everything" should be accomplished at sentencing. This is more than a minor challenge being placed at the feet of judges and the criminal justice system.

The second conclusion that can be drawn from these data is that there are some differences in the purposes as applied to adults in comparison with youth. Incapacitation is seen as being more important for adult offenders than for youth and "expressing the community's disapproval" and rehabilitation are seen as being more important for youthful offenders.

The overwhelming problem, however, is that it is hard to accomplish multiple purposes at sentencing. Different purposes may also lead to different sentences being handed down. Members of the public are not, of course, schooled in sentencing theory and may not fully appreciate these complexities.

Nevertheless, most members of the public are not very optimistic about using sentencing to control crime. We asked people what they thought "would be the most effective way to control crime." Half were asked about controlling youth crime, the others were asked about controlling adult crime. Fewer than a third of respondents thought that making sentences harsher was the best way to control adult crime, and fewer than a quarter of respondents thought that this was the best way to reduce youth crime.

Table 2:
Which is the most effective way to control crime?
(% indicating each was the "most effective")

Most effective method to reduce crime:	Adult crime	Youth crime
Make sentences harsher	31.7%	24.6%
Reduce unemployment	24.7%	19.3%
Increase social programs	11.7%	24.2%
Increase the use of punishments other than imprisonment	18.7%	22.0%
Increase the number of police	13.2%	9.9%
Total	100% (n=486)	100% (n=487)

Clearly increased punishment on its own is not seen as the best way of dealing with crime by most people, but one cannot ignore the fact

that close to a third of Ontario adults think that "harsher sentences" for adults would be the best way to reduce crime.

People seem to want to accomplish lots of things at sentencing, though, when asked, most people believe that harsher sentences will not make us safer.

Do people really want harsher sentences?

It is always tempting to assume that the answer to one question assumes answers to other questions. If people say they want "harsher sentences" then, presumably, they want the consequences of harsher sentences. Three "natural" consequences of a harsh sentencing regime are (1) more prisons need to be built and maintained, (2) fewer resources would be assigned to punishments other than prison, and (3) fewer resources would be available to be invested in crime prevention. As shown in Tables 3 and 4, whether one is considering adults or youth, Ontario residents are not enthusiastic about investing in more prisons.

Respondents were told that "Ontario's prisons are overcrowded. Two solutions that have been proposed are the following: (a) build more prisons and (b) sentences more offenders to alternatives to prison such as probation, restitution, fines and community service orders […]." They were then asked for their preference: spend money on more prisons, or invest in alternatives to prison.

In the second question, people were reminded that prisons were full and were asked, "If the government were to have a sum of money to spend on crime, would you suggest that they spend it on more prisons or that they spend it on programs to prevent crime? Again, respondents, like political leaders with limited resources, had to make a choice.

Table 3:
Preference for investing in more prisons
or in alternatives to prison
(for adult and young offenders)

Preference	Adult offenders	Young offenders
Build more prisons	34.5%	21.5%
Sentence more to alternatives	65.5%	78.5%
Total	100% (n=469)	100% (n=479)

Table 4: Preference for investing in more prisons
or in crime prevention
(for adult and young offenders)

Preference	Adult offenders	Young offenders
Build more prisons	14.0%	11.4%
Invest in prevention	86.0%	88.6%
Total	100% (n=487)	100% (n=492)

The results are clear: whether people are talking about adult offenders or youthful offenders, and whether the choice is prisons vs. alternatives to prison, or prisons vs. prevention, prisons lose the vote.

Not surprisingly, those who indicated that sentences are too lenient were somewhat more likely to prefer investing in prisons. Table 5 looks *only* at those people who indicated that sentences for adults or youth were too lenient and shows the percent of respondents who favoured prison construction.

Table 5:
For those who indicated sentences were too lenient,
what proportion preferred investing in more prisons
rather than alternatives to prison or prevention

	Adult	Youth
Prefer investing in prison rather than alternatives	39.0%	24.7%
Prefer investing in prison rather than prevention	16.9%	12.6%

In no case, did a majority of those who said that sentences were too lenient prefer investing in prisons over alternatives to prison or to prevention. The data in Table 5 are important because they illustrate an important point about attitudes generally, and criminal justice attitudes in particular: people may give a simple answer to a simple question (in this case "Should sentences be harsher?"). But when pressed to make difficult *choices* as one almost always does in normal life, different preferences emerge.

In the absence of choices, then, the desire for harsh punishment is often expressed. Given a choice, however, people do not appear to want to invest in the obvious vehicle for harshness in our society: prisons.

Does the punishment environment change when people think about the consequences of imprisonment?

As I have already pointed out, it is easy to be in favour of imprisonment if one is, in effect, asked only to consider whether one wants "more" or "less" imprisonment. Critics of the prison have often pointed out that prison can be counterproductive because it isolates

offenders from the community and may, in fact, increase rather than decrease the likelihood of future offending.

We asked people to indicate which of two sentences they would prefer for someone who had been found guilty of an assault. Respondents were told that the judge had decided that "the only two sensible choices are either three months in prison or a sentence consisting of 150 hours and a rather long probation term […]. The cost to the taxpayer of the two choices would be about the same."

Once again, half were asked about an adult offender, the others were asked about young offenders. But this time, half of each group were told "Keeping in mind the fact that if the offender is sent to prison he will be released into the community in three months, which sentence would you prefer?" The remaining respondents were asked, simply, "Which sentence would you prefer?"

The reminder that there is, indeed, life in the community after prison made prison look somewhat less attractive for both the young and the adult offenders. The data are shown in Table 6.

Table 6:
Preference for prison vs. CSO & probation for
an adult/young offender found guilty of an assault
as a function of whether future release is made salient

Choice:	Adult Offender		Young Offender		Adult & Youth combined	
	Reminder of release	No reminder	Reminder of release	No reminder	Reminder of release	No reminder
Strongly prefer prison	22.4%	25.1%	13.2%	21.9%	18.4%	23.4%
Prefer prison	9.7%	13.7%	12.2%	12.6%	10.9%	13.1%
Prefer CSO & probation	27.8%	28.6%	20.7%	23.1%	24.4%	25.7%
Strongly prefer CSO & probation	40.2%	32.6%	52.8%	42.5%	46.3%	37.8%
Total	100% (n=259)	100% (n=227)	100% (n=246)	100% (n=247)	100% (n=505)	100% (n=474)

Again, these data show the volatility of the public's desire for harshness. Although the differences are not large, the “combined” data show a statistically significant drop in support for imprisonment when people are reminded that offenders will eventually be released.

Another way in which people can be made to think about whether they really want to imprison an offender is to make the financial costs of imprisonment salient. Does the desire to imprison offenders mean that they should be imprisoned "at any cost"? The answer, clearly, is "no."

We asked our respondents what sentence (prison, community service, or fine) they would like for a first time offender found guilty of a minor break and enter of a home. Half of the respondents were told "It should be understood that the cost of imprisonment is about $3700 a month" (for those recommending a sentence for a 22 year old adult offender). For those respondents giving their views of the appropriate sentence for a 17 year old young offender the figure was $6000. Both of these figures are plausible estimates.

The results are shown in Table 7. For ease in presentation, I have pooled the "fine" and "CSO" choices.

Table 7: Preference for prison vs. CSO/fine for an adult/young offender found guilty of Break-and-enter as a function of whether costs were made salient

Choice:	Adult Offender		Young Offender		Adult & Youth combined	
	Reminder of cost of prison	No reminder	Reminder of cost of prison	No reminder	Reminder of cost of prison	No reminder
Prefer Prison	13.6%	15.6%	16.0%	26.8%	14.9%	20.9%
Prefer CSO/Fine	86.4%	84.4%	84.0%	73.2%	85.1%	79.1%
Total	100% (n=228)	100% (n=262)	100% (n=262)	100% (n=235)	100% (n=490)	100% (n=497)

In this case, there was little reduction in the desire to imprison the adult offender when costs were made salient in part, perhaps, because there were so few already (15.6% of respondents) who wanted to imprison the adult offender. There was, however, a significant effect for the young offender (and for the combined data): Making the cost of imprisonment salient to respondents makes people a little more reluctant to wish imprisonment on criminal offenders.

Support for the use of prison is soft: it goes down when people are reminded either that offenders are eventually released or that imprisonment is expensive.

Conclusion: What is wrong with other approaches to dealing with offenders and can these problems be overcome?

Other research (Marinos, 1997, 1998; Marinos, 1999 in progress, and Doob and Marinos, 1995) has shown that sanctions other than imprisonment cannot always be easily substituted for prison. Marinos (in progress) has argued, with data from a variety of sources, that there is something "special" about imprisonment in our society that in certain circumstances makes it be seen as more appropriate, quite independent of the issue of severity. For certain types of offences (serious violent or sexual offences, for example), prison may be seen as accomplishing certain goals of sentencing better than non-prison sanctions.

In addition, prison has one other rather obvious advantage over non-prison sanctions: it is seen as being likely to be carried out. Offenders are led from the courtroom, often handcuffed, to go to prison. They are not led, in a similar fashion, to a counter to pay their fines or arrange their CSOs. Though it is obviously true that nobody can predict just how long an offender will stay in prison, at least some time is spent in prison.

Unlike prison, sentences involving CSOs and fines are supposed to be carried out in full. Our respondents did not think that this was likely to occur. We asked people whether they thought community service work was fully completed when it was ordered. The results, broken down by whether respondents were thinking of youth or adult recipients of CSOs, are shown in Table 8.

Table 8:
Views on whether CSOs for youth and adults are carried out

How often are CSOs fully completed?	Adult offenders	Young offenders	Combined adult and youth
Always	7.1%	6.7%	6.9%
Most of the time	27.9%	29.9%	28.9%
About half the time	36.4%	38.9%	37.7%
Rarely	20.2%	17.1%	18.6%
Almost never	8.5%	7.4%	7.9%
Total	100% (n=481)	100% (n=475)	100% (n=956)

In other words, no more than about a third of respondents thought that more than about half of CSOs were carried out. If people want, as they say they do, an "accountable" criminal justice system, then "enforcement" of community sanctions is important. If substantial numbers of people think that substantial numbers of those assigned community service do not do it, there is a problem. Unfortunately, data do not exist (that I am aware of) that tell what happens to those adults and youth assigned community service by the courts.

What, then, would be an example of an approach to dealing with offenders that would meet some of the public concerns? It would apparently have the following characteristics:

- It need not necessarily be seen as "severe."

- It should be seen as accomplishing something, though exactly what it accomplishes may not be as important as the fact it can be justified in some sensible manner.
- It need not involve imprisonment.
- A focus on keeping the offender in the community and a focus on the costs of imprisonment would make a community approach more attractive.
- It needs to be seen as something that is carried out.

Restorative approaches to dealing with offenders—in particular family group conferences—would appear to meet these criteria. We asked people how "appropriate" it would be to handle a case either in court or by way of a family group conference. The case involved either an adult or young offender who had apparently stolen something from a store. Conferences were described as follows:

> The offender is dealt with outside of the court system. He and members of his family and the store owner are brought together at a meeting to discuss the offence and come to a written agreement about what the consequences should be for the offender. If the offender does not do what is agreed upon, he can be brought to court. How appropriate do you think it is to deal with a case of this kind in this way where 1=very inappropriate and 10=very appropriate?

If one considers scale values of 7 to 10 to be "appropriate" fully 65% of the respondents thought that dealing with the adult offender by way of a family group conference was appropriate and 75% of respondents thought that it was an appropriate way of dealing with a young offender. In comparison, taking a youthful or adult offender to court was seen as appropriate only by about 19 to 35% (depending on the exact facts that were given).

For minor offences, then, and quite possibly for more serious ones, alternatives that take cases completely out of the system are seen as being more appropriate than "normal" court processing. We shouldn't be surprised by these findings: the only surprising thing is that these are the same people who tell us that they think that the criminal justice system is too lenient. But as I have just pointed out, sensible alternatives to the criminal justice system—or to a system whose main focus is simple

punishment—are quite acceptable as long as they hold the offender accountable and are, themselves, accountable to the community.

As in many areas of public debate, what appears to be necessary is a movement away from rhetoric and simplistic debates. We should quit debating whether the system is "too lenient" or "too tough." What is needed is a discussion about whether an approach is "intelligent" and "fair." The experience that we have with family group conferencing (e.g., Palk, Hayes, and Prenzler, 1998) suggests that victims and offenders alike can find such systems as being fair and intelligent. The notion that "giving to the victim" necessarily means "taking from the offender" is simply wrong.

In addition, our data suggested that substantial portions of the population would be interested in becoming involved in structures outside of the formal justice which, broadly speaking, are reparative in their orientation. We found that roughly 25% of Ontario adults were "very interested" and an additional 30% were "somewhat interested" in becoming involved. Obviously it is possible that these figures over-estimate people's willingness to put in real time on such projects. But even so, it is clear that there is great willingness to step in and ensure that something sensible occurs.

The challenge we are facing is, then, to implement alternative approaches to dealing with offending and offenders. We may soon have a legislated opportunity in the new *Youth Criminal Justice Act*. There are opportunities, enabled in that proposed legislation, for creative approaches. These deserve serious attention by the provinces. If these opportunities are taken, and if our political leaders learn from that experience that intelligent and fair approaches to justice issues can be as popular as false claims of quick fixes, we might be able to "transform the punishment environment" more generally.

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