Has the Role of Judges in Sentencing Changed….Or Should It?

Tim QUIGLEY*

I. INTRODUCTION

The topic for this panel, "The Changing Role of Courts in Sentencing" suggests that judges now play a very different role in the sentencing process than was once the case. I want to challenge that implication. A useful role for a criminal law academic at a conference dealing with sentencing issues is to be a *bête noire* for those who truly believe that something has changed in the field of sentencing. Besides, it can plausibly be argued that the greatest failure of Canada's criminal justice system has been its persistent and fruitless use of imprisonment as an instrument to deal with criminal behaviour. Judges bear some, though far from all, of the responsibility for that state of affairs.

In the past several years, there have been several developments in sentencing in Canada that on the surface point to dramatic change. Some of these have been judge-made through sentencing innovations by some creative trial judges, sentencing circles being an example,[1] or through appellate court decisions that apparently provide more scope for such creativity.[2] Other changes have been legislative in nature, notably through

---

* Professor of Law, University of Saskatchewan.

1 Judge Barry Stuart of the Yukon Territorial Court has, for example, along with Kwanlin Dun Circle Court, been an innovator in this way. See, *e.g.: R*. v. *Moses* (1992), 11 C.R.(4th) 357 (Y.T. Terr. Ct.); Judge B. Stuart, "Community-Based Justice Initiatives: An Overview" in *Seeking Common Ground* (Toronto: Society of Professionals in Dispute Resolution, 1994); David Cayley, *The Expanding Prison* (Toronto: House of Anansi Press Limited, 1998), chapter 10 [hereinafter "Cayley"].

2 *E.g.: R*. v. *Gladue* (1999), 133 C.C.C.(3d) 385 (S.C.C.).

the passage of *Bill C-41*.[3] Unfortunately, these apparently profound changes have resulted in at best cosmetic change to a criminal justice system that still imprisons far too many people for dubious reasons and in a way that is systemically discriminatory to boot. My goal in this brief paper is to, first, attempt to justify those accusations and, then, in the latter portion, to propose some mechanisms that judges might use to truly achieve change in sentencing.

A disclaimer is also in order. All of us must recognize the obvious: that the criminal justice system as a whole has relatively little impact on criminality in society. A study in England showed that only about 3% of those committing crimes are actually sentenced.[4] Similar rates likely apply in Canada.[5] Moreover, the sentencing and corrections part of the process, based as it is on a paradigm that criminal offences are a breach against society more than against individuals, has little to say to the victims of crime, other than as a primitive form of retribution. In other words, true change to our approach to criminality must encompass more than tinkering with the criminal justice system. As a society, we must study the roots of criminality and the responses to it in a more clear-headed way, less encumbered by the sensationalism portrayed by the media or the short-term political grandstanding of many politicians. Broad public education would serve to dispel many of the myths surrounding the use of imprisonment as a correctional tool and make it easier for judges to embrace alternatives in a more whole-hearted way.

Police, lawyers (especially those on the prosecutorial side), and corrections officials must also change their approaches in order to accept that there is no easy, simple-minded "cure" to criminality as is often

---

[3] *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. [hereinafter "*Bill C-41*"]

[4] Andrew Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicholson, 1992), at 23.

[5] Julian V. Roberts and Loretta J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Boulder, Colorado: Westview Press, 1997), at 46, showed that only about one case of sexual assault in 300 actually results in a sentence being imposed. Although sexual assault is one of the most under-reported crimes, these data illustrate that only a small proportion of crimes proceed through to the sentencing stage.

falsely promised by imprisonment. That said, there is, of course, a role for judges themselves to dramatically reduce our reliance upon imprisonment as a solution.

II. WHAT HAS CHANGED IN THE JUDICIAL ROLE IN SENTENCING?

It should be recalled that, until *Bill C-41*, much of sentencing procedure and policy was developed by the judiciary. Perhaps surprisingly, much of this jurisprudence is of relatively recent vintage. For instance, until *R*. v. *Gardiner*[6] was decided in 1982, it was not clear that the burden of proving aggravating circumstances rested with the Crown at the level of proof beyond a reasonable doubt. Similarly, such sentencing principles as the parity principle, totality principle, and the principle of restraint (the latter as much honoured in the breach as in the observance), although now in legislative form, were the creation of judges.

As well, courts of appeal, in the exercise of their supervisory role over sentencing policy, established appropriate ranges of sentence or, especially in Alberta and Saskatchewan, starting point sentences for certain offences.[7] These measures, obviously designed to eliminate unwarranted disparity in sentencing, reduced the discretion otherwise available to sentencing judges. Perhaps less obviously, they also served to reinforce imprisonment as the only fitting punishment for some offences and to entrench our societal view that jail is the most severe sanction available.

More recently, some judges began to institute restorative justice initiatives such as sentencing circles, elder panels, and the like in an attempt to promote reconciliation between offenders, victims, and communities, and to gain the benefit of the experiences and insights of community members in the sentencing process.

---

6 *R*. v. *Gardiner* (1982), 30 C.R.(3d) 289 (S.C.C.).

7 See, for instance: *R*. v. *Sandercock* (1985), 48 C.R.(3d) 154 (Alta. C.A.); *R*. v. *McGinn* (1989), 49 C.C.C.(3d) 137 (Sask. C.A.).

Much more recently, the role of the judiciary has changed to more of an interpretive role as the courts have had to wrestle with the changes that have been wrought by *Bill C-41*. This development has coincided with a much greater interest by the Supreme Court of Canada in sentencing matters. Until *Gardiner*, it was not even clear that our country's highest court had the jurisdiction to entertain sentence appeals.[8] In recent years, however, the number of sentencing cases heard at that level has burgeoned. Among other decisions, the Supreme Court has informed us that ordering restitution is constitutionally sound,[9] that an order for restitution survives a bankruptcy discharge,[10] and interpreted appeal rights from sentencing decisions in a relatively broad fashion.[11] Exercising their jurisdiction under the Charter, the Court has also outlined the approach for determining whether cruel and unusual punishment has occurred contrary to section 12,[12] upheld the dangerous offender provisions of the *Criminal Code*[13] against a variety of constitutional challenges,[14] and upheld the mandatory penalty of life imprisonment and the twenty-five year minimum parole eligibility period for first degree murder.[15]

---

[8] It is true that the Court had occasionally considered a sentencing case prior to *Gardiner* (*e.g.: R*. v. *Hill* (1975), 23 C.C.C.(2d) 321 (S.C.C.); *R*. v. *Hill* (1975), 25 C.C.C.(2d) 6 (S.C.C.), but the jurisdiction to do so was not fully developed until Gardiner.

[9] *R*. v. *Zelensky* (1978), 2 C.R.(3d) 107 (S.C.C.).

[10] *R*. v. *Fitzgibbon* (1990), 55 C.C.C.(3d) 449 (S.C.C.).

[11] *R*. v. *Chaisson* (1995), 41 C.R.(4th) 193 (S.C.C.).

[12] *R*. v. *Smith* (1987), 58 C.R.(3d) 193 (S.C.C.); *R*. v. *Goltz* (1991), 8 C.R.(4th) 82 (S.C.C.).

[13] *Criminal Code*, R.S.C. 1985, c. C-46.

[14] *R*. v. *Lyons* (1987), 61 C.R.(3d) 1 (S.C.C.).

[15] *R*. v. *Luxton* (1990), 79 C.R.(3d) 193 (S.C.C.); *R*. v. *Arkell* (1990), 79 C.R.(3d) 207 (S.C.C.).

Possibly of greater significance, the Court, in the trilogy of *R*. v. *Shropshire*,[16] *R*. v. *M*.(C.A.),[17] and *R*. v. *McDonnell*,[18] held that appellate courts are to be deferential to the sentencing discretion of trial judges, including on the issues of parity and starting point sentences. Thus, an appeal court should only intervene where there has been an error of law or principle or the sentence imposed is clearly unreasonable. Disparity should be a ground for intervention only where there is a marked and substantial departure from the sentences normally imposed on similarly placed offenders committing similar offences, and, while establishing starting point sentences is permissible, this may not result in the creation of judicially-defined sub-categories of offences nor may the simple failure to comply with the starting point be seen as reversible error.

Taken together, compliance with *stare decisis* by appellate courts could result in this trilogy of cases providing much-needed breathing space for trial judges to experiment with alternatives, particularly those directed towards restorative justice. Time will tell whether this is so, but early indications are not promising.[19] Deference towards trial judges too often is invoked to uphold a severe sentence on an appeal by the accused, while the standard of deference is often finessed in order to justify intervention on a Crown appeal.

At first blush, the dropping jail population might belie this charge. From its peak in 1992-93, the number of admissions to prisons fell by some 13% by 1997-98.[20] Nevertheless, much of the decrease can be explained by the aging of our population as more people move out of the

---

16 *R*. v. *Shropshire* (1995), 43 C.R.(4th) 269 (S.C.C.).

17 *R*. v. *M*.(C.A.) (1996), 46 C.R.(4th) 269 (S.C.C.).

18 *R*. v. *McDonnell* (1997), 6 C.R.(5th) 231 (S.C.C.).

19 For an analysis of the effect of these decisions on the practices of the Saskatchewan Court of Appeal see: Tim Quigley, "Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?" (1999), 42 *Crim. L.Q*. 129, especially at 142-44.

20 Canadian Centre for Criminal Justice Statistics, *Adult Correctional Services in Canada, 1997-98* (Ottawa: Statistics Canada, 1999), at 16 indicates a total of 251,329 jail admissions in 1992-93 and 218,526 in 1997-98.

high-risk age bracket (the late teens and early twenties), since the proportion of sentences that includes prison sentences has remained relatively constant at around 35% of all sentences imposed.[21] Moreover, this is so in spite of a new sentencing alternative, the conditional sentence, which allows someone subject to a jail sentence to serve the sentence in the community on a conditional sentence order, a topic to which I will return below.

A striking—and very sad—feature of our criminal justice system is the disproportionate jailing of minorities. In Ontario, 49% of black men convicted of drug possession go to jail, while only 8% of white men do so.[22] Across the country, Aboriginal people are jailed at a rate roughly six times their proportion in the population—and, in some jurisdictions, this trend is becoming worse. This province, Saskatchewan, is the worst of all provinces in this regard. In a province where Aboriginal people represent about 11% of the population, they constituted about 74% of jail admissions in 1997-98.[23] Thus, while the chances of a non-Aboriginal in Saskatchewan going to jail are 1 in 250, a status Indian faces 1 to 10 odds of such an occurrence and a non-status or Métis has a 1 in 25 chance of going to prison.[24]

It is on this question that the Supreme Court of Canada may yet have its greatest influence. In *R*. v. *Gladue*,[25] the Court interpreted the

---

[21] "Fewer adults enter prison, study shows" *The [Saskatoon] StarPhoenix* (April 7, 1999), quoting Julian Roberts.

[22] Cayley, *supra* note 1, at 25.

[23] Quigley, *supra* note 19, at 158, note 69, citing Saskatchewan Justice statistics. Canadian Centre for Criminal Justice Statistics, supra note 19, at Table 17 indicate that only 72% of Saskatchewan jail admissions were of Aboriginal descent. I cannot account for the disparity.

[24] J. Harding, Y. Kly and D. MacDonald, *Overcoming Systemic Discrimination Against Aboriginal People in Saskatchewan: Brief to the Indian Justice Review Committee and the Métis Justice Review Committee* (Regina: Prairie Justice Research, 1992), at 13. The odds cited date to the early 1990's but likely remain reasonably accurate today since Saskatchewan's disproportionate jailing of Aboriginal people has, if anything, gotten worse.

[25] *Supra* note 2.

new section 718.2(e), which requires that particular consideration be given to the circumstances of Aboriginal offenders, in an expansive way that is designed to deal with the systemic discrimination against Aboriginal peoples which unfortunately typifies our justice and corrections systems. The Supreme Court has now directed lower courts, when sentencing an Aboriginal offender, to, first, assess what background factors unique to the plight of Aboriginal peoples in Canadian society might have contributed to the criminality of the individual and, second, to determine what procedures and sanctions might be appropriate to that offender because of those background factors. Although there is nothing in *Gladue* that addresses the other causes of the disproportionate jailing of Aboriginal offenders (such as socio-economic factors, a younger population, somewhat higher crime rates, discriminatory policing and prosecutorial decisions, etc.), it does at least have the merit of attempting to deal with systemic discrimination at the sentencing stage. *Gladue* also recognizes the general problem of the overuse of incarceration as a sanction. Moreover, it reinforces the earlier trilogy in the view that a certain degree of disparity should be encouraged or, at least, tolerated through the deference standard of appellate review.

It is far too early to ascertain what impact *Gladue* will have on sentencing policy in this country. Early indications in my home province, Saskatchewan, are mixed. At the Court of Appeal level, in the only two cases to mention *Gladue* to date,[26] its methodology had no effect. Admittedly, both offenders had very long criminal records that might have militated against a restorative approach. On the other hand, lower courts judges, notably Judge Turpel-Lafond of the Provincial Court and Justice Klebuc of Court of Queen's Bench, have begun to take the *Gladue*

---

[26] *R*. v. *Hunter*, [1999] S.J. No. 355 (Sask. C.A.) [QL]; *R*. v. *Pelletier*, [1999] S.J. No. 279 (Sask. C.A.) [QL]. *Hunter* concerned an offender with a very lengthy record, charged with an additional 26 offences including a robbery and 13 break and enters. *Pelletier* also concerned an offender with an extensive criminal record; he was charged with multiple property offences that included a robbery charge. On the other hand, very serious offences and a long criminal record did not prevent the British Columbia Court of Appeal from invoking *Gladue* to reduce a sentence in *R*. v. *Armbruster*, [1999] B.C.J. No. 1661 (B.C.C.A.) [QL].

message seriously.[27] As well, the Alberta Court of Appeal appears to be attempting to follow the strictures of *Gladue*.[28]

The conditional sentence was a new alternative sanction introduced as a part of *Bill C-41*. It is still too early to be sure whether it is being used as intended as a true alternative to imprisonment or whether judges are engaged in net-widening by imposing it upon those who would not have received a jail sentence in any event. Again, however, the preliminary results are not particularly encouraging. A study conducted by Carol La Prairie and Chris Koegl for Justice Canada has shown that, while over 22,000 conditional sentences had been imposed from the proclamation date of *Bill C-41* in September, 1996 until April 30, 1998, there was no corresponding decrease in the rate of imprisonment.[29] As previously explained, any decrease in imprisonment is more attributable to demographic changes. This suggests that net-widening is occurring, rather than that conditional sentences are being used appropriately.

There is, however, an opportunity for the Supreme Court to reverse this net-widening trend. At the time of writing this article, six cases dealing with conditional sentences have been argued in that Court and the decisions are pending.[30] The recognition in *Gladue* that Canada resorts

---

[27] Judge Turpel-Lafond has issued written guidelines to implement *Gladue*, not, I am afraid, without some controversy. Similarly, Justice Klebuc, in *R*. v. *Carratt* (Sask. Q.B., 1999) (unreported), adjourned the sentencing of an Aboriginal offender on a charge of aggravated assault in order that (a) the Crown could investigate alternatives to incarceration (which Crown counsel chose not to do) and (b) that a sentencing hearing could be conducted that took account of the requirements of *Gladue*. Unfortunately, Justice Klebuc did, in the end, sentence the offender to prison, although for a shorter period than might otherwise have been imposed.

[28] *R*. v. *Healy*, [1999] A.J. No. 817 (Alta. C.A.) [QL]; *R*. v. *LeClaire*, [1999] No. 820 (Alta. C.A.) [QL].

[29] Carol La Prairie and Chris Koegl, "The Use of Conditional Sentences: An Overview of Early Trends" (1999) (unpublished), especially at 9 and 15.

[30] *R*. v. *R.N.S.* (1997), 121 C.C.C.(3d) 426 (B.C.C.A.), leave to appeal granted [1998] S.C.C.A. No. 60 (S.C.C.); *R*. v. *R.A.R.*, [1997] M.J. No. 539 (Ma n. C.A.), leave to appeal granted [1998] S.C.C.A. No. 643 (S.C.C.); *R*. v. *Bunn*, [1997] M.J. No. 543 (Man. C.A.), leave to appeal granted [1998] S.C.C.A. No. 637 (S.C.C.); *R*. v. *Proulx* (1997), 121 C.C.C.(3d) 68 (Man. C.A.), leave to appeal granted [1998] S.C.C.A. No. 633 (S.C.C.); *R*. v. *L.F.W.* (1997), 119 C.C.C.(3d) 97 (Nfld. C.A.), leave to appeal

too often to imprisonment as a sanction and that one of the results is systemic discrimination towards minority groups leads to hope that the Court will send a strong message to lower courts to use the new alternative in the manner intended by Parliament.

In the end, however, the apparently significant changes in the role of the judiciary in sentencing on closer analysis become more modest. Before turning to some proposals for the judiciary to ameliorate this state of affairs, it may be useful to briefly discuss why judges, prosecutors, the media, politicians, and much of society hold so strongly to the view that jail is a necessary and beneficial part of our array of criminal sanctions.

III. WHY JAIL IS SO POPULAR

It would be very unfair to place the entire blame for our overuse of incarceration upon the judiciary. The reasons for the popularity of jail are many and varied and only some of them can be attributed to judges. As a beginning, the legislative framework in the *Criminal Code* and in other statutes points in the direction of imprisonment as the most severe and normal sanction inasmuch as punishments are typically expressed in terms of the maximum jail term available. There can be little doubt that this colours our thinking about appropriate sanctions, since non-carceral options are seen as "alternatives" and therefore something less than normal.[31]

A less obvious factor may be attributed to both academic writers and courts of appeal: the concern about disparity. Until the recent moves towards restorative justice began to make some inroads, it has been clear for some time that the dominant theoretical underpinning for sentencing policy and reform in the last two or three decades has been retribution, not in its older form of vengeance but in a more moderate form that embraces proportionality and abhors sentencing disparity. For instance, the

---

granted [1998] S.C.C.A. No. 598 (S.C.C.); *R*. v. *Wells* (1998), 125 C.C.C.(3d) 129 (Alta. C.A.), leave to appeal granted [1998] S.C.C.A. No. 310 (S.C.C.).

[31] See, *e.g.*: A.N. Doob, "Community Sanctions and Imprisonment: Hoping for a Miracle but Not Bothering Even to Pray for It" (1990), 32 *Can. J. Criminology* 415, at 424-25.

recommendations of the Canadian Sentencing Commission emphasize this concern.[32] The same motivation has led, in other countries, notably the United States, to mandatory sentencing guidelines or, in a more extreme form, mandatory sentences of which we have several in our *Criminal Code*.

We would do well not to completely reject retribution as an aim of sentencing. However, we should not worship unduly at that altar to the point where we create and perpetuate the problems I have identified. The most important contribution of retribution is as a brake on the use of other justifying aims of sanctions; that is, proportionality should act as a limit on the punishment that might be imposed to try to achieve, for example, general deterrence or rehabilitation. Retributivists are correct to say that no one should be used as an instrument for other ends (such as to deter others) or as a guinea pig for treatment that is out of proportion to the wrongdoing. Section 718.1 of the *Criminal Code* should be interpreted as having this effect.

In my judgement, however, the other aspect of retribution—the concern about disparity—has had altogether too much influence. Countless studies have shown that there is indeed a great deal of disparity in sentencing.[33] On the surface, it might appear to be very unjust that two similarly situated offenders committing a similar crime should be sanctioned in quite disparate ways. The difficulty is that focussing on disparity as the problem helps to create or reinforce other problems: jail becomes the norm, starting point or ranges of sentence become hardened into fixed sentences, and factors leading to systemic discrimination are either ignored or inadequately dealt with.[34]

---

[32] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1986).

[33] See, *e.g.*: Julian V. Roberts, "Sentencing Trends and Sentencing Disparity" in Julian V. Roberts and David P. Cole (eds.), *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999).

[34] This is a reference to legally relevant factors, such as employment, educational level, or family support, that, when lacking, deprive the offender of their benefit as mitigating the severity of a sentence. For more discussion, see: Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in Richard Gosse, James Youngblood Henderson, and Roger Carter (eds.), *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994), 269, at 270-276 and 284-86.

Moreover, it is practically impossible to eliminate disparity. The factors arising in any given case are so many and varied that it is extremely difficult to compare two seemingly similar cases. Even where two offenders have committed the same offence together, there will be differences between them that may account for disparate sentences. Offenders also experience sanctions differently; that is, a jail sentence for one offender may be felt as punitive, while to a more institutionalized person, it is a piece of cake. For some reason, while in other legal contexts we are able to see equality concerns in a rich and contextual way, we are unable to do so in the sentencing context where standardized penalties appear to many to be fair, just, and therefore necessary. Rupert Ross has put it this way:

> ... it can be argued that STANDARDIZATION of sentences for similar criminal acts is likely a greater guarantor of disparate treatment of offenders. One need only consider imposing identical sentences when one offender is rich and the other is poor; when one works full-time and has onerous family duties, while the other is single, unemployed and inactive; when one has shown true contrition to his victim while the other maintains a stance of antagonism; when one by his act has demonstrated a growing unwillingness to control his angry tendencies while the other has demonstrated substantial progress towards using less violent responses than before.

By contrast, Victim-Offender Accountability Processes may be especially well-suited to discerning and responding to all such variables, and to tailoring a disposition which maximizes the true GOALS of criminal law in each case: the creation of effective offender denunciation, deterrence and rehabilitation.[35]

As a society, and especially among judges, we seem unable to accept that a restorative justice sentence, for instance, may be more onerous and more effective (because it involves taking responsibility by

---

[35] Rupert Ross, "*Gladue* Could Make It! Victims, Sentencing and 'The Blunt Broad Axe of the Criminal Law'" (1999), unpublished, at 7.

facing the victim) than a jail sentence that is impersonally meted out and does not involve the taking of responsibility.[36]

In addition, there is very little in a practical way that can be done to eliminate disparity without resorting to draconian mandatory minimum sentences and/or rigid guidelines. Judges are individual human beings, each with her or his own predilections about what is gravely serious conduct, what should be the aims of sentencing, and what is appropriate as a sanction. Much of this individualized sentencing goes without scrutiny as relatively few sentences are appealed. Anyone who has attended court with some regularity will note that judges quickly arrive at rather standard sentences (usually fines or imprisonment) for certain offences and that judge A has a different standard from judge B. It is impossible to regulate this. Realistically, could (and would) someone be able to successfully argue on appeal that the trial judge's sentence of, say, 30 days imprisonment for a break and enter is inappropriate because another judge typically imposes a suspended sentence or three months imprisonment?

A far more fruitful exercise would be to fully implement *M.(C.A.)* and *Gladue* on the question of disparity. There should be considerably more deference towards trial judges in accepting seemingly different sentences. Moreover, we should begin the exercise of developing rough equivalencies so that, for example, a period of time on electronic monitoring is equated with a term of imprisonment. This would also mean, however, that appeal courts must more willingly accept departure from starting point or typical ranges of sentences—in other words, obey the Supreme Court's pronouncement in *McDonnell*.

A major share of the responsibility for our over-reliance upon imprisonment must also rest with the media, with politicians, and, to some extent, with victims' rights organizations.[37] It is now well-documented that media reports of sentencing focus overwhelmingly on the tiny

---

[36] Daniel Kwochka, "Aboriginal Justice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L. Rev.* 153, at 165, has persuasively made this point.

[37] For an account of how the victims' rights movement has affected the criminal justice system in a harshly retributive way, in the process pushing us inexorably towards a crime control model in spite of countervailing constitutional and legal protections, see: Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press Incorporated, 1999).

minority of spectacular cases, usually involving personal violence, and that the reports of sentencing in such cases is superficial and lacking in context.[38] This problem is obviously a difficult one to contend with, simply because the notorious crime that attracts attention is often the very type of crime that would justify a significant jail sentence under any sentencing policy. Nevertheless, much more could occur in the way of public education to dispel myths about criminality and sentencing.

Politicians, whether in power or in opposition, add fuel to the fire for more jail sentences. All too often, the controversy surrounding a particular case causes a public outcry, in which opposition parties participate by criticizing the government of the day for being soft on crime; the government too often reacts by instituting more repressive measures, whether legislative or through prosecutorial policy. There is no point to singling out any one political party because they all engage in this conduct at some point. This synergistic role of our legislators translates into greater fear of crime, especially violent crime, and a simple-minded cry for more and longer sentences of imprisonment, at a time when crime rates are falling nation-wide and violent crime is down in most jurisdictions.

Victims' rights organizations also play a role by, again, focussing on the most spectacular cases to the exclusion of the much more mundane criminality that is processed daily through our courts. Unfortunately, the message sent by some such organizations is a cry for more punitive sanctions that is frankly an appeal for vengeance. Although vengeance is an understandable emotion when the crime is horrific, in the end vengeance alone is an unhealthy remedy. Victims deserve more than this. Although it is not a panacea in all cases, restorative justice measures that involve the victim in a more comprehensive way offer more to victims than simple revenge.[39]

In particular, responsible media, politicians, and victims' rights organizations could begin by examining the claims of the various theoretical aims of sentencing in a critical way, then devoting as much

---

[38] See, *e.g.*: Roberts and Stalans, *supra* note 5.

[39] Roach, *supra* note 37, especially in Chapter 10, has made a compelling case for this approach.

attention to publicizing the findings as on raising a clamour for more and longer jail sentences. The role that judges might play in this venture will be discussed below.

I believe that another factor in the tendency to incarcerate is a sense of frustration on the part of judges. At least for certain recidivist offenders, it may seem to judges that nothing short of jail works. Indeed, many judges will acknowledge that they have little faith in the ability of imprisonment to effect change. Nevertheless, those same judges will frequently imprison someone as a form of temporary incapacitation and, perhaps, for want of other visible options. This is exacerbated by the shortage of resources for other than imprisonment. Although imprisonment accounts for about 35% of all sanctions, it gobbles up some 82% of all corrections spending in the country.[40] Thus, judges are often faced with the reality that there are inadequate resources to properly monitor offenders in the community. It is a valid concern that community-based sanctions without enforcement and accountability would very soon discredit the use of those sanctions and the criminal justice system as a whole.

A related issue is the tendency of some corrections programmers and some judges to use the resources that are available in an inappropriate way. For example, some bail supervision programs, intensive probation programs, and conditional sentence orders regularly call for curfews for those under such constraints. Yet, a curfew may have little to do with the criminality in question. For instance, it is now the case that a large proportion of break and enters in urban areas occur during the day. There is therefore no connection between late nights and committing such offences. Imposing a curfew in such circumstances invites a charge of breach of bail conditions or breach of probation, or an allegation of a breach of a conditional sentence order, as the case may be. The result is net-widening of a different sort, through what might be called "system-generated offences." Therefore, even if the original disposition avoided jail, the subsequent offence for what amounts to a relatively trivial form of misconduct may well result in incarceration. This, too, should be avoided,

---

[40] Canadian Centre for Justice Statistics, *supra* note 20, Table 8 indicates that 82% of spending is on custodial services, while only 14% is spent on community supervision. The remaining 3% is spent on administration of the various correctional programs in each province and in the federal sector.

especially when the community-based resources are in short supply and should be reserved for the most suitable cases.

No doubt there are other factors contributing to the excessive use of imprisonment, especially of minorities, in the Canadian criminal justice system. However, since the focus of this panel is on the role of the judiciary in sentencing, the factors listed above are sufficient to set the stage for proposals to judges to do what they can to improve the situation. It must be emphasized, however, that the sentencing stage in our courts is far from the only cause of the problem. Other players in the criminal justice system, in government, in the media, in the victims' rights movement, and in society at large, particularly in the social and economic policy sector, must also take some responsibility. Nevertheless, there is a place for wise judicial action in this sphere.

IV. HOW JUDGES MIGHT CHANGE THEIR ROLE IN SENTENCING

Given the undeniable truth to the propositions that Canada overuses incarceration and that there are systemically discriminatory effects from that overuse, the question then becomes how to redress those problems. The mere fact that the causes for the problems are many, complex, and the responsibility of many actors, including the wider society, does not relieve judges of their responsibility to effect change. This is particularly so in the current environment where Parliament has specifically stated, in sections 718.2(d) and (e), that imprisonment is a last resort for all offenders. The advent of restorative justice and the Supreme Court's embrace of it in *Gladue* provide added impetus for the judiciary to reduce its reliance on incarceration. That said, it is not always easy to develop alternatives for judges faced with daily court dockets, apparently few resources, and precious little time to think of ways to avoid sending offenders, especially recidivists, to jail. In an effort to be helpful, rather than meddling, some proposals will be offered here.

1. Critically Examine the Claims of the Theoretical Aims of Sentencing:

Bill C-41 largely repeated the theoretical aims of sentencing that have guided judges, at least in the common law tradition, for centuries:

deterrence, both specific and general, denunciation, rehabilitation, separation from society, and, through the concept of proportionality in section 718.1 and the parity principle in section 718.2(b), retribution. However, section 718 adds subsection (e), reparations for harm done to the victim or the community and subsection (f), the promotion of a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community. Arguably, the first is an aspect of retribution in the sense of restoring to the victim that which was taken through the criminal act. Subsection (f) is, however, new and, properly interpreted, should move us more in the direction of restorative justice.41

Change along these lines will not happen, however, so long as judges routinely invoke the more traditional aims such as general deterrence and denunciation in order to justify sentences of imprisonment. It is important therefore for some critical assessment of the traditional aims to take place. In addition, although there is now considerable knowledge by some judges about the promise of restorative justice, many other judges are unfamiliar with either the theoretical underpinnings or the practical successes of this approach. At the risk of slighting other authors, I wish to mention two books that would be invaluable for sentencing judges, both for assessing the claims of the traditional aims and for instituting more restorative approaches. These are David Cayley's book, *The Expanding Prison*,[42] especially Chapter 5, which in just eleven pages succinctly sets out the critiques of each of the traditional aims of sentencing and the claim that imprisonment can meet these aims. Cayley's critique of the traditional aims draws upon the widespread research performed by others, including such notables as Nils Christie and Thomas Mathiesen. The second book is by John Braithwaite, *Crime, Shame and Reintegration*.[43]

First, let me briefly recapitulate Cayley's findings. Deterrence, for example, is not enhanced by more severe punishment. Most offenders or potential offenders do not calculate their conduct in terms of weighing the

---

41 This point was made by Cory and Iacobucci JJ. in *Gladue*, *supra* note 2, at 402.

42 *Supr*a note 2.

43 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge, U.K.: Cambridge University Press, 1989).

pain of punishment against the pleasure of the crime; rather, most crime is spontaneous and ill-conceived and much of it is committed by those under the influence of drugs or alcohol, hardly a state amenable to calculating costs and benefits. The lack of public knowledge of either actual or potential sentences also impedes deterrent effects. Moreover, deterrence is open to the moral objection that it is wrong to use an individual offender as a means of frightening others from committing crime. Other studies have shown that the most important determinant of true deterrence is the certainty of being apprehended and convicted.[44] In a society where perhaps 3% of all crimes committed actually result in punishment being imposed,[45] we are obviously deceiving ourselves to think that the severity of punishment can be any meaningful deterrent at all.

Similarly, the other aims fail to measure up to scrutiny. Incapacitation or separation from society, for instance, entails accurate predictions of future behaviour, something that repeated studies show are impossible to achieve. The chief complaints against retribution, that is, proportionality, just deserts, and sentencing parity, are several in number. Proportionality fails because there is simply no sound way to calibrate punishment for crimes in an objectively correct way. Parity fails because it is an illusion: as Cayley puts it, "it implies fixed standards where there are none."[46] Thus, can we claim to impose just deserts if there is no accurate way of comparing the pain of imprisonment with that caused to the victim by the crime? The last claim—that rehabilitation may be advanced through imprisonment—has already been roundly criticized and, barring certain exceptional programs and particular individuals, rightly so.

Cayley has not mentioned denunciation as an aim of punishment. However, this aim has come increasingly to the fore in recent years as an additional basis for imprisoning. The rationale is that incarceration is expressive of society's abhorrence of the crime. What we should

---

44 See, *e.g.*: E.A. Fattah, "Deterrence: A Review of the Literature", in Law Reform Commission of Canada, *Fear of Deterrence* (Ottawa: Supply and Services Canada, 1976).

45 *Supra*, notes 4 and 5 and surrounding text.

46 *Supra* note 1, at 94. See also: Ross, *supra* note 35 and surrounding text.

question, however, is, first, whether denunciation is even remotely achievable when so few sentencing cases are publicly reported in sufficient detail to be expressive and, second, even if so, whether we might achieve denunciation more effectively by having offenders visibly in the community.[47] Indeed, restorative justice processes in which the offender must face the victim surely are more expressive than the impersonal imposition of what is usually a relatively short jail sentence.

John Braithwaite does not seek to entirely replace these traditional aims of sentencing. Rather, he has developed a theory of punishment, reintegrative shaming, which might better achieve those aims. Braithwaite believes that the shaming of offenders (by which he means social processes showing disapproval of the conduct and which have the intention or effect of invoking remorse in the person being shamed) is a very important measure but even more important is whether that individual is stigmatized, hence becomes an outsider and more likely to join other anti-social groups and individuals in more criminality, or reintegrated into the community, usually through rituals of forgiveness and repentance. Thus, reintegrative shaming is shaming followed by efforts to reintegrate the offender back into the law-abiding community; these efforts take the form of words or gestures of forgiveness or ceremonies. The shaming and the reintegration are done sequentially. The overall effect is really to send a message to the offender that the crime is hated but he or she is not.

The main points of his theory are, first, that research indicates that specific deterrence operates more through fear of shame, than through fear of formal punishment. Second, general deterrence is also possible through shaming but will be more effective for those who are still strongly attached in relationships of interdependency and affection, because the interpersonal costs of shame are greater for them. For this reason, reintegrative shaming is more effective than mere stigmatization. Braithwaite goes on, however, to posit that most compliance with the law is not as a result of either general or specific deterrence but because crime has become unthinkable to us through shaming processes which lead to the cognition that a particular type of crime is unthinkable. For societies

---

[47] This point has been made by others, especially in relation to conditional sentences. See, *e.g.*: Allan Manson, "Finding a Place for Conditional Sentences" (1997), 3 C.R.(5th) 283.

or cultures where this does not occur, citizens do not internalize this abhorrence for crime and as a consequence there will likely be a higher crime rate.

Another benefit of reintegrative shaming is that the combination of shame and repentance is a more powerful affirmation than mere moralizing. Thus, reintegrative shaming has a more powerful denunciatory effect than the formal imposition of sanctions by a court. The ceremonies of shaming and repentance have a strong role to play in community-wide conscience building.

The discussion of rituals in Braithwaite's theory does not necessarily refer to formalized rituals. However, some of the practical manifestations of the theory can be seen to employ some form of ritual. For instance, a sentencing circle process typically involves the participants informing the offender of how the criminality in question affected them. The circle discussion thus instills shame upon the offender through the direct conveying of information. Often, however, the instilling of shame leads to expressions of affection and/or support for the offender. Thus, there is a reintegrative aspect to the circle. Similar effects could be described through other forms of restorative justice as well.

Canada has seen several experiments in this direction. The Kwanlin Dun Circle Court in the Yukon[48] and the Hollow Water Community Holistic Circle Healing Program[49] at Hollow Water, Manitoba are just two examples. I raise these to show the promise of reintegrative shaming and restorative justice. Undoubtedly, they do not and cannot succeed in all cases but, given the failures of imprisonment and the more traditional ways of pursuing the aims of sentencing, they should be attempted wherever possible. There are, however, issues of resources, misuse of community power, the burnout of community members and the like that must be addressed if we are to embrace this approach. Although most of those issues are beyond the power of the judiciary to control, there is a role for judges in helping communities and the regular justice system

---

48 *Supra* note 1.

49 For a description of the program, see: Rupert Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Richard Gosse, James Youngblood Henderson, and Roger Carter (eds.), *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994), especially at 243-48.

cope with them. This can occur through careful investigation with the community of the possibilities in a given case, scrutiny to ensure that power is not abused by the offender or other members of the community, and persuasive suggestions to government that adequate resources be provided. The main point is that judges must begin to recognize how futile is the pursuit of the aims of sentencing through imprisonment and the usual sentencing process. Restorative justice, on the other hand, holds a great deal of promise and should be given every opportunity to demonstrate its worth.

2. Take *Gladue* Seriously

The Supreme Court sent a powerful message in *Gladue* but it must be heeded by lower courts if it is to have any impact on the scandalously disproportionate jailing of Aboriginal peoples in this country. To reiterate, the Supreme Court acknowledged both that Canada overuses incarceration and that there is systemic discrimination against Aboriginal people in this regard. To counter those effects, the Court has said that sentencing judges must attempt to assess the impact of Canada's treatment of Aboriginal people on the individual offender and that a restorative justice approach will often be called for to combat that impact. In the process, sentencing parity becomes of less concern. *Gladue* must be seen as an equality rights measure and consistent with the rejection in Canada of the "similarly situated" approach to such rights.[50] Fulfilling the directions of *Gladue* therefore requires a diminished role for the parity principle and a more flexible view of what constitutes disparity. It is particularly important that courts of appeal relax their tendency to over-emphasize the parity principle in their deliberations.

There are other important messages from *Gladue*. For instance, it is applicable to all Aboriginal offenders regardless of status, place of residence, or other differentiating factors. Second, whether or not restorative justice programs are actually available in the jurisdiction has no bearing on whether that approach should be adopted in the given case. Judges may resort to restorative justice techniques in the absence of community support programs. Indeed, it must be recognized that a

---

[50] *Andrews* v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143.

community-based sentence, such as a probation order or conditional sentence order, may contain restorative elements for that individual offender even if restorative processes, such as a sentencing circle, have not been used.

It is also a natural outgrowth of *Gladue* that where resources are lacking, the judge should make an effort to locate them. In this regard, although *Gladue* itself places great weight on defence counsel and pre-sentence reports for this purpose, judges would also be well-advised to place some responsibility on the prosecution. In a criminal justice system where there is a huge discrepancy in the resources available to the Crown, as opposed to the defence, it is surely not asking too much for the prosecutor to devote some time and energy in seeking out alternatives to the expensive, wasteful, and inapt use of imprisonment. At a minimum, Crown counsel should be called upon to justify a submission for imprisonment.

Where there is a persistent failure by the relevant authorities to develop and provide the necessary resources or where the Crown refuses either to investigate their availability or to justify its submission for imprisonment, judges might consider imposing *conditional stays*–that is, stays of the proceedings that operate unless and until the authorities do as they are obliged to do under the *Gladue* principles.[51] The use of conditional stays is not unprecedented in our criminal justice system. Some judges have already resorted to this mechanism where an accused requires counsel but has been denied legal aid or the appointment of counsel by the relevant Attorney General.[52]

In fashioning a sentence under the rubric of *Gladue*, judges must also refrain from seeing imprisonment as the only severe sentence. As has already been argued,[53] other types of sentences and processes may be

---

[51] I cannot claim credit for this proposal. It was made to me by a Saskatchewan Crown counsel who, for obvious reasons, wishes to remain anonymous. This prosecutor did suggest that I attribute the proposal to the Saskatchewan Executive Director of Public Prosecutions, Richard Quinney. No doubt readers in other provinces could imagine their Directors of Public Prosecutions also making such proposals!

[52] See, *e.g.*: *R*. v. *Zylstra* (1996), 47 C.R.(4th) 314 (Ont. Gen. Div.).

[53] *Supra* note 36 and surrounding text.

more onerous. Simply facing a victim and accepting responsibility may be more severe and, hence, have the potential to be more effective. A caution is also in order: it is neither necessary nor desirable for judges to attempt to compensate for the perceived leniency of a community-based sentence by adding overly stringent conditions. Indeed, to do so invites a form of net-widening and the potential for system-generated offences, topics which will be discussed below.

3. Don't Take Disparity Seriously

It is to be hoped that the previous discussion[54] about the parity principle will have made the case for reduced attention to the issue of disparity. Therefore, it is mentioned here only as a reminder, particularly to appeal court judges, to follow the directions provided by the Supreme Court trilogy and by *Gladue* to be deferential on the question of parity. That true parity is next to impossible to achieve should also be kept in mind.

4. Avoid Short Jail Sentences

One very simple and effective way of reducing our reliance on incarceration is to avoid short jail sentences. In 1997-98, the median sentence length was a mere 44 days; some 81% of all jail admissions were for less than six months in length.[55] It is difficult to imagine what penological purpose might be served by sentences of such short duration—even assuming that there is some validity to achieving the aims of sentencing through imprisonment. It is true that the mandatory jail sentences for second and subsequent convictions for drinking and driving offences likely influence these data[56] but a great many short sentences are

---

[54] *Supra* notes 31-37 and 46 and surrounding text.

[55] Canadian Centre for Justice Statistics, *supra* note 20, at 26.

[56] Canadian Centre for Justice Statistics, *supra* note 20, at 48 indicates that the proportion of jail admissions attributable to drinking and driving offences varied from 5% to 24% in 1997-98; unfortunately, the Centre has not calculated a Canada-wide proportion.

for other crimes where judges had the discretion to do otherwise. A firm commitment by trial judges to impose jail only where a term longer than six months can be justified would be a very positive measure indeed.

5. Avoid Net-Widening and System-Generated Offences

As was discussed previously,[57] net-widening occurs when judges use so-called "alternative" sanctions for offenders who would not have gone to prison in any event, rather than as a substitute for jail for those who would otherwise have been so sentenced. This appears to have occurred so far for conditional sentences[58] and is something that ought to be addressed by the Supreme Court when it decides the conditional sentencing cases before it. There may be merit, however, in discussing the topic in more depth.

There are, I submit, two forms of net-widening in operation. The first is the direct type already discussed whereby judges misuse new sentencing options. The other is much less direct but just as insidious. It involves "system-generated" offences—offences such as breach of bail conditions, breach of probation, or breach of a conditional sentence order—that is, offences that flow out of conditions placed upon the offender by the criminal justice system itself. It is true, of course, that there must be some means of promoting compliance with court orders and the most direct means is by further invoking the criminal process. Judges, however, should exercise great care not to impose unnecessary conditions upon offenders. Earlier, I cited the example of a curfew for a probation order or as a condition of bail when it has no relation to the offence committed or allegedly committed.[59] Inappropriate use of such conditions has two deleterious effects. First, scarce resources are consumed when they are not required. Second, in the event of a breach, the offender must be sanctioned, often by imprisonment, and accumulates a longer criminal

---

[57] *Supra* note 29 and surrounding text. See also: Doob, *supra* note 31 for a discussion of the similar effect when earlier alternatives, such as community service, were implemented.

[58] La Prairie and Koegl, *supra* note 29.

[59] See text following note 40.

record that militates against further non-carceral sentences and all but ensures a jail sentence for subsequent offences.

To minimize these effects and to make wise use of such constraints upon offenders, judges should take care to follow the guidelines for probation conditions developed through the jurisprudence. These are conveniently set out in an article by Judge Barnett:[60] probation conditions should be reasonably certain in their terms, enforceable, designed to secure rehabilitation (both in the sense of being reasonably connected to the offence and not unduly punitive in nature), infringe no more than necessary upon basic rights, come within the statutory scope of probation orders under what is now section 732.1 of the *Code*, and not involve unacceptable delegation of authority to others. It is certainly arguable that these principles should also be applicable to bail conditions and conditional sentence orders, adjusted, of course, for the different contexts and requirements.

Finally, judges sentencing someone for a system-generated offence should keep perspective about the conduct in question. Surely, there is greater seriousness in a breach of probation which involves the commission of an entirely new *Criminal Code* offence than for the failure to abide by a curfew. Undoubtedly, most judges would agree but imprisonment for relatively minor breaches of conditions nevertheless occurs with too much frequency.

6. Scrutinize the Prior Criminal Record with a Jaundiced Eye

Of the legally relevant factors in sentencing, a prior criminal record (or the absence of one) is arguably the single most important factor in arriving at a sentence.[61] On the surface, this is not surprising since it seems to have great relevance, both as a predictor of future behaviour and in assessing just deserts. Nevertheless, a prior record should be carefully assessed before being put to either of these uses. First, our predictions of future behaviour are notoriously false. Thus, to send someone to prison on account of the record may not be accurate or, worse, may become a self-

---

[60] C.C. Barnett, "Probation Orders Under the Criminal Code" (1977), 38 C.R.N.S. 165.

[61] Some of the other factors are discussed in Quigley, *supra* note 34.

fulfilling prophecy as the person becomes even more dysfunctional through the effects of imprisonment. Second, if the prior record consists of a great number of system-generated offences, rather than indicating a poor attitude towards court orders, it may suggest that inappropriate controls were imposed on prior occasions. Finally, prior convictions for what appear to be serious offences may not be such on further scrutiny. For example, a criminal record for break and enters might actually consist of a series of rather minor entries where little was taken and only slight damage caused. Thus, retaining a sense of perspective about a prior criminal record is important.

There is also a discriminatory aspect to the criminal record. Since Aboriginal offenders are disproportionately denied bail[62] and, in turn, the denial of bail leads to a higher conviction rate,[63] part of the length of the criminal record may be explained by prior bail decisions. Similarly, system-generated offences may have this effect since probation conditions placed on Aboriginal offenders may, for a variety of reasons, be inappropriate.

All of this suggests much greater caution in using a prior criminal record as a basis for justifying incarceration. Indeed, one of the goals of an improved criminal justice system should be to, if possible, wean recidivist offenders away from the system. An offender with a sizeable criminal record may, in fact, be a better candidate for a restorative justice process because he or she may never before have had to accept responsibility or had the opportunity of seeing that there might be community support in a rehabilitative direction. In other words, restorative justice, rather than incapacitation, might be the answer for at least some chronic offenders.

---

62 See, *e.g.*: A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: Government of Manitoba, 1991), at 108.

63 See, *e.g.*: Martin L. Friedland, *Detention Before Trial: A Study of Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) and Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada,1969). Hamilton and Sinclair, ibid., noted the same effects over two decades later and that it was more pronounced in the case of Aboriginal offenders.

7. Question the Rule Against Lengthy Adjournments for Sentencing

Courts of appeal have frowned on lengthy adjournments by trial judges as a way of assessing the prospects of an offender.[64] The rationale appears to be that it is unjust to delay sentencing. Yet, it may be argued that there is merit in permitting the practice, at least in some cases. It allows the court to determine whether the offender is genuine about changing anti-social behaviour, to arrange resources that are not yet in place, and, perhaps, to ensure that the needs of victims may be better taken into account. It is not surprising, therefore, that restorative justice approaches more often lead to reasonably lengthy adjournments.[65] Consequently, if we are truly to embrace restorative justice, we should also accept that lengthy adjournments are sometimes entirely appropriate. Appeal courts should revisit this issue. Permitting lengthy adjournments does not remove appellate scrutiny in the event of misuse; moreover, it should always be open to the offender to insist upon being sentenced if that is her or his wish.

8. Speak Out!

Judges are, for the most part, reluctant to make public pronouncements about the legal process. Nevertheless, there is a role for them to do so. This could take several forms:

- Where it appears that the offence in question is suitable for alternative measures, rather than processing through the regular court system, indicate as much in open court or in pre-trial

---

[64] *E.g.*: *R.* v. *Cardin* (1990), 58 C.C.C.(3d) 221 (Que. C.A.); *R.* v. *Taylor*, [1996] 3 W.W.R. 88 (Sask. C.A.).

[65] For a defence of lengthy adjournments of this type, see: *R.* v. *N.(D.)* (1993), 27 C.R.(4th) 114 (Yukon Terr. Ct.). The Hollow Water Community Holistic Circle Healing Program, described at *supra* note 48, also relies upon lengthy adjournments. Sentencing in the courts is adjourned pending the outcome of the healing program. Successful performance of the healing program results in a recommendation for a suspended sentence in the regular court system.

conferences in order to place some pressure on the prosecution to consider that course of action. This is especially important in youth court in some provinces since there is a wide variance in the use of alternative measures across the provinces. Quebec, for instance, uses such measures much more often than Ontario or Saskatchewan;[66]

- Direct prosecutors to investigate alternatives to imprisonment and/or to provide sound justification for proposing a sentence of imprisonment. The leverage of conditional stays might be advantageous in this context;

- Where necessary, call for more resources to implement community-based and restorative justice approaches. This could simply take the form of directing a probation officer to investigate and locate resources. It could, however, also involve making a more public pronouncement that the relevant government authorities are frustrating the courts' attempts to reduce our reliance on expensive, ineffective forms of punishment. Again, the possibility of conditional stays might enhance the message;

- Explain the weaknesses of the present approach. Again, this could take the form of more careful explanation in open court of the reasons for imposing a non-carceral sanction. However, it could also amount to public education in fora other than court. I would submit that there is nothing inherently wrong about the judiciary taking a public stand on such an issue, particularly after the Supreme Court's decision in *Gladue*.

Perhaps as important as speaking out in any of the above ways, judges should not allow themselves to be unduly influenced by public opinion about sentencing. As Roberts and Stalans have pointed out, there are widespread myths about sentencing that can be changed when more information is provided.[67] Thus, judges can, along with other professionals in the criminal justice field and, one might dare to hope, with

---

[66] Anthony Doob and Jane Sprott, "Interprovincial Variation in the Use of the Youth Court" (1996), 38 *Can. J. Crim.* 401.

[67] *Supra* note 5.

the requisite will by our politicians, help to shed light on the folly of imprisonment and point the way to more effective approaches. Finland, for example, has managed to greatly reduce its reliance on incarceration through just such measures.[68]

V. CONCLUSION

I have at some length argued that the role of the judiciary has not substantially changed in spite of apparent evidence to the contrary. Whether the argument is convincing is for others to decide. Nonetheless, I would be remiss not to acknowledge that some judges have made very serious efforts in the direction of avoiding incarceration and seeking a more humane, just, and effective sentencing process. It is also necessary to reiterate that judges can, in the end, exert only a small influence in this area. However, judges are a powerful muscle in the body of our criminal justice system. It is heartening that the sentencing part of the criminal process is now getting the attention it has always deserved. What is now needed, particularly at the appellate court level, is more conscious reflection about what we may hope to achieve through the sentencing process and greater receptivity to looking at sentencing in different, more flexible ways. If that occurs, then we might truly speak of the changing role of judges in sentencing.

---

[68] This is described by Cayley, *supra* note 1, at 268-72.