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HAVE THE COURTS FAILED?
THE PROBLEMS OF SENTENCING IN THE 1980'S

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Future historians of the criminal law will doubtless find no cause for surprise in the fact that throughout the English speaking world, the process of sentencing offenders became a major focus of political and academic attention in the late 1970's and 80's. Most western societies face the same problems - rising rates of reported crime, overloaded court systems, overcrowded penal institutions. A growing sense that penal strategies are failing to deliver results in terms of containment of crime and the rehabilitation of the offender, despite the commitment of ever increasing resources, is accompanied by a collapse of confidence in the penal ideology which has sustained the development of sentencing systems over a number of decades. The certainties of our predecessors of a century ago, with an unambiguous commitment to general deterrence as the principal theme of sentencing and the penal system, gave way in turn to enthusiasm for the concept of rehabilitation of the individual offender. As the limitations of this concept, both practical and ideological, become increasingly apparent, penologists find themselves in a vacuum which no-one has yet come forward to fill with a new penal ideology for our time (although it must be conceded that there are some very old ones on offer under new names). At the same time, in most western societies, a growing demand for accountability on the part of those who exercise authority on behalf of the state is accompanied by the development of an appreciation, in times when public expenditure is subject to constraints, that sentencing decisions are among other things spending decisions with major implications for the allocation of public resources. These are some of the reasons why it may seem that sentencing is no longer something which the community is prepared to leave to the judges to do as they see fit.

If we consider the question whether the courts have failed, we must bear in mind that the courts operate within a framework established for them partly by legislation and partly by public expectations. If there is legitimate ground for dissatisfaction with the performance of courts in relation to sentencing, we must consider how far that fault is a function of the framework within which the courts are required to operate, and how far it reflects a failure of the judiciary to organise themselves within the established framework to meet the reasonable expectations of the community. At a time when much attention, on both sides of the Atlantic, is being given to adjustment of the framework, on the assumption that if there is cause for dissatisfaction, that is where it lies, or at least that is where the remedy is to be found, it may be appropriate to consider briefly how the framework with which we are familiar developed. Canada's unique position, enabling it to draw the best from the legal traditions of England and the innovations of the United States, carries with it also the risk of adopting the worst of both worlds.

Although much of the law of the various jurisdictions of the United States can be traced back to origins in the common law of England, sentencing is an exception. The American revolution took place before the modern English sentencing system had begun to take shape, with the result that American sentencing laws evolved independently from the developments which occurred in nineteenth

century England. The typical American penology textbook, beginning with a short historical introduction, details the haphazard savagery of eighteenth century England, with 200 or more capital statutes, and then takes the reader across the Atlantic to describe the development of the penitentiary, leaving often the impression that in England we still have 200 capital statutes and wholesale executions after each assize. The basis of the modern English sentencing system were laid in the middle years of the nineteenth century, as transportation replaced death as the normal sentence for felony, and in turn gave way to penal servitude, which measured the gravity of the offence by reference to a period of incarceration. By the late nineteenth century, the foundations of the modern penal equation had been established in the English criminal statutes in the form of a system of maximum penalties which set the scale for nearly a century: the legal literature of the later years of the nineteenth century contains evidence of concern and debate over the best means of controlling judicial discretion and establishing standards or conventions. (The parallels between that literature and current American writing on sentencing are particularly interesting.) The growth of the concept of rehabilitation in early twentieth century England resulted in the development of an alternative set of penal measures - in particular probation - which left the existing structure intact. The use of incarceration remained firmly associated with punishment, with the inevitable consequence that proportionality of sentence to offence was the overriding principle. With the exception of certain special custodial sentences, of which the most important was borstal training, the idea of rehabilitation never penetrated the use of imprisonment so far as the courts were concerned (although it was recognised for the purposes of prison administration by Rule 1 of the Prison Rules). It may be that the retention until 1948 of the unambiguous expression "penal servitude" to describe sentences involving custody for three years or more, reinforced the rejection of the idea of the indeterminate sentence of imprisonment as a therapeutic device - an example of the advantages of avoiding cosmetic terminology in penal matters. The result of this history was that by the 1960's, England had a statutory framework for the sentencing process which had a satisfactory internal logic, even though some of its premises were subject to question, and within which a logical approach to decision making could develop. The sentencer had a reasonably clear choice between punishment, expressed in the form of imprisonment or fines, and treatment, expressed in the form of a probation order, borstal training or something similar. The problems which have arisen in the English sentencing system since that time, and I regret to say that in my view the system is now damaged beyond repair, have been the result of a series of developments, intended primarily to control the growth of the prison population, which have ignored the fundamental logical structure of the existing system.

The general approach of recent legislation has been based on the assumption that the more sentencing alternatives there are the better, even though it is not quite clear how they relate to each other, and that even if a new measure does no good it can do little harm. Increasingly, the growth of new sentencing alternatives has relied on the assumption that all participants in the process, both decision makers and recipients of sentences, will engage in a mutual exercise in suspended disbelief,

expressed in such forms as the principle that a court intending to impose a suspended sentence of imprisonment must first conclude that no sentence other than imprisonment will satisfy the demands of justice in the case, and then decide that the sentence need not be served. Frequent repetition of such a principle blurs the mind to its inherent absurdity. The same may be said of the idea that a prisoner on parole licence is "serving his sentence in the community", or that a community service order (one of the few real improvements of recent years) is the equivalent of a sentence of imprisonment. The result of the legislation of the last twenty years - from the Criminal Justice Act 1967 to the Criminal Justice Act 1982, with more threatened for 1986 - is that the legislative structure of sentencing in England now lacks any clarity of structure, is replete with legal technicalities at every turn, and often produces practical effects which those making the decisions cannot foresee, or if they can foresee, are expected to ignore.

One example, necessarily rather a complex one, will illustrate the point. It results from the extension of the parole scheme under Criminal Justice Act 1982 section 33, which has reduced the process of custodial sentencing in the Crown Court to a farce. In the original scheme introduced under Criminal Justice Act 1967, the prisoner was required to serve one third of his sentence, or twelve months, whichever was the greater, before becoming eligible for consideration for release on licence. This limited parole eligibility to a minority of prisoners, those sentenced to more than eighteen months' imprisonment, and allowed a discretionary selection procedure. The effect of the extension of parole under the 1982 legislation is to reduce to six months the minimum period which an offender sentenced to imprisonment or youth custody must serve before becoming eligible for release on licence. This has vastly increased the number of prisoners who become eligible for consideration, and necessitated a new streamlined procedure for dealing with "section 33" cases as they are now to be known - persons sentenced to more than nine months and up to two years. This bracket undoubtedly includes the majority of persons sentenced to custody by the Crown Court. Under the new procedures the release of offenders in this category is virtually automatic, and the figures for 1984 (which includes the first half year of the operation of the new scheme) show that almost eighty percent of eligible prisoners were released on licence. The effect of these changes on the sentences imposed by the Crown Court is often to make nonsense of the distinctions between different forms of sentence, eliminate differentials intended by the sentencing court, and to cause real injustice to those who have been in custody before sentence for any appreciable time. Because remand custody does not count towards the "specified period" of six months required before parole eligibility is reached, the practical effects differ according to whether the offender has been on bail or in custody before sentence (negating the statutory provision that time spent in custody prior to sentence should be deducted from the sentence). In the case of offenders who have been on bail, there will normally be no practical difference between full immediate sentences of nine months, twelve months, fifteen months and eighteen months: all will result in six months custody in most cases. Sentences of twenty one months and two years will require respectively seven and eight months in custody. The extension of parole has turned the partly suspended sentence - introduced in 1982 as a device for mitigating sentences - into a

device for aggravating them in some cases. A court which imposes a sentence of imprisonment for a term between three months and two years is empowered to order that the offender will serve a specified part of the sentence (between twenty eight days and three quarters of the whole term), and be released with the balance suspended. When the interaction between this form of sentence and the newly extended parole system is considered, it will be seen that if the nominal sentence is not more than eighteen months, there will be no advantage to the offender in an order suspending it in part unless the part to be served in the first instance is less than nine months, and that an offender ordered to serve nine months or more, with the balance suspended, is in theory worse off than an offender sentenced to a full immediate sentence of the same length. Both will be liable to be released on the same day (after six months, as there is one third remission from the part ordered to be served in the first instance), but the offender with the partly suspended sentence will be at risk for longer (the full remainder of the nominal term of the sentence, as opposed to the licence period, which will always be shorter), and if he re-offends he will be liable to be ordered to serve the whole of the balance, as opposed to being recalled to serve what ever remains of the licence period on the day of recall. Perhaps the greatest absurdity in the context of offenders who have been on bail is that a partly suspended sentence in the upper part of the bracket of sentences which can be partly suspended - say eighteen months and over - requiring the offender to serve half of the term, with the rest suspended, will be more severe in its effect than a partly suspended sentence requiring the offender to serve a greater proportion, such as three quarters: in both cases the date of release is likely to be the same, but the period to be served in the event of a further conviction is longer in the case of the first example (half suspended) than in the case of the second (one quarter suspended.)

The worst aspect of the extended parole system is the gross injustice it inflicts on offenders who have been in custody on remand before sentence, as a result of the rule that time in custody on remand does not count towards the minimum "specified period" of six months (although it does count towards the one third requirement, and towards the remission date). This means that time spent in custody on remand will have not normally reduce the effective duration of sentences of more than nine months. A man sentenced to eighteen months who has spent six months in custody will serve the same minimum of six months as his co-defendant who receives the same sentence after being on bail.

I have set out this material in detail because it seems to me to provide a perfect illustration of some of the dangers which face legislators as they approach the amendment of the statutory framework of the sentencing process. It reflects a failure to see one particular change in the context of the system as a whole, to examine in full the practical implications of what seem on superficial examination to be simple changes, and above all to attempt to see the implications of proposed new legislation from the point of view of those who will have to operate it. The judge of the Crown Court in England, trying to exercise judgement in the broad sense on a difficult sentencing problem, is now likely to find himself enmeshed in a net of bewildering legal technicalities, the observation of which does little to improve

the real quality of the decision. The reason for extending the parole system was the hope that it would ease the pressure of overpopulation on the prisons, which it did for a matter of weeks, but within a few months the prison population had begun to grow again at an unprecedented rate, and has now reached an all time high of 48,000. The history of English sentencing legislation of recent years may not be all bad, but there is more to be learned from it in the form of mistakes to be avoided than of ideas to be adopted.

If recent English sentencing legislation has little to offer, what is there in the recent developments in the United States - the presumptive sentence and the idea of sentencing guidelines, written by a sentencing commission. Before these ideas are imported, it is necessary again to consider the context in which they have developed. The evolution of sentencing in America followed a different course from that taken in England. By the beginning of the twentieth century, the idea of the indeterminate sentence, based on the assumption that incarceration could have a therapeutic effect, was establishing itself as the dominant theme in many jurisdictions. The indeterminate sentence took many different forms, but typically it left the sentencing judge with a limited role - that of deciding whether to incarcerate the offender and then to set broadly spaced limits, maximum and minimum, within which the actual period of confinement would be decided by an administrative agency. For many years criminologists, especially those outside the United States, looked on the indeterminate sentence as the ideal sentencing system of the future, free from the outmoded concept of retribution in all its forms: but suddenly, in the early seventies, opinion began to swing against the indeterminate sentence, which was described by one distinguished American judge as "a monstrous apparatus of ignorance and horror." To replace the extensive discretion exercised by decision makers within the system, whether administrative or judicial, new models of sentencing were proposed, in which the sentence would be determined according to formulae established by legislation, or under the authority of legislation. The role of the judge would be limited to the application of the statutory formulae, with a limited discretion, to the facts of the particular case before him. (The idea was not an entirely new one: it had captured the imagination of the English Criminal Law Commissioners in the 1830's and 1840s, and a version of the idea was enacted in France in the late eighteenth century). Certainty and predictability were the virtues claimed for the new models, both in the form of the sentence to be pronounced in court and the proportion of that sentence which would be served in practice. Practical implementation of the new models took various forms - a complex legislative scheme in California, and the guideline grid in operation in Minnesota are the best known. It is not difficult to find grounds for criticism of these new systems - to some they seem to oversimplify the sentencing decision by taking account of a very limited range of variables (the Minnesota guidelines take account only of the legal definition of the offence and a score derived from the offender's previous convictions), the extent to which they deliver real control of the sentencing process to the legislator, and thence to political manipulation (as in California), and the fertile ground they provide for plea bargaining, by delivering to the prosecutor an increased ability to control the sentencing outcome by the

manner in which he indicts the case. Despite these criticisms, there can be no doubt that within the context in which it has developed, the presumptive sentence, in all its varieties, provides a useful structure for the evolution of sentencing, by providing a framework which was otherwise lacking. Three quarters of a century of commitment to the indeterminate sentence meant that other means of structuring the sentencing process, for instance by appellate review, either failed to develop at all, or were of very limited impact, as the various studies of appellate review of sentencing as operated in American jurisdictions have demonstrated. The limited role which the American judge played in the sentencing process meant that there was no scope for the development of a jurisprudence of sentencing, or the growth of informal judicial conventions. The result was that the collapse of confidence in the indeterminate sentence left a vacuum, which politicians and quantitative social scientists moved to fill.

The question for Canada seems to be whether the ideas which have gained currency in the United States have a similar application in a jurisdiction much more closely related to England in matters of sentencing than to the United States. My own view is that the American style presumptive sentence, involving close statutory control of the sentencing process, is not the best model for the future of Canadian sentencing, for two reasons. The first is that it would undoubtedly prove less acceptable to Canadian judges, and therefore less likely to work well in practice, than it has proved to many American judges. The American judge in the state system is an elected official who must face at intervals an electorate which is more likely to take a close interest in his sentencing practices than in most other aspects of his work. An unrestricted discretion, giving the judge the full responsibility for hard choices, may appear a source of political embarrassment, and a system which allows the judge to avoid being held to account for an unpopular sentencing decision has obvious attractions. I would not wish to make too much of this point, but there is no doubt that it has some force. The second, and more substantial, reason why I do not consider that the importation of American models is the best way forward for Canada is that there does not exist in this country the vacuum which led to the growth of the presumptive sentence in the United States. There is in existence the machinery for structuring the sentencing process in a more flexible and sophisticated way, and one which will be more effective in practice than an imported concept developed in a different environment. The existence in each province of a Court of Appeal with full jurisdiction to review sentences (not subject to the crippling limitation to appeal from the defendant only, which confines the English Court of Appeal to the development of a jurisprudence substantially limited to custodial sentences) provides the basis on which a sound sentencing practice, rooted in an awareness of the complexity of the process, can develop. Before this can happen, the legislative framework must be in satisfactory condition. No courts, however conscientiously they apply themselves to the task of ordering their sentencing practices, can function acceptably within a legislative framework which is illogical and disjointed. The first question which should be in the minds of those who are responsible for the maintenance of the legislative framework of sentencing is whether the statutes offer a choice of sentencing measures which can be approached in a logical manner, without requiring the sentencer to take steps

which cannot be rationally analysed or explained. This is one of the most serious deficiencies of the present English sentencing system - there is no logical process by which a court can arrive at the decision to impose some of the sentences available to it. The prime example is the relatively new partly suspended sentence of imprisonment. The approved approach requires the sentencer first to consider all other alternatives to custody, conclude that a sentence of imprisonment is necessary, fix the length of that sentence, consider whether the sentence can be suspended in full, decide against that, consider whether the sentence can be suspended in part, and if it can, decide what portion of the sentence should be served in the first instance. Apart from the fact that, as I have attempted to show earlier, this process bears little relationship to the actual fate of the offender, it involves the judge in taking decisions for which it is impossible to give sensible reasons: once he has reached the stage of deciding that a sentence of imprisonment is necessary and fixed the length of the sentence, he has exhausted all relevant considerations, and must begin to use some of them again. It is inherently impossible to generalise satisfactory criteria by which an illogical decision can be reached, and the introduction of sentencing measures of this kind will inevitably encourage both the appearance and the reality of disparity in sentencing. The second question which should be asked of sentencing legislation is whether it is honest. Does it require the sentencing judge to pronounce sentences which are not remotely related to what will actually happen. Again in England in my view we have reached the point where the credibility of the sentencing process is stretched to breaking point, as the gap widens between what the court says and what actually happens. I would not suggest that it would be possible to operate a sentencing system where sentences as pronounced in court were carried out to the letter, without any scope for remission, but when the gap between what is pronounced in court and what happens in practice becomes too wide, the authority of the court is undermined and the integrity of the judicial process is exposed to question: the intelligent observer is left with the impression of an elaborate charade designed to conceal from the public the real punishment being inflicted on the offender. The third question which might be asked of sentencing legislation is whether it is unnecessarily complicated, to the point where the need to observe legal technicalities obscures the real nature of the decision which the sentencer must make. Again, this is a criticism of current English sentencing legislation. Consider the position of an English court dealing with the all too familiar problem of the teenager who persistently takes and drives away other peoples' cars. This is not an easy case for which to find a solution which promises anything positive, but is the task of the judge made easier by the fact that he must first consider whether the statutory criteria required by Criminal Justice Act 1982 section 1(4) for the imposition of a custodial sentence are satisfied. These are that the court is satisfied that no other means of dealing with the offender are appropriate because he is unable or unwilling to respond to non-custodial penalties, or because a custodial sentence is necessary for the protection of the public, or because the offence is so serious that a non-custodial sentence cannot be justified. Having grappled with those provisions (with the aid of a social inquiry report which the legislation requires the judge to obtain "in every case" unless he considers it "unnecessary to do so"), and stated in open

court which of the criteria he finds satisfied, (an obligation which is more honoured in the breach than the observance), the judge must then turn to the question of disqualification from driving, and calculate whether the Transport Act 1981 section 19 requires him to disqualify the offender and if so for how long - not always a simple task. At this point the Court of Appeal has come to his rescue to the extent of holding that the fact that the offender is to receive a custodial sentence is a "ground for mitigating the normal consequence" of accumulating more than twelve penalty points - a further period of disqualification. By the time the judge has made sure that he has remembered all the applicable statutory provisions, he is in danger of forgetting the what the case is actually about. It is of course the prerogative of Parliament, which gives the sentencers their powers, to limit them and constrain them in any way it pleases, but it may be hoped that when this is done it will be done in a manner which facilitates rather than obstructs the making of intelligent decisions.

It will always be open to doubt whether courts can achieve more than a marginal impact on the incidence of crime by their sentencing policies, and the success or failure of a sentencing system cannot be measured in those terms, as so many other forces are at work. Given a sound statutory framework, which will inevitably allow considerable scope for judicial discretion, the courts can reasonably be expected to develop coherent and articulated practices - a systematic approach to decision making which is accepted by the community as rational, fair and reasonably predictable, and in which the idiosyncrasy of individual sentencers is minimised. This can be achieved by using the traditional disciplines of legal analysis, adapted as necessary to the particular context. Sentencers must accept the obligation to account for their decisions by explaining the reasoning process by which they have been reached, and relating the decision in the particular instance to a general body of doctrine and practice. Appellate courts in particular must accept responsibility for formulating and disseminating policies and principles, using the individual case as a vehicle for the analysis and exposition of general sentencing principles, and articulating more formal guideline judgments in particular contexts. The temptation to slip into the easier approach of an unofficial parole board, dealing with each individual case as a single instance, without regard to the generalities, must be avoided. An appellate court which does not pay sufficient regard to its own previous judgments, and the need to maintain consistency in its own decision making, will soon find that it has undermined its own authority in the eyes of the trial judiciary. It is easy to understand the temptation to an appellate court to reduce, out of concern and sympathy for the offender, a sentence which is not open to logical criticism, perhaps on the ground that the offender's reaction to his sentence shows that he has learned his lesson, but to do so works injustice to all those offenders who accept the advice of their counsel that the sentence they have received is not wrong in principle or excessive, and decide not to appeal. In the long term, an appellate court which is too ready to reduce sentences for no particular reason will find its own case load growing to the point of becoming unmanageable, as the number of offenders who think it is worth while to try their luck increases. There is no conflict between the duty of an appellate

court to remedy injustice in the individual instance, and the duty of the court to develop general principles and offer guidance to the trial judiciary: they are two aspects of the same function, and remedying injustice in the individual case provides the best illustration and reinforcement of the general principle.

If the courts are to avoid the judgment of having failed to discharge their responsibilities in relation to sentencing, communication is of critical importance. Communication between the judges of the appellate courts will avoid inconsistencies of approach at that level. Communication between the appellate judiciary and the trial judiciary will ensure that the guidance given by the appellate court is disseminated and acted on, and if the communication is two-way communication, there will be scope for the experience of the trial judiciary to inform and influence the formulation of guideline judgments, so that they do not seem unrealistic when seen from the perspective of the trial judge. One of the most dangerous threats to the development of coherent judicial sentencing practice is the opening up of too great a gap between the appellate judiciary and the trial judiciary. The shape and size of the Canadian jurisdictions is such that the problems of organising two-way communications between all the judiciary involved in the sentencing process, at every level, can easily be overcome. Finally, there is communication between the judiciary and the community at large. There must be a constant awareness on the part of the judiciary of the need to explain how decisions have been reached, and to demonstrate that they result from the application of a coherent approach. It cannot be guaranteed that even with the most elaborate explanations, all sentences will escape unfavourable public comment - sentencing in its nature is a process which will invariably leave some dissatisfaction - but without communication between the judiciary and the community there is no chance that the sentencing decisions of the courts will command public confidence.