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A REVIEW OF

ISSUES IN SENTENCING

by

Aidan R. Vining

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Canada

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ABSTRACT

If substantive reform of the Criminal Code is to be effective, it is necessary to adopt a very broad definition of sentencing that includes the roles played by Crown and Parole. Since the last major comprehensive reform in 1892, the terms of various Royal Commissions have tended to be narrow, resulting in piecemeal changes since that date. The current sentencing system is only partially one of "fixed" sentences. Amending legislation has resulted in the availability of numerous sentencing options and wide ranges of imprisonment, without adequate legislative guidance regarding the circumstances under which they should be utilized. Experience in other jurisdictions has demonstrated that there is likely to be little impact on disparity by such measures as the type of guidelines proposed by the Law Reform Commission, sentencing conferences, or the requirement of reasons.

Diversion is likely to increase the exercise of discretion, and probation and restitution are unlikely to be more frequently used in the absence of major changes in the structure of sentencing.

Guidelines and other sentencing reforms are unlikely to be effective in reducing disparity unless they take into consideration:

- -prosecutorial discretion and plea-bargaining;
- -parole;
- -differences in values in different jurisdictions and at different times;
- -the provision of explicit criteria for non-incarcerative sentencing;
- -the appropriate length of incarcerative sentences and the factors which should not be considered in determining sentence length;
- -the means for differentiating offenders according to the specific circumstances of their offences and to their individual characteristics prior to and after the commission of their offences;
- -the need for flexibility in dealing with "hard" cases.

RÉSUMÉ

Pour que la réforme en profondeur du Code criminel soit efficace, il faut adopter une définition très générale de la détermination de la peine, qui comprenne les rôles joués par la Couronne et par la libération conditionnelle. Depuis la dernière réforme complète importante, qui a eu lieu en 1892, la tendance a été de limiter les mandats des diverses commissions royales et les modifications du Code ont donc été faites sans trop d'ordre. Le système actuel de détermination de la peine n'est, qu'en partie, un système de peines "déterminées". À la suite des changements apportés à la loi, il y a maintenant de nombreuses options concernant la détermination de la peine et toute une gamme de peines d'emprisonnement, sans aucune orientation législative appropriée sur l'utilisation de ces options. L'expérience d'autres administrations a montré que des mesures comme les lignes directrices proposées par la Commission de réforme du droit, les conférences sur la détermination de la peine ou l'obligation de donner des motifs auront peu d'effets sur la disparité.

Il est probable que la déjudiciarisation entraînera une augmentation de l'exercice du pouvoir discrétionnaire et peu probable qu'on recoure plus souvent à la probation et au dédommagement, vu l'absence de changements importants dans la structure du processus de détermination de la peine.

Les lignes directrices et autres réformes de la détermination de la peine ne seront probablement pas efficaces pour réduire la disparité, sauf si elles tiennent compte des points suivants:

- pouvoir discrétionnaire en matière de poursuites et négociation des chefs d'accusation;
- libération conditionnelle;
- valeurs différentes dans diverses administrations et à divers moments;
- durée appropriée des peines d'incarcération et facteurs à ne pas prendre en considération pour déterminer la durée de la peine;
- moyens de différencier les infracteurs selon les circonstances entourant leurs infractions et leurs caractéristiques personnelles avant et après la perpétration de leurs infractions;
- nécessité de faire preuve de souplesse dans le traitement des cas difficiles.

PART I A SUMMARY OF SENTENCING ISSUES

A. The Macro-Issues

The objective of this report is to summarize the major issues in sentencing. More specifically the objective is to assist in ensuring that major issues are not overlooked in any major revision of the Criminal Code. The following two types of issues are considered to be of paramount importance.[1]

Sentencing issues can be divided into two major categories: (1) those relating to the effectiveness of sentencing, and (2) those relating to the equity of sentencing. These two macro-issues can only be considered in the context of the historical development of sentencing in Canada. Because of the highly incremented and fragmented nature of sentencing changes in Canada (partially resulting from the piecemeal adoption of British and American practices and legislation) neither the effectiveness nor equity of the current sentencing "system" has been examined systematically.

The result is a system with multiple, vague and possibly conflicting objectives such that there is no operational definition of effectiveness. A systematic examination of the objectives and the feasibility of actually achieving them is particularly important because in recent years there has been increasing disagreement over the appropriate objectives of sentencing. This has partially been a normative debate and partly a policy debate. Essentially the debate has ranged utilitarians (those concerned with deterrence, incapacitation and rehabilitation) against non-utilitarians (those

concerned with "just deserts". The criticisms of retributionists ("just deserts") have been that: (1) some utilitarian objectives (special deterrence, rehabilitation) are inappropriate because they involve the use of non-justifiable predictions; (2) the positive impacts of some objectives (general deterrence, incapacitation) have been overrated (for example by underestimating "replacement" rates), and (3) attempts to achieve these objectives (generally unsuccessfully) have resulted in highly discretionary sentencing schemes with high degrees of inequity. The views of non-utilitarians are well summarized by John Conrad:

> Experience and observation have led me to believe that little can be expected of criminal justice beyond the fair administration of a process. The utilitarian aims of general deterrence, intimidation, incapacitation and reformation of offenders, when achieved at all, are incidental to the administration of retributive justice. Until we can make [the] system efficient and predictable, we cannot know how well the traditional Benthamite objectives can be achieved. Until we can demonstrate their feasibility, we should discard the notion that criminal justice is a teleological system in which objectives are to be achieved. We shall be more honest and less liable to disappointment if we recognise that criminal justice is a process with constitutional, legal and ethical requirements that are properly subject to deonotological appraisal.[2]

One conclusion seems clear. The risks of building a reformed sentencing framework upon utilitarian foundations are high. To the extent that predictions have to be made on a discretionary basis by individual decision-makers there are likely to be considerable inequity costs. Another conclusion is that there is no convincing evidence that particular penalties for particular types of criminal behaviour are effective. Once again this reinforces the problems of using utilitarian approaches.

Each macro-issue (effectiveness and equity) raises a series of micro-issues. These topics are dealt with in detail in Part III and Part IV of this report; here only the main conclusions are summarized.

B. Effectiveness Micro-Issues

Effectiveness micro-issues can be best structured in terms of a question relating to each issue.

(1) Incapacitation: Does incapacitation reduce the level of crime? While the answer at first glance might seem obvious (yes), there is only very mixed evidence. The crucial practical question is: how large is the "replacement rate"? Put another way is there some equilibrium rate for crime, such that incarcerated, experienced criminals are simply replaced by new, inexperienced criminals? Additionally most incapacitative schemes can be criticized (as can other utilitarian goals) on normative grounds because they involve predictions concerning future criminality with its attendant problems of "false positives" (see below). On the other hand incapacitative schemes that de-emphasize prediction (i.e. utilize a broad "net") are inevitably enormously expensive.

(2) Special Deterrence: Does punishment deter the individual from returning to crime? Once again, surprisingly, there is little evidence on the effectiveness of special deterrence. Most research has concentrated on the impact of "rehabilitative" treatment programs and the evidence is inconclusive. A priori there is no particular reason for believing that special deterrence will reduce recidivism: while it is true that the offender is made more aware of the "costs" of crime this may be offset by the reduction of legitimate

opportunities and the resultant increased attractiveness of illegitimate opportunities.

(3) General Deterrence: Does punishment deter other individuals from crime? There does appear to be reasonably strong evidence that punishment deters other individuals from crime. Additionally general deterrence is not concerned with predictions of individual criminality (i.e. there is no false positives problem). The problems of a deterrence approach are twofold. The first problem is normative: the benefits of deferrence have to be compared to the costs in terms of justice. It may be an effective deterrent to hang offenders who steal a loaf of bread, but if not normally considered just (although it may be equitable if all such offenders are actually hanged). This first problem is linked to a second, practical problem. If penalties are perceived to be too harsh in general, or too broad in their harshness, the result is likely to be reduced enformcement (less prosecutions or convictions) or "informal" differentiation among offenders. Mandatory sentencing schemes typically generate such responses. Additionally the perception of inappropriately harsh penalties appears to be one of the primary motivations for the ad hoc addition of "innovative", and (at least superficially) less severe penalties.

(4) Rehabilitation: Do "treatment" programs rehabilitate? Here, at least until recently, the evidence appeared to be relatively strong -- treatment programs have not led to noticeably lower rates of recidivism. While there has been some revisionism on this topic (see below) there is certainly no evidence that rehabilitation works in a broad range of institutional environments.

(5) Retribution (Just Deserts): Can sentencing systems be designed and implemented that actually result in equitable sentencing? Retribution, as a goal of sentencing, faces a lower burden of proof than other, utilitarian, goals of sentencing. However a just deserts system should demonstrate that equity will actually be achieved; thus far it is not clear than an effective operational just deserts sentencing scheme has as yet been implemented. As effectiveness here is almost synomous with equity the elements of such a scheme are discussed subsequently under equity.

(6) Other Sources of Sentencing Goals: what other sources of sentencing goals are available? Alternative sources of sentencing goals are what sentencing decisionmakers do and/or say they do. Such an approach putatively draws its normative validity from the current actions of decisionmakers, and, as such, has all the problems associated with such an approach. Equally importantly, the differentiating principles, or factors, that emerge in such sentencing schemes are never purely the product of what decisionmakers do (see below).

The focus of this summary now shifts to equity issues.

C. Equity Micro-Issues

Again equity micro-issues can be best be framed as a series of issue questions.

(1) The Definition of Sentencing: Should sentencing be defined broadly or narrowly? This is a central issue which, to some extent, determines the response to all other issues. It is also the issue which probably has led to more disagreement between on one hand

academics (and to some extend, offenders) and on the other legislators, judges, parole board members and other practitioners. Academics generally argue, implicitly or explicitly, that any decision that affects the post-sentencing status of a sentenced offender (but especially any decision that affects the length of incarceration) is "a sentencing decision". Others have tended to only consider as sentencing that which is formally labelled sentencing.

A narrow definition of sentencing is that it is the sentence imposed by a judge after a finding of guilt for a Criminal Code offence. A broad definition of sentencing is that it is any decision of an actor in the criminal justice system that effects the eventual disposition of a convicted offender -- including decisions such as: the charge (or diversion), the choice between incarceration and non-incarceration, the nature of any non-incarcerative penalty and the length of any incarcerative sentence.

The evidence reviewed in this study suggests that the use of a broad definition of sentencing will be necessary if substantive reform of the Criminal Code is to be effective. Thus for reform to be effective "the legal serpent may have to be grasped on every coil".[3] The adoption of such a broad perspective has important implications, one primary implication is that the perspective of this study is behavioural and legal, rather than legal.

(2) The Locus of Control: Who imposes the sentence and who has the power to influence, amend, shorten or otherwise alter the status of the sentenced offender? This question is obviously closely linked to the previous question. For example, if one defines sentencing

narrowly one would probably conclude that the current Canadian sentencing system implies narrow (or focussed) control by the sentencing judge. If one defines sentencing broadly then the current Canadian sentencing system could best be described as diffuse as control is shared with: (1) crown counsel, who have high prosecution discretion and relatively few controls on the degree of plea-bargaining they engage in; (2) parole boards, who have considerable discretion as to the actual length of time served, and (3) prison officials who can materially affect time served by their interpretation of behaviour relating to "good time".

(3) The Amount of Formal Discretion: How much formal discretion should the decisionmaker have in making the sentencing decision? There is obviously a wide range of formal discretion that can be assigned to the decisionmaker or decisionmakers. Here we wish to distinguish between formal discretion and informal discretion. A sentencing system may have little formal discretion, but a great deal of informal discretion -- which will depend on the definition of sentencing, the locus of control of sentencing and on the goals or criteria employed in sentencing (to be discussed below). If, for example, the criteria employed in sentencing are vague to such a degree that a decisionmaker must normally follow his or her own judgement a formally "low - discretion" system will be a high discretion system in practise.

(4) The Type of Criteria: Are the sentencing goals or criteria to be used by the decisionmaker(s) clear and reviewable? If the criteria to be used in sentencing are general, vague and unreviewable (except in a general sense) then sentencing will involve a high degree of high

discretion even though the degree of formal discretion is low. This is likely to be the case if goals are couched in terms of general goals such as deterrence or rehabilitation. Additionally it is unlikely that even clear criteria can be utilized successfully in a system where sentencing is defined narrowly, where the locus of control is diffuse or where the extent of formal discretion in wide.

(5) The Range and Diversity of Penalties: What penalties, range of penalties and types of penalties should by available to the decisionmaker? If the range of penalties is broad, and the decisionmaker has discretion to substitute one penalty for another the sentencing system is likely to complex and there will be a tendency (although one that could be counteracted) for a high discretion system no matter what is attempted on other dimensions. There is little empirical evidence on the efficiency of particular penalties for particular offences. Again the achievement of equity will be difficult because of the non-comparability of penalties. This is closely related to the issue of differentiation to be discussed below.

(6) The Degree of Sentence Differentiation within a Given Offense: To what extent should specific penalties be linked to variations in culpability within a given offense category? Obviously to the extent that a given system has high formal discretion specific penalties will not be associated with specific intra-offense variations of culpability. Certainly a considerable degree of differentiation is possible. Differentiation might be based on factors relating to the offense (e.g., aggravating or mitigating circumstances) or the

offender (prior record). The sources for such factors might include reconstructions of actual decisions (perhaps adjusted by a sentencing commission).

The six major process issues in sentencing can thus be summarized as DEFINITION, CONTROL, DISCRETION, CRITERIA, PENALTIES and DIFFERENTIATION. These issues, it is suggested, can be evaluated in terms of two criteria: predictability, and horizontal equity. The impact of the determination of the issues on the criteria can be illustated by assuming (for simplicity) that there are only two states of the world associated with each issue: the two states for DEFINITION are broad or narrow, for CONTROL focussed or diffuse, for FORMAL DISCRETION high or low, for PENALTIES many or few and for DIFFERENTIATION high or low. Given that any given system can be characterized in terms of these six variables there are 64 possible permutations. Here we will simply present several illustrative sentencing systems. Four of these alternatives are summarized in Table I-1.

One important issue can be illustrated by comparing alternatives A and B. The only difference in the two schemes is that in alternative A there is a broad definition of sentences, while in alternative B there is a narrow definition. Given these characteristics it is likely that both schemes would be described as mandatory sentence schemes. However alternative B would probably, in practice, not involve "mandatory" sentences. Typically in these systems pre-trial diversion, prosecutorial plea-bargaining and parole broad decisions all result in considerable exercise of informal discretion. Several United States systems that fall in this category

TABLE I-1

SAMPLE SENTENCING SYSTEMS

A	BPOAD DEFINITION	FOCUSSED CONTROL	LOW FORMAL DISCRETION	SPECIFIC CRITERIA	FEW PENALTIES	LOW DIFFERENTIATION	MANDATORY SENTENCING SCHEME IN PRACTISE AND THEORY
B	NAPROW DEFINITION	FOCUSSED CONTROL	LOW FORMAL DISCRETION	SPECIFIC CRITERIA	FEW PENALTIES	LOW DIFFERENTIATION	MANDATORY SENTENCING SCHEME IN THEORY, DISCRETIONARY SYSTEM IN PRACTICE
C	BPOAD DEFINITION	FOCUSSED CONTROL	LOW FORMAL DISCRETION	SPECIFIC CRITERIA	NUMEROUS PENALTIES	HIGH DIFFERENTIATION	DETAILED GUIDELINES SYSTEM IN THEORY AND PRACTICE
D	BROAD DEFINITION	FOCUSSED CONTROL	LOW FORMAL DISCRETION	VAGUE CRITERIA	NUMEROUS PENALTIES	HIGH DIFFERENTIATION	DETAILED GUIDELINES SYSTEM IN THEORY, BUT NOT IN PRACTICE

are described in Part IV. From observing these two alternatives we can make a generalizable statement: if any of the first four variables described above (and listed in Table 1) shift from broad definition, focussed control, low formal discretion or specific criteria the result is likely to be a system with relatively low predictability of sentences and high informal discretion, although there may be some increase in predictability. For example if the sentencing criteria are broad and vague (see the Law Reform Commission proposals below) the result is likely to a high degree of informal discretion.

A comparison of alternative A and alternative C reveals the differences between an effective mandatory sentence scheme and a "detailed guidelines scheme. As can be seen they are the same in terms of the first four variables,but not in terms of the last two variables, namely penalties and the extent of differentiation. Obviously alternative C implies a much more complex sentencing scheme than alternative A because such a scheme attempts predictable differentiate. Thus, as described below, such a scheme might differentiation according to the characteristics of the offender (e.g., prior record) or the offence (e.g., aggravating or mitigating circumstances). It is likely that a detailed guidelines schemes is even more vulnerable that a mandatory sentencing scheme to degeneration into unpredictability if any of the first four variables "shift". For example if a narrow definition of sentencing is utilized in a putatively type C sentencing scheme prosecutional plea bargaining leverage is greatly increased (see the discussion of S.B. 42 in California, below).

The advantage of alternative C is that it, like alternative A, should make sentencing more predictable, but with much greater emphasis on equity. High discretion sentencing schemes (whether defined as such or not), of course, putatively incorporate high discretion so that such horizontal equity can be achieved: i.e. like offenders can be treated in a like manner, however the achievement of horizontale equity is not easily verifiable, and the empirical evidence suggests that it is not normally achieved.

The constituant parts of this reports are as follows: (1) Part II describes the development and current structure of sentences and dispositions in Canada; (2) Part III examines the potential criteria (objectives) that a reformed sentencing system might embody; (3) Part IV of the analysis examines recent reforms in sentencing, both proposed and implemented.

D. Conclusions and Findings of the Component Parts of this study

(1) Part II: The Current Structure of Sentences and Dispositions

The major conclusion of Part II is, inevitably, that the Criminal Code has been continuously changed "piecemeal" since 1892. There has been no major comprehensive reform since that time. The Code, like most other sentencing legislation of it's time, was (and still is) strongly influenced by utilitarian, Benthamite concepts which are increasingly under attack.[3] Additionally Parliament has not formulated any clear principles as to the purposes of sentencing.[4]

In detail the evidence suggests that: (1) the current system is only partially one of "fixed" sentences; (2) amending legislation has consistently expanded the number and nature of sentencing options

without specifying under which circumstances they should be utilized; (3) the current systems typically involve numerous sentencing options and wide ranges of imprisonment; almost always without specifying under what conditions these penalties should be exercised.

(2) Part III: Sources of Sentencing Criteria

Part IV of this analysis deals with the issue of sentencing principles (criteria) in an ad hoc manner. Specific issues that arose in the context of specific reform proposals are discussed. In Part III these criteria are approached more systematically. It is suggested that sentencing criteria can be derived from one of two sources: (1) normative discussion and analysis of potential appropriate criteria; (2) empirical studies of current sentencing practices.

There are two major sources of decisionmaker-derived criteria. First aggregate empirical analyses of the behaviour of sentencing decisionmakers, including judges, parole officers and prosecutors. Second, analysis of the sentencing principles and factors articulated by judges and appellate judges. The aggregate, multivariate analyses have been utilized in several jurisdictions in the United States to develop sentencing criteria and their weighting. For example experiments jointly conducted in Denver and Vermont provide some tentative evidence on the advantages and disadvantages of utilizing multivariate studies in the development of sentencing guidelines. Some of the advantages appear to be: (1) the approach is relatively incremental in the sense that it purports to move from "average" current practice to future policy. However, Denver/Vermont suggests

that this approach may appear to be more incremental than it actually is. This appearance of incrementalism is likely to make implementation easier. (2) The predicted/ideal sentence is based upon the previous sentencing behaviour of all judges in a given jurisdiction therefore it (partially) represents the mean of previous behaviour. Guidelines based primarily on such data therefore represent "mean" uniformity. (3) The multivariate studies may reveal that judges are currently utilizing variables that they may overtly decide to eliminate in future. Thus, in Denver/Vermont arrest record was eliminated from the models even though they were causally significant. (4) The multistage nature of guideline development using multivariate studies allows input at various points of development. Judges and legislators could be incorporated into the decision-making process in a relatively low-key research environment.

The disadvantages of this approach are, in some respects, the mirror images of the advantages. The disadvantages are: (1) multivariate analysis naturally highlights current practices, therefore debate will tend to be defined by that current practice. Debate will focus on whether to include or exclude all variables found to be causally significant. It will probably be much harder to introduce discussion of other potential differentiating criteria that the empirical data (for whatever reason) did not reveal as being significant. (2) This approach is highly dependent on both the competence and the honesty of the researchers that develop the regression equations and then translate them into models and guidelines. For example, they might not include a variable that

would, if included, have been found to be significant. (3) Closely related to the last point is the fact that the researchers are dependent on the data they have available. They may not have the time resources or knowledge to collect variables that would increase the variation explained. Most cross-sectional studies of the empirical determinants of sentencing outcomes retain considerable unexplained variation, thus, while the predictive equation may be relatively accurate in predicting "in" or "out" they may be much less successful predicting length of sentence.

The second method of analysis -- analysing judicial statements about sentencing principles -- also has advantages and disadvantages. The disadvantages are that: (1) the rationales given by appellate judges may not reflect their behaviour; (2) appellate decisions apply to only a small, probably non-random, subset of cases; (3) the appellate judges are reacting to the initially prescribed sentence and therefore do not review sentences in aggregate; (4) appellate review procedures usually do not make it feasible for courts to learn institutionally. On the other hand appellate judges decisions -- after analysis -- do provide useful, practical taxonomies of sentencing factors.

One method of deriving sentencing criteria is primarily normative in orientation (even if the normative argument is buttressed by empirical evidence). This section of the analysis reviewed the putative goals of sentencing: incapacitation, deterrence, rehabilitation and retribution. The first three all rest upon utilitarian notions, therefore it is relevant to consider the

empirical evidence. The evidence on incapacitation is mixed, but suggests that the impact is highly dependent upon the level of existing penalties and upon the estimated frequency of existing crime. The rationale for increased sentences for repeat offenders is often described in terms of the incapacitative effects, but this requires a prediction about the future behaviour of particular groups of individuals. The empirical evidence suggests that such predictions have been highly inaccurate, although prior records is the only variable which appears to have some validity.

Deterrence must be separated into special deterrence and general deterrence. The evidence on special deterrence is weak and inconclusive. However empirical research on special deterrence, in reality, is limited to studying the impact of "treatment programs". There is general evidence to support the existence of a general deterrence impact, but specific evidence is mixed.

There is little evidence that rehabilitation is a viable correctional goal. There is, however, almost no evidence as to whether rehabilitative programs would be effective if they were voluntary, non-cohersive, skill-oriented etc.

The weakness of the evidence on the utilitarian goals of sentencing has naturally focused interest on non-utilitarian, "justice" objectives of sentencing. This commensurate-deserts approach is not wholly inconsistent with utilitarian concepts, but rather stresses the moral culpability of the offender. The retributive objective explicitly deals with the issue of equity, as the approach is justice-oriented. This Kantian view of sentencing is

gaining wide support in the United States.

(3) Part IV: Major Issues in Sentencing: Recent Reform -- Either Proposed or Implemented

The introduction presents, in detail, a description of the historical development of sentencing in Canada with special emphasis on the impact of various Commissions. The major conclusion is that the Code, since its initial enactment, has never been comprehensively reviewed. Terms of reference of various Royal Commissions have also tended to be narrow, contributing to highly incremental change. Additionally historically Canadian lawmakers were strongly influenced by British attitudes as to the role of the judge. This has begun to weaken somewhat in recent years, to be replaced by United States influence.

Part IV of this analysis examines recent reform proposals; both proposed and implemented. Because of the relevance of recent U.S. experiences (there is considerable evidence that Canadian reform proposals have "mimicked" U.S. proposals) these reforms are also examined in depth. The decentralized U.S. sentencing system (each state, as well as the federal government has its own system) makes it an ideal "laboratory" for testing the potential impact of some of these reforms in the Canadian context.

Canadian reform proposals are divided into five categories: (1) those reforms dealing with the sentencing process itself: sentencing guidelines, sentencing councils, judicial conferences, and written reasons for decisions; (2) those "sentencing" decisions dealing with the "early" release of offenders: parole and remission; (3) those

dealing with special groups of offenders: dangerous offenders and sexual offenders; (4) those dealing with innovative penalties or the innovative use of penalties: pre-trial diversion, restitution and the increased use of probation and fines; (5) the role and influence of plea-bargaining.

The conclusions on Canadian reform proposals are as follows: (1) the sentencing guidelines currently proposed in Canada (especially by the Law Reform Commission of Canada) are likely to be ineffective. The proposals suggest broad, vague criteria which ask judges to make predictions on the basis of almost no evidence; (2) sentencing councils would have little impact on the present disparity and would probably not assist in the development of coherent sentencing principles; (3) sentencing conferences would also have little impact on sentencing under most circumstances; (4) sentencing reasons alone are also likely to have a minimal impact on the exercise of sentencing discretion. On the other hand they might have considerable impact in conjunction with effective guidelines; (5) parole is a central part of the sentencing process. Any reform which does not acknowledge, for practical purposes, that parole is an integral part of sentencing is likely to fail in imposing uniform principles or reducing disparity. While there is considerable disagreement as to the inherent usefulness of parole there is consensus that it is almost always an integral part of the sentencing process. There is a growing movement that argues that parole should be limited to post-release prisoner supervision and that parole should not involve "sentencing". Others argue for the retention of parole, but would, in fact, restructure parole boards as

sentencing boards -- usually with formal, structured guidelines. (6) legislative changes in 1977 have made some improvements in the usage of remission, but there is considerable pressure for total abolition; (7) there is considerable agreement that dangerous offender legislation (even after recent reforms) is inappropriate, but its continuation is understandable given the existance of wide sentencing ranges; (8) the evidence on pre-trial diversion is that it appears potentially to increase the exercise of discretion (but without legal safeguards) and is likely to increase the relative "sentencing" power of the police and prosecutors; (9) probation and restitution are unlikely to offer opportunities for greater usage without very major changes in the whole structure of the Canadian criminal justice system; (10) plea bargaining is an important component of the sentencing system. Empirical evidence is emerging to suggest that it is an important factor in the Canadian criminal justice system, even though perhaps not as pervasive as in the U.S. Any reform which ignores the central role of plea bargaining in "informal" sentencing is likely to be counterproductive.

The second objective of this section is to examine recent U.S. reforms proposals and recent legislative changes. As the U.S. proposals are either actually implemented or are specific pieces of proposed legislation they tend to aggregate several features of various "pure" reforms. The United States reforms are considered in the following two categories: (1) high discretion states; (2) low formal discretion states.

High discretion states are those states which have introduced

determinate sentence structures, but with wide sentence ranges. New legislation may represent an improvement over the previously existing indeterminate sentence structures in these states, but they have serious weaknesses; primarily, they may result in greater disparity in sentences and they specify no sentencing principles.

Low (formal) discretion states are those jurisdictions which have attempted, as the name implies, to develop procedures which specify sentencing principles and to limit the exercise of discretion. These states can be divided into at least four categories: (1) those that have introduced extremely loose guidelines that are not likely to "bite"; (2) those states which have developed presumptive sentence structures; (3) those states which have mandated detailed sentencing guidelines; and (4) those states which have developed mandatory sentences for specific kinds of offenders (this will usually overlap with other categories). A second dimension which can be utilized to differentiate these new sentencing schemes is according to the body which is responsible for developing the sentencing rules. The potential sources of sentencing rules (apart from judges themselves) are: (1) the legislature; (2) the "Parole" Board (we use quotation marks because the board's role may be only loosely linked to historical ideas of parole) and (3) a sentencing commission or council.

The "loose" guidelines categories are included to emphasize that a particular piece of legislation may have all the verbal appendages of low discretion but the that the structuralist language may have no behavioural impact. The proposed federal sentencing law in the U.S. --

S.1437 -- might well fall in this category. Reverting to Canadian proposals the Law Reform Commission's proposed sentencing guidelines would also probably fall within this category.

The next groups of reforms are those based upon the presumptive sentence model. Presumptive sentences, typically, specify a "normal" incarcerative penalty for a given offence with variations under certain specified conditions. A detailed examination of California's recent presumptive sentencing law suggests that: (1) it may eliminate some of the worst cases of disparity; (2) the opportunities for prosecutorial plea-bargaining are greatly increased; (3) incarcerative sentences of one year or less are not covered by the legislation -- these remain within the discretion of the judge; (4) although guidelines are formulated to guide the exercise of the incarceration/non-incarceration decision they are broad, vague and non-inclusive; (5) the preamble of the California Act is overtly "just deserts" oriented, but elements of dangerousness prediction have appeared in guidelines.

The next major category is detailed guidelines. Once again there are several potential sources for detailed guidelines: the legislature, the parole board, a sentencing commission or a combination thereof. The major innovator in the area of detailed guidelines has been the United States Parole Board (now Commission). The guidelines do appear to substantially reduce the exercise of discretion, but they have major problems, including: (1) they only apply to offenders already incarcerated; (2) the guidelines effectively negate previously agreed plea bargains; (3) the guidelines

are based on predictions which are based upon weak empirical evidence.

It is worthy of note that the introduction of detailed guidelines makes the overt consideration of sentencing principles (criteria) mandatory. A discretionary (maximalist) system on the other hand, allows criteria to remain unspecified. Other parole boards which have developed detailed guidelines have adopted different criteria from those of the United States Parole Commission. For example the Oregon legislature has instructed the Oregon Parole Board to develop guidelines that are "just deserts" in orientation. Perhaps the primary apparent weakness of the Oregon law is that, once again, it only applies to offenders sentenced to state prison. There have, as yet, been no studies of the impact of the Oregon system.

Two other states -- Minnesota and Pennsylvania -- have recently established independent sentencing commissions, rather than specifying sentencing criteria in legislation or mandating the parole board to develop them. Both commissions are mandated to develop detailed sentencing guidelines. The guidelines are advisory, although judges must provide written reasons for departures from the guidelines. These guidelines have not, as yet, been formulated.

Finally many states have formulated mandatory sentences for specific categories of offenders, especially violent, drug or repeat offenders. Obviously if these statutes were implemented uniformly they would generate "gross" uniformity. However, studies indicate that there are two major problems with mandatory sentences: (1) they increase the availability of plea bargaining; (2) juries are less likely to convict an offender if they regard the penalty as

inappropriate.

The conclusions of part IV can be summarized as follows: (1) high discretion schemes are likely to retain disparate sentences and eliminate the liklihood of the application of any consistent set of sentencing principles; (2) many formally low discretion schemes are unlikely to effectively impose a consistent set of sentencing principles. Indeed it is possible to suggest a set of criteria that might be utilized in evaluating the potential effectiveness of any reform that attempts to effectively reduce discretion.

The suggested criteria are:

(1) The reform should differentiate between offenders convicted of the same offence. Characteristics that might be used in this differentiation can be considered in the three following broad categories: (a) factors relating to the offence (mitigating or aggravating circumstances of the offence itself); (b) factors relating to the offender before the commission of the crime (for example, the offender's prior record); (c) factors relating to the offender after the commission of the offence.

(2) The reform should explicitly state which categories should be utilized and which should not be utilized. Additionally the reform should specify whether certain factors should only be considered for certain offenses.

(3) The reform should explicitly state the grounds which determine whether an offender is to be incarcerated; as we have seen, several reforms do not deal with this issue.

(4) The reform should explicitly state the criteria which determine the length of incarcerative sentences. If these two criteria are

taken seriously a reform would structure the sentence of all, or the great majority of, convicted offenders rather than a small subset.

(5) The reform should explicitly take into account the existence of plea bargaining. As we have seen, reforms which do not take plea bargaining into account may encourage charge-bargaining (see California) and consequently generate disparity (as some prosecutors make such deals and others do not).

(6) The proposal should provide for temporal flexibility. This criterion is an attempt to recognize that both societal and judicial values change over time and, sometimes, quite rapidly.

(7) The reform should allow for some jurisdictional flexibility. While jurisdictional variation does present greater normative problems than temporal variation there are some arguments on its behalf. For example, a given jurisdiction may be experiencing a rapid increase in the occurence of a given crime. This kind of variation obviously requires strict controls and very limited usage.

(8) Any reform should also allow judges some limited flexibility where there are especially "hard cases". Once again this would require strict safeguards.

The fulfillment of the criteria would help to ensure that a reform actually structures the exercise of discretion. This would be an important achievement. It alone, of course, cannot ensure that the differentiating criteria will themselves be perceived as "appropriate" or "good".

E. Summary

The major issue presented by this study can be summarized in a single question: should the wide degree of discretion that Canadian judges (and other judicial actors) exercise in sentencing continue?

If the answer is "yes" one must almost inevitably conclude both that synoptic change is inappropriate and that a broad review of the sentencing provisions embodied in the Criminal Code is unnecessary. This is not to say, however, that Parliament or commissions would not continue to review particular penalties for particular offences or to incrementaly change particular sentencing laws. Undoubtably they would.

If the answer to the question posited above is "no" then very difficult consequences might be envisioned. A negative answer implies: (1) a much broader analysis of the Criminal Code. The historical evidence suggests, for example, that a Royal Commission might not be effective in this respect. (2) that lessons should be drawn from recent United States experience; (3) that uniquely Canadian experience -- such as the work of Courts of Appeal -- should be considered in reform.

FOOTNOTES: PART I

1. The decision has necessarily been made to limit what is defined as major. Three issues has been excluded which many might consider to be major, namely: (1) the morality and/or efficacy of the death penalty; (2) the morality and/or efficacy of particular penalties for particular offences (e.g. drug offences). However the study does deal with the efficacy of differential sentencing processes, therefore legislation such as dangerous offender laws are considered. And (3) the morality and/or efficacy of utilizing criminal sanctions for so-called regulatory or public welfare offences.

   A third major topic -- the morality and/or efficacy of any term of incarceration -- is only addressed indirectly (see part V).

2. John Conrad, "The Quandary of Dangerousness", (1983), 22, British Journal of Criminology, 3, 255, at 255.

3. H. Laurence Ross, "The Neutralization of Severe Penalties: Some Traffic Law Studies", (1976) 10 Law and Society Review 403.

PART II DEVELOPMENT AND CURRENT STRUCTURE OF SENTENCES AND DISPOSITIONS

A. Introduction

The purpose of this section is to briefly describe the current structure of sentences and dispositions in Canada. However, first, it is necessary to briefly review the constitutional framework and structure of the current system.

1. The Constitutional Framework

An understanding of the current structure of Canadian sentencing and dispositions requires an appreciation of the peculiar division of powers between the provincial governments and the Federal Government. Under the British North America Act[1] (BNA) the Federal Government is given exclusive jurisdiction to legislate in criminal law matters and criminal procedure.[2] The Federal Government also appoints and pays all Superior Court justices[3] and has the constitutional authority to establish, maintain and manage penitentiaries.[4] Under the Parole Act[5] the Federal Government also bears the responsibility for early release of prisoners.

Provincial legislatures, on the other hand, have complementary powers set out in the BNA Act. They may: impose punishment by fine; impose penalty or imprisonment for breach of provincial laws[6]; administer the constitution; maintain and organize provincial courts in both civil and criminal matters[7]; appoint Magistrates (now termed Provincial Court Judges) and Judges of the Sessions of the Peace[8]; as well as establish and administer prisons in, and for, the province.[9] Additionally, probation, diversion and other forms of conditional release are part of the responsibility of the provincial legislatures.

Theoretically, the split of constitutional authority provides that the Federal Government will assume responsibility over more serious crimes while the provinces control the disposition of regulatory and minor offences, as well as administrative matters within its boundaries. In practice, however, this split of authority has placed the burden for initially dealing with offenders on the provinces, and has left primary control over the release of offenders to the Federal Government.

2. The Structure

The division of legislative and administrative authority is further complicated by the separation of control and financing of the structural components of the system. This division affects the police, prosecutors, judges and corrections. The police may be trained and employed either by: (1) the Federal Government (Royal Canadian Mounted Police); (2) the Provincial Government (in Ontario and Quebec); and (3) the various municipal governments.[10] Consequently, standards and practice in the use of police discretion vary across Canada. This is of concern here as the police are centrally involved in the sentencing process -- if a broad definition is utilized. Bargains, in the form of reduced charges for the supply of information or a plea of guilty, are frequently negotiated. In one study, police officers were involved in 79 percent of the cases where negotiated pleas were made. In 52 percent of all the cases, the only officials negotiating with the offenders were, in fact, the police.[11]

The Crown prosecutor's office is also important in this regard. Prosecutors ultimately decide whether any given offender will be brought to trial. Although private citizens may lay charges and

conduct cases against persons whom they believe on "reasonable and probable grounds" to have committed an indictable offence,[12] the attorney-general is still required to supervise the case, in most instances. Additionally, some offences require the express permission of the Solicitor-General of Canada or a provincial Attorney-General before they can be conducted by private initiative.[13] The education, training, background and orientation of prosecutors are of central importance in the sentencing process given that there are no formal guidelines as to how that discretion should be exercised.[14] Another area of concern is the potential for influencing the prosecutor's decision which may be exercized by the political superiors in the various provincial Departments of Justice.[15]

Obviously, provincial court judges occupy the "keystone" position in the sentencing process. These judges, appointed and paid by the provincial governments, conduct more than 90 percent of all criminal cases.[16] They have the power to impose, sitting alone, any penalty from a fine to life imprisonment. In fact, no other lower court judges -- in Europe, the Commonwealth, or the United States -- have as broad a jurisdiction.[17] Provincial court judges sentence more indicted offenders, the most serious breaches of the law, than any other group of judges in the Canadian court system.[18]

There is some empirical evidence to suggest that their lack of legal training and their widely disparate backgrounds influence the sentencing outcomes of offenders appearing before provincial court judges.[19] Their sentencing task is made even more difficult by the lack of guidance from either the various superior courts in the provinces or, as we shall see below, Parliament. As the Supreme Court

of Canada does not have jurisdiction to hear sentencing appeals[20] (the highest authority available is the provincial court of appeal) there is no national judicial policy on appropriate sentencing principles.

Finally, there is the corrections component of the criminal justice system. The Criminal Code[21] directs that offenders sentenced to incarcerative sentences of two years or more in length be placed in federal penitentiaries and that those sentenced to less than two years be placed in provincial prisons. Frequently, provinces do not have either the same resources or priorities for the treatment of offenders. Consequently, judges partially base the length of an incarcerative sentence upon the existing allocations of provincial and federal resources.

Other components of the criminal justice system which may have an impact on the disposition of offenders are: the structure, organization and funding of provincial legal aid programs; the availability of competent defence counsel and the calibre and instruction of the probation officers and other officials charged with the preparation of pre-sentence reports and parole submissions.

Dispositions can be formally dividied into two categories: (1) incarcerative sentences, and (2) non-incarcerative sentences. However, because of the importance of various forms of early release they informally amount to another form of disposition. Each is now discussed in turn.

B. Incarcerative Sentences

1. Fixed Term Sentences

Imprisonment for some period up to life remains the primary sanction for breach of a criminal statute. Where there is no indication as to the length of the maximum sentence, a general

provision for indictable offences sets the sentence at a maximum of five years[22] and a similar provision sets a six-month maximum for a summary conviction offence.[23]

Although new many new non-incarcerative penalties have been adopted since 1892, as well as new mechanisms for release, the basic principle of judicially-determined sentences has remained essentially unchallenged. As noted above, there is no indication in any of the criminal statutes as to how judges are to exercise their discretion except to the extent that statutory minima have been occasionally set out for some offenses.[24]

However, it should be noted that the commonly used phrase "fixed term sentence" is no longer accurate, and, indeed, is somewhat deceptive. Since the original enactment of the Criminal Code, the power of the Governor-General to commute the sentence or pardon the accused, "good time" laws and, subsequently, the introduction of tickets of leave and parole (see subsequent sections) have all added an "indefinite" element to the "fixed" sentence. Furthermore, the sentencing judge also has the authority to order that sentences for several offences tried at the same time either be served consecutively or concurrently.[25]

2. Indeterminate Sentences

Complete indeterminancy in sentencing has been almost unknown in Canada, although a poorly drafted 1886 Public and Reformatory Prison Act[26] allowed for sentences of undefined duration for children under sixteen years of age and women convicted of certain offences. Relative indeterminancy, the concept of a fixed term plus a limited indeterminate period (indeterminate period to a maximum of two years),

was first introduced in Ontario in 1913.[27] Females sentenced to a particular reformatory were sentenced to a wholly indeterminate period up to a maximum of two years.[28] The main check upon the use of the enabling federal legislation seems to have resulted from provincial delay in establishing reformatory institutions and the necessary boards to review the indeterminate portion of the sentence. However in 1948, British Columbia made special provisions for adult males aged 16 to 22 years[29] and in 1955 New Brunswick established an adult reformatory with the prospect of adopting the enabling legislation.[30]

Since 1938, the indeterminate sentencing laws have been extensively criticized and numerous commentators have recommended their abolition.[31] In R. v. Burnshire a constitutional challenge claimed that individuals sentenced to indeterminate terms were being discriminated against, in contravention to the Canadian Bill of Rights. Ironically, the challenge was rejected, principally because the legislation was considered remedial legislation formulated for the benefit of the offender.[32] This 1974 case demonstrates how quickly philosophies on the purposes of sentencing can change. Today, indeterminant sentences remain a sentencing option for judges in Ontario and B.C. (although B.C. maintains an age restriction of 17-22 years) for individuals in breach of federal laws.[33] Another form of indeterminate sentence will be discussed below under the heading of "preventive detention."

3. Aggravated Sentences: Hard Labour

Some offences in the early Criminal Code, as well as sections in the Penitentiary Act and the Public and Reformatory Prisons Act, contained provisions for the employment of prisoners at "hard

labour".[34] The provisions were generally unenforced. Part of the problem lay in the conflicting purposes of the various legislation. For example, under the Criminal Code, hard labour was viewed as an additional punitive measure to deter other would-be offenders, while under the Penitentiary Act, work was considered useful from an administrative point of view in that it promoted good operation of the prison. Finally, under the Public and Reformatory Prisons Act, work was seen as an additional tool in the "reformation" of the criminal. The major problem lay in finding work for the prisoners; thus "hard labour" appears to have been primarily a sham. In 1955, the specific "hard labour" provisions were dropped from the Code and the prison rules with respect to employment were deemed to apply.[35]

4. Repeat Offender Sentences

Prior to the 1938 Archambault Report there were many offences where increased punishment was required on second or third conviction. In 1955, following the recommendation of the Royal Commission on the Revision of the Criminal Code, all increased sentences for second offences, except for drunken driving, habitual offender and sexual psychopath provisions, were deleted. In 1961, however, the Narcotics Control Legislation introduced an indeterminate sentence for second-time drug traffickers but, to this date, the provisions with reference to indeterminate sentences have not been proclaimed.[36]

5. Preventive Detention Sentences

(a) Habitual Offenders

In 1922 the Canadian Bar Association (CBA) recommended the enactment of special provisions for habitual offenders.[37] The CBA

suggested that the English Prevention of Crime Act 1908 be followed, i.e. relative indeterminacy in sentencing (a fixed term plus an indefinite term).[38]

In England, some twenty years after habitual offender legislation was enacted, the Report of the Departmental Committee on Persistent Offenders extensively criticized the provisions.[39] The Report concluded: (1) nuisance offenders (petty thieves, etc.) were most likely to be convicted under the habitual offender legislation; (2) only a small minority of potential habitual criminals were convicted, indicating the court's reluctance to use the provisions; and (3) there was serious doubt whether the offenders were reformable.

After considering English, European and American habitual criminal legislation, the Archambault Commission proposed that habitual offender legislation be enacted in Canada.[40] They recommended, however, that the sentence be purely indefinite (no definite term for the last offence) which meant the sentence could, in effect, be life imprisonment. Other recommendations were that the provisions of the Ticket of Leave Act[41] apply and that a special prison be constructed for habitual offenders as the Commission claimed that the primary purpose of the legislation was to separate the habitual offender from other prisoners, as well as from society.

World War II intervened and it was not until 1946 that the Department of Justice asked that a report be prepared with a view to amending the Criminal Code.[42] The report recommended that no habitual criminal proceedings should be implemented without the consent of the provincial attorney-general and that only offenders at least 18 years old be subject to the provisions.[43]

In 1947 the Federal Government acted upon the majority report making preventative detention of habitual offenders the law of Canada.[44] Habitual criminal sentences were subject to ministerial review every three years but the provisions were never brought within the Ticket of Leave Act. Eventually, with the passing of the National Parole Act[45] in 1958, the Parole Board acquired the power to release habitual offenders.

In 1969 the Ouimet Report recommended the abolition of the habitual criminal legislation and the substitution of "Dangerous Offender" legislation, arguing that indefinite sentences could only be justified for criminals who posed a serious threat to society. The recommended "dangerous offender" provisions were restricted to the most serious offences under the Code: arson, robbery, manslaughter, attempted murder,[46] and they were only to apply where the offender had been diagnosed as a dangerous offender following a six-month assessment in an institution for assessment prior to sentencing. The recommendation included the right to counsel to defend such a finding as well as the right to appeal. These recommendations were eventually enacted during the 1976-1977 sitting of Parliament with some modifications,[47] and are currently the law in Canada.

(b) Sexual Offenders

In 1948 a "sexual psychopath" was defined as a person who (having also committed one of the enumerated offences) "by the course of conduct in sexual matters had shown a lack of power to control his sexual impulses and who as a result was likely to attack or otherwise inflict pain or injury or other evil on any person".[48] Such offenders were subject to a determinate sentence of two years and an indefinite

sentence thereafter. The number of sexual offences under which a person might be convicted of being a sexual psychopath was expanded in 1953 and "attempts" at any of the named offences were also included in the amendments.

A Royal Commission in 1958[49] recommended amendments to the legislation. These included the removal of the term "psychopath", the imposition of an indefinite term with review every year (rather than the determinate/indeterminate sentence then used), and that the treatment of sexual offenders should be the same as that of habitual criminals with an emphasis on medical treatment. In 1968 following the Ouimet Royal Commission essentailly the same recommendatons were implemented.

C. Non-Incarcerative Sentences

1. Capital punishment

Prior to 1961, any person convicted of murder in Canada was automatically sentenced to death[50] and the punishment was carried out unless the Governor-General, acting upon the advice of Cabinet, chose to commute the sentence to life imprisonment.

Amendments to the Criminal Code in 1961 divided murder into two categories: "Capital murder" which was still punishable by death, was defined as planned and deliberate murder or murder of a prison guard or police officer acting in the course of duty. "Non-capital murder" covered the remaining types of murder and was punishable by mandatory life imprisonment.[51] The 1961 amendments also introduced automatic review of all capital convictions by the Court of Appeal and a full right of appeal to the Supreme Court of Canada (in law or fact, not sentence).

Amendments to the Code in 1967 permitted the imposition of the death penalty only in cases of murder of prison officials and/or policemen, for a five-year trial period.[52] This was extended in 1973 for another five-year trial period, but a Bill proposed in the House in February 1976 eventually led to the total abolishment of the death sentence on July 16, 1976.[53]

2. Corporal punishment

The early Code mandated whipping of male offenders for a few selected offences[54] and in subsequent years it was introduced as a sentence for rape, attempted rape, burglary of a dwelling while armed, gross indecency, assaults on wife or other females.[55] In 1935 amendments to the Criminal Code, whipping was dropped for three offences: assault on the sovereign, acts of gross indecency, or assaults on wife or other females.[56] An additional clause in the 1955 amendments allowed the cat-o'-nine-tails preference over other instruments in the carrying out of the sentence. Whipping was to be administered within the limits of the prison walls under the supervision of a medical officer. The number of strokes and the choice of instrument was specified by the court in the sentence.

The Hayden-Brown Report in 1956[57] recommended the abolishment of corporal punishment, but not until 1972 were the provisions for corporal punishment dropped from the Code.[58]

3. Probation

Formally, probation is a disposition that allows the supervised release of an offender prior to sentencing. If the probationed offender complies with the conditions of release, he is discharged; otherwise he is subject to reappear before the court for sentencing.

Probation was introduced to Canada in 1889[59] in conjunction with suspended sentences. It was initially restricted to young offenders who had committed trivial offences, but over the years its use has been broadened by amendments. In 1921 provisions[60] were enacted in the Criminal Code allowing any offender not convicted of an offence liable to more than two years' punishment and with no prior conviction[61] to be supervised on probation if the judge so ordered. The court could also direct the offender to pay the costs of prosecution, order the offender to make restitution to persons "aggrieved or injured" and provide for the support of "his wife and any other dependents".

In 1955, further amendments to the Code expanded the court's power to grant probation[62] and dropped the provision that allowed the court to order the payment of prosecution costs.[63]

Ontario was the first province to establish probation services in 1922; Alberta, British Columba and Saskatchewan followed in the 1940s; Nova Scotia, Manitoba and New Brunswick established services in the 1950s, and the other provinces and territories followed suit through the 1960s, with Quebec and Prince Edward Island most recently providing services in 1967 and 1972, respectively.[64]

Social Welfare, Corrections, Solicitor-General's and Justice Departments have each taken on probation roles in one or more of the provinces.[65] These agencies are also responsible for providing pre-sentence reports.

Shortly after the Ouimet Commission Report, provisions were added to the Criminal Code allowing the transfer of cases to the jurisdiction where the offender resides.[66] These were amended in 1976

for greater clarity.[67] Further, failure to comply with a probation order was made an offence and is, by virtue of amendments in 1968-69, enforceable in the residential jurisdiction of the offender.[68]

Statutory guidelines have also been introduced providing guidance as to the types of conditions appropriate for a probation order.[69] The court may impose any other "reasonable conditions" that it considers "desirable for the securing of good conduct of the accused and/or preventing a repetition by him of the same offence or the commission of other offences". The court no longer has the power to increase a probation order as it sees fit, and a three-year maximum has been established for a probation order in keeping with the Ouimet Commissioners' recommendations.[70]

Probation is now available to any offender "having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission". Furthermore, it may be imposed in addition to a fine or a sentence of imprisonment. If imprisonment is not ordered and the sentence (not to exceed 90 days) is to be served intermittently, the probation order applies during those times the offender is not incarcerated.[71]

4. Binding over

"Binding over" is the common-law power of a judge to order an individual to keep the peace and pay sureties where there is a genuine apprehension of a breach of the peace.[72] The early Code provided statutory recognition of this disposition in lieu of, or in addition to, any other sentence.[73] These provisions remained generally unchanged until 1960 when Parliament instituted provisions allowing for the imposition of conditions such as restitution, support or

reporting fom time to time to a police officer.[74] Failure to comply with any conditions meant a further appearance before the court and a sentence on the original conviction. At present, the "binding over" provisions have been subsumed into the numerous other dispositions available to the sentencing judge, although it would appear the common-law power to bind over remains.[75]

5. Suspended sentence

"Suspended sentence" was available as a disposition in the earliest version of the Criminal Code.[76] The essential difference between suspended sentence and probation is that under a suspended there is no supervisory requirement. Originally, the power to suspend sentence was limited to first offenders convicted of trivial offences but the growth of its application has paralleled that of probation.

6. Absolute and conditional discharge

The discharge of offenders has long been a de facto practice of sentencing courts utilizing the mechanism of adjourning cases sine die without adjudication of guilt or passing sentence, or by withholding the warrant of committal.[77] Technically, there is no legal basis for this practice, but it has not been challenged.

Provisions enacted in 1972 include the limitation that the accused may not be discharged where the offence is punishable by more than 14 years, or where a minimum punishment is specified. Further, the court must consider it to be in the best interests of the accused and not contrary to the public interest to give an absolute or conditional discharge.[78] Breach of a discharge order meant conviction for the first offence, as well as possible conviction for failure to comply with the order.[79]

7. Fines

The provisions for fines under the original Criminal Code remained unchanged for a number of years despite the outdated money values of the punishments. There were five forms in which fines might appear as a sentence for a summary conviction offence: (1) fines alone; (2) fines or imprisonment; (3) fines in addition to imprisonment; (4) both fine and imprisonment; or (5) fine combined with a binding over order.[80] No discretion was given to a judge to name the fine despite the wording of the provisions[81] and imprisonment was generally ordered where the individual was in default of a fine payment.

There was also no provision until 1947 for the reduction of a prison term on part-payment of a fine.[82] Furthermore, until 1955, payment of a fine could be obtained by the distress of the offender's goods under criminal proceedings.[83] Presently the civil remedy of enforcement is retained in the Code against corporations.[84]

Prior to 1955, where the offence was indictable and punishable by five years or less, a fine of an unlimited amount could be imposed in addition to, or in lieu of, any other punishment. Amendments in that year allowed additional fines for offences punishable by sentences of five years or more and prohibited fines where the minimum punishment was fixed by law. Further amendments in 1959 allowed the court to direct on what terms and at what time a fine might be paid.[85]

8. Forfeiture

On conviction for certain offences under the Code, a court may order forfeiture of property to the state. For example, in the early Code, fighting cocks were forfeit to the municipality to be auctioned

off![86] Subsequently, forfeiture of weapons, gambling equipment, counterfeit coin and drugs have also been dispositions available to the court.[87] Presently, the general provision providing for seizure (from 1955) covers seizure of most illegal goods under the Criminal Code.[88] Section 10(8) of the Narcotic Control Act governs forfeiture of money, drugs or equipment for using drugs to the Crown.[89]

9. Compensation

Compensation upon conviction for an indictable offence has always been available upon application of the aggrieved person.[90] Most likely the power was confined to compensation in the case of property damage, but the provision was broad enough to include personal injury.[91] The 1955 Code revision made clear that the compensation was for property damage and removed the $1,000 limitation.[92] These provisions are currently part of the Criminal Code.

10. Restitution

Orders for restitution have also been available since the enactment of the Code.[93] The 1955 amendments widened the application of restitution by allowing it to apply to property before the court at trial, rather than property listed in the indictment.[94] It is available whether or not the offender is convicted, so long as the court finds an indictable offence has been committed. These provisions are still in force and are available as conditions in a probation or conditional discharge order.[95]

D. The Early Release of Offenders

Another aspect of offender disposition after sentencing is the early release of offenders through either: (1) the exercise of the

Crown prerogative of mercy; (2) statutory earned remission; or (2) ticket of leave and parole legislation.

1. Crown Prerogative of Mercy

The Crown prerogative of mercy was historically an important means of early release of offenders; however, other forms of release and early disposition of offenders (outlined in previous sections) now predominate.[96] The Royal prerogative extended to: (1) commutation of sentences of death to imprisonment; (2) remission of corporeal punishment; (3) granting of free pardons; (4) granting of conditional pardons; (5) remission of sentences of imprisonment; (6) remission in whole or in part of fines, pecuniary penalties, forfeitures and costs; (7) suspension of orders prohibiting driving.[97]

The procedure required the offender to apply to the Chief of Remissions in the Department of Justice. He would conduct an investigation and make recommendations to the Minister of Justice, who would advise the Governor-General of Canada. Prior to 1925, the Remission Service (discussed below) made recommendations for the commutation of sentences of imprisonment; that is, the imposition by the Crown of a sentence with a shorter term than the one imposed by the courts. This practice was eventually discontinued.[98]

The wide power conferred on the Governor-General on behalf of the Queen is not affected by the narrower statutory grounds.[99] Currently applications under the Royal Prerogative of Mercy are made to the Chairman of the National Parole Board and recommended to the Governor General by the Solicitor General.

2. Remission

Remission of sentence time for "satisfactory conduct, application to industry and strict observance of penitentiary rules"[100] has been available to prisoners since the enactment of the Penitentiary and Prison and Reformatories Acts. There were several arbitrary elements of these provisions. For example, a prisoner in a penitentiary could earn up to ten days a month for appropriate conduct, while a prisoner in a reformatory could only earn a maximum of five days per month. Not until amendments in 1977 was this situation remedied.[101] Presently, an inmate may earn up to 15 days per month to a maximum of one-third of his total sentence. The amendments also did away with the unenforced distinction between statutory and earned remission. Earned remission was supposed to be given at the rate of three days per month if the inmate applied himself industrially.[102] However, the practice had always been to calculate both statutory remission and earned remission as a matter of course.

The discretion of the correctional authorities to revoke remission time was also statutorily limited in the 1977 amendments.[103] For example, under the Penitentiaries Act, an inmate is only liable to lose his earned remission after conviction in disciplinary court and for any forfeiture greater than 30 days, the concurrence of the Commissioner or his agent is required. For forfeitures greater than 90 days, the concurrence of the Minister is required.[104]

These restrictions do not appear in the Prisons and Reformatories Act where an inmate may lose his earned remission for breach of a prison regulation, but both Acts allow the return of the earned remission at the discretion of the official designated by the

Lieutenant-Governor under the Prisons and Reformatories Act, or the Commissioner under the Penitentiary Act.

3. Ticket of Leave and Parole

Under An Act to Provide for the Conditional Liberation of Convicts (Ticket of Leave Act) in 1899, the Governor-General by order of the Secretary of State could grant any prisoner a conditional license to serve the remainder of his sentence at large. The Act was primarily used as a form of clemency until the proclamation of the Parole Act in 1958.[105]

The qualifications for a license under the Ticket of Leave Act were, not unexpectedly, stringent. The Remission Service, which grew out of and absorbed the Dominion Parole Officer, established some "rules of general application" which governed the granting of a ticket of leave. On sentence these included: (a) no interference in drug cases; (b) no interference until approximately one-half a sentence has been served. In terms of the prisoner they included: (a) no interference if a prisoner is a confirmed recidivist or an instinctive criminal; (b) no interference if a prisoner has been previously convicted of one major crime, or two intermediate crimes, or several minor crimes; (c) no interference if a prisoner had been previously granted clemency; (d) no interference if a prisoner was under treatment for syphilis; (e) no interference unless the likelihood of reform was indicated. In terms of procedure the conditions included: (a) no submission to Governor-General without investigation; i.e., reports from judicial and custodial authorities in all cases, and from an attorney-general, police, and other sources, as required; (b) no investigation while a case is **sub judice**; (c) no grant of clemency is

made in advance; (d) no interference unless reform is indicated; (e) advice to be tendered to the Minister upon analysis of merits in each individual case, following careful and impartial collection of necessary data.[106]

The Remission Service also noted that clemency features might be so strong as to warrant exception to the general rules. Some of these features include "improbability of guilt", "assistance to the Crown", "technical offence", "uncommon views of Magistrate".

A ticket of leave was subject to revocation at will or upon conviction of a summary conviction offence and was forfeited upon conviction for an indictable offence. That had important repercussions as revocation of a license meant cancellation of all earned remission under the Penitentiary Act. Amendments in 1960 allowed the Parole Board to consider whether or not remission should be cancelled.[107]

Revocation or forfeiture of a license also meant the offender had to serve the remainder of the unexpired term of the first sentence in addition to any additional punishment for the new offence. This aspect of a license to be at large continued in the Parole Act. Major changes were embodied in the Parole Act of 1958, which replaced the Ticket of Leave legislation. However, many of the criteria on which the Parole Board bases its decision to grant parole have also been subject to criticism.[108]

Following the Ouimet Report, a general liberalizing of parole occurred.[109] Parole Board members interviewed the applicants for parole in the prisons rather than relying merely on written information. Board membership increased to 19 and made the

establishment of five regional sections of the Board possible. By 1975, there were 40 regional Parole Service offices responsible for the collection of files on applicants for parole as well as the supervision of parolees. Furthermore, parole was made available after one-third of the sentence had been served, or seven years, whichever was less, as long as it was not a sentence for life, preventive detention or for forfeiture or revocation of parole.[110]

Parole services have also developed in the provinces to allow the early release of offenders sentenced under provincial legislation.[111] In Ontario and British Columbia this once caused some overlap of jurisdiction in the case of indeterminate sentences.[112] Generally, the problem has been solved in practice by agreement between the federal and provincial parole authorities.[113] Since the amendments to the Parole Act in 1977 allowing provincial parole boards to assume jurisdiction over inmates charged under federal laws (except for those sentenced to life imprisonment or an indeterminate period) the parole boards of Ontario and B.C. have assumed control over the parole of all inmates within their respective provinces.

E. Summary

Dispositions in Canada can either be studied from the perspective of process (i.e. the historical development of the forces affecting sentencing), or from the perspective of outcomes (i.e. the current structure of sentencing and dispositions). The introduction to Part IV adopts the former approach; Part II the latter approach. The conclusions remain the same: (1) reform has been highly incremental and fragmented; (2) if a broad view of sentencing is adopted it is clear that sentencing authority has become increasingly diffuse;

(3) with few exceptions sentencing decisionmakers have been left with high discretion; (4) there has been no systematic description, or analysis, of either the purpose of sentencing or the practicality of actually achieving purported objectives. This is the issue that subsequent parts of this report deal with.

FOOTNOTES: PART II

1. 1867, 30 & 31 Victoria, c.3

2. s.91(27) B.N.A. Act

3. s.96 B.N.A. Act

4. s.91(28) B.N.A. Act

5. Parole Act 1958 c.38 s.1

6. s.92(15) B.N.A. Act

7. s.92(14) B.N.A. Act

8. s.92(41) B.N.A. Act

9. s.92(6) B.N.A. Act

10. Royal Canadian Mounted Police Act RSC 1970 c.R-9; Loi de la Surete Provinciale RSQ 1964 c.40; Police Act R.S.O. 1970 c.351; Police Act 1979 RSBC c.331.

11. See John F. Klein, Let's Make a Deal: Negotiating Justice (Toronto: Lexington Books, 1976). Plea bargaining is discussed extensively in Part IV of this report.

12. See Stanley F. Cohen, Due Process of Law: The Canadian System of Criminal Justice (Toronto: Carswell Co. Ltd., 1977) at p. 131.

13. Sections 54, 82, 108, 243 and 433(2) of the Criminal Code require the consent of the Attorney-General of Canada; sections 124, 162(3), 168, 170, 343(2) and 434(3) require the consent of the Attorney-General of the Province.

14. James R. Silkenat, "Limitations on the Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era." (1971) 5 Ottawa L.R. 104. See also R v Leonard (1962) 38 C.R. 209 (Alberta court of appeal) for a discussion of the prosecutor's powers.

15. The highly publicized Vogel Affair in British Columbia is one example of the potential for abuse of the prosecutor's position of responsibility.

16. Report of Canadian Committee on Corrections, 1969 at 212 (hereafter referred to as the Ouimet Report).

17. John Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971) at 35.

18. Stuart Ryan and Frederick B. Sussman, "The Adult Court," in Crime and its Treatment in Canada, ed. by W.T. McGrath (Toronto: MacMilan Co., 1976) at 191.

19. Hogarth, ibid.

20. s. 618 of the Criminal Code RSC 1970 c-34, allows that appeals to the Supreme Court of Canada may be heard on any question of law. Appeals as to sentence were held to be excluded in Goldhar v The Queen 1960 SCR 60. See for example Miles v The Queen (1976) 32 CCC (2d) 291 where it would appear the accused may appeal a discharge order with leave of the SCC.

21. see R.S.C. 1970 c-34, s. 659

22. s. 658 Criminal Code

23. s.722(1) Criminal Code "...liable to a fine of not more than five hundred dollars or to imprisonment for six months or both."

24. s.218 Criminal Code sets the minimum punishment for murder as imprisonment for life, the importing and exporting of narcotics under the Narcotic Control Act RSC 1970 c.N-1 s.5 is punishable by a minimum term of 7 years, other minimums in the Criminal Code are 14 days for a second conviction of impaired driving and 3 months minimum for a third convictin of impaired driving (s.236). The Income Tax Act RSC c.148 s.1 provides for aminimum of 2 months imprisonment upon election by the Attorney-General of Canada.

25. s.645(4) Criminal Code

26. R.S.C. 1886 c.183

27. The Prison and Reformatories Amendment Act: Indeterminate Sentences Stats. Can. 1913 c.39, The Ontario Reformatory Act, Stats. Ont. 1913, c.77

28. An Act to Amend the Prisons and Reformatories Act 1913 c.39 s.2,s.3

29. The Prison and Reformatories Amendment Act, Stats.Can. 1947-48 c.26, New Haven Act, Stats. B.C. 1949, c.45

30. K. B. Jobson, Sentencing in Canada: Historical Aspects 1895-1965 (New York: Columbia University, 1965), thesis.

31. Report of the Royal Commission to Investigate the Penal System of Canada, 1938, at 248 (Hereafter referred to as the Archambault report); Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, 1956, at 23 (Hereafter referred to as the Fauteux Report); Report of the Canadian Committee on Corrections, 1969 at 205 (Hereafter referred to as the Ouimet Report).

32. R. v. Burnshire (1974) 15 CCC (2d) 505 (SCC6:3)

33. Prisons and Reformatories Act RSC 1970 P-21 s.41 (Ontario), s.150 and s.151 (British Columbia)

34. See Jobson, supra note 30 at 25-6.

35. Ibid., 28.

36. Narcotic Control Act RSC 1970 N-1 part II s.15

37. Proceedings of the Seventh Annual Meeting of the Canadian Bar Association, 1922, at 278-279

38. See Archambault Report, 220

39. Cmd. 4090

40. The Archambault Commission found two faults with the English habitual criminals statute. One problem was the act's fundamental principle that an habitual criminal sentenced to preventive detention might be reformed. The Archambault Commissioners expressed grave doubt about this premise (220). The second fault lay in the underutilizatin of the act "no doubt due to its cumbersome and restrictive provision." (220)

41. Stats. Can. 1899 c.49, 1900 c.48, 1906 c.150 The Ticket of Leave Act provisions will be discussed in the section concerning the release of offenders, infra.

42. Jobson, supra note 30 at 74.

43. See Report of the Alberta Provincial Committee to the Subcommittee on Criminal Law of the Conference of the Commissioners on Uniformity of Legislation, Re Habitual Offenders, 1945

44. An Act to Amend the Criminal Code Stats. Can. 1947 c.55 s.18 becoming ss 575A to 575H of the Criminal Code.

45. Stats. Can. 1958 c.38 The provisions of the Parole Act will be discussed in the section concerning the release of offenders, infra.

46. Ouimet Report at 259-260. These provisions have already been discussed in Part I.

47. One of the most important modifications was the removal of the provision requiring a 6 month assessment of the offender. Instead, on certification of 2 psychiatrists (one nominated by the Crown and the other nominated by the defence) an offender might be subject to the dangerous offender provisions (s.690). Under s.691, the offender might be remanded for observation but only for 30 days. Lack of a substantial period for observaton is criticized in John F. Klein, "The Dangerousness of Dangerous

Offender Legislation: Forensic Folklore Revisited," (1976) 18 Canadian Journal of Criminology: 109-122.

48. An Act to Amend the Criminal Code 1948 c39 s.43.

49. Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths (Ottawa: Queen's Printer, 1958) [McRuer Commission]

50. s.642 Criminal Code of 1955

51. Criminal Code Amendment Act Stats.Can. 1960-61 c.43

52. An Act to Amend the Criminal Code 1967-68 c.15 s.1

53. An Act to Amend the Criminal Code 1974-75-76, c.105 s.21

54. See Jobson, supra note 30 at 115 for greater detail

55. Ibid.

56. Report of the Joint Committee of the Senate and House of Commons on Capital Punishment, Corporeal Punishment and Lotteries, 1956, (Hayden-Brown Report) at 41

57. Ibid., p. 43

58. Criminal Law Amendment Act 1972 c.13 s.59

59. An Act to Provide for the Conditional Release of First Offenders, 1889, c.44

60. Criminal Code Amendment Act: Probation 1921 c,25 s.19

61. The provisions also allowed that:

> 1081(2) where the offence is punishable with more than 2 years imprisonment, the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender....
>
> 1081(4) where one previous conviction and no more is proved against the person so convicted and such conviction took place more than five years before that for the offence in question, or was for an offence not related in character to the offence in question. The court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

62. For example, consent of the prosecutor was no longer a requirement in the granting of probation for offences punishable by more than 2 years imprisonment or where an offence had been committed more than 5 years earlier.

63. See A.K. Argeroff "The Evolution of Suspended Sentence and Probation Legislation in Canada" (1968) 16 Chitty's Law Journal 230.

64. See Sheridan and Konrad, "Probation," in Crime and its Treatment in Canada ed. by W.T. McGrath, (Toronto: MacMillan, 1976).

65. Proposals for the Development of Probation, Canadian Corrections Association (Ottawa, undated, presumably 1974) p.267

66. Criminal Law Amendment Act 1968-69 c.38 s.75 amending s.665(2) of the Criminal Code.

67. Criminal Law Amendment Act 1974-75-76 c.93 s.82

68. s.666(2) Criminal Code as amended in 1968-69

69. s.663(2) Criminal Code

70. Ouimet Report at 301 now s. 664(2)(b) Criminal Code

71. s.663(1)(c) Criminal Code

72. In R v. MacKenzie (1945) 85 CCC 233 it was found to be essentially a civil action.

73. s.958 and s.959(1) Criminal Code 1892. In MacKenzie v Martin [1954] SCR 361 it was held that the power to bind over was not completely supplanted by the Criminal Code.

74. An Act to Amend the Criminal Code 1960-61 c.43 s.31

75. See footnote 73

76. s.971 Criminal Code 1892

77. See Graham Parker "The Law of Probation" Community Participation in Sentencing, Law Reform Commission of Canada (Ottawa: Minister of Supply and Services, 1976)

78. s.662.1(1) Criminal Code

79. Under the combined provisions of s.662.1(1), s.664(4) and s.666 Criminal Code

80. See Jobson, supra note 30 at 110

81. See In Re Placide Richard (1907) 38 SCR 394

82. An Act to Amend the Criminal Code 1947 c.55 s.32

83. see Ouimet Report, p. 197

84. s.648 Criminal Code

85. An Act to Amend the Criminal Code 1959 c.41 s.27

86. s.513 Criminal Code 1892

87. s.96, s.171 and s.405 Criminal Code 1955

88. s.446(3)(b)(ii) Criminal Code

89. Narcotic Control Act RSC 1970 N-1

90. s.836 Criminal Code 1892

91. See Jobson, supra note 30 at 114

92. Ibid., 115

93. s.838 Criminal Code 1892

94. Martin, J.C. Criminal Code of Canada (Toronto: Cartwright & Sons, 1955) annotations at 954

95. See sections 662.1(4) and 663(2)(e) Criminal Code

96. Prior to the Ticket of Leave Act 1889, the prerogative of mercy was the only means of early release (aside from remission allowed under the 1886 Penitentiary Act).

97. Fauteux Report, p. 28

98. Ibid. at 36

99. Ibid., p. 28. Crown prerogative can only be removed or restricted by express words or by necessary intendment. British Coal Corp. v. R. [1935] 2 WWR 564, 64 CCC 145

100. Archambault Report, at 231

101. Criminal Law Amendment Act 1977 c.53 s.41 and s.45

102. Penitentiary Act RSC 1970 c.P-6 s.24

103. See The Penitentiary Act RSC 1970 P-6 22(3), 22(5) and 23. Also The Prison and Reformatories Act RSC 1970 p. 21 sections 5(1) and (2)

104. Criminal Law Amendment Act 1968-69 c.38 s.108

105. Parole Act 1958 c.38

106. Archambault Report , 238

107. Penitentiary Act 1960-61 c.53 s.25

108. See for example: Pierre Carriere and Sam Silverstone, The Parole Process: A Study of the National Parole Board (Ottawa: Minster of Supply and Services Canada, 1977); Peter McNaughton-Smith Permission to Be Slightly Free (Ottawa: Minister of Supply and Services, 1976) and A.R. Vining, "Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons" (1979) 2 Osgoode Hull Law Journal 354.

109. F.P. Miller, "Parole" in Crime and Its Treatment in Canada, ed. by W.T. McGrath, supra note 44.

110. Parole regulations as amended by SOR/78-628 and SOR/79-88. The amendments in SOR/78-628 restrict provincial parole boards when granting parole to prisoners sentenced to more than five years who were liable to imprisonment for ten years or more where the offence involved conduct that:
(a) seriously endangered the life or safety of any person
(b) resulted in serious bodily harm to any person, or
(c) resulted in severe psychological damage to any person.
In those cases, the inmate must serve 1/2 of the term of imprisonment or seven years, whichever is the lesser.

111. See, for example, New Brunswick's Parole Act, Nova Scotia's Ticket of Leave Act RSNS 1967 c.305, Saskatchewan's Corrections Act R.S.S. 1978 c-40.

112. For example, in the case of an offender sentenced to 2 years determinate and 2 years less a day indeterminate, the National Parole Board might release the inmate on parole prior to his being considered for provincial parole on the indeterminate portion of his sentence.

113. Ouimet Report, p. 337

PART III SOURCES OF SENTENCING CRITERIA

What is the evidence on effectiveness? There are two levels at which this question can be analysed. The first level is relatively abstract: what evidence is there on the classic purposes of sentencing? Second, how achievable are these purposes in particular jurisdictions? Part III attempts to address the former question, while Part IV addresses the latter question.

Any articulation or formalization of sentencing criteria - whether broadly defined as sentencing principles or more narrowly defined as sentencing factors - presents enormous policy difficulties. For example a proponent of "just deserts" guidelines might prefer no guidelines, i.e. wide discretion, to guidelines based on rehabilitative criteria. The issue of guidelines/no guidelines, therefore, cannot be divorced from the issue of the nature the guidelines.

In order to discuss this topic more fully we make, for expositional purposes, a rather artificial distinction: between criteria and guidelines which derive primarily from normative analysis (together with implications concerning effectiveness) and criteria and guidelines which are primarily derived from empirical evidence on how decision makers actually behave. The distinction is only valid in terms of the initial impetus for the criteria; obviously within each category the normative analysis is partially based upon empirical evidence. In part IV of this report these purposes will be examined in a series of actual contexts.

A. Evidence on the Effectiveness of the "Classic" Purposes of Sentencing: Incapacitation, Deterrence, Rehabilitation and Retribution.

In the last decade there has been a vast outpouring of literature on the appropriate purposes of sentencing. This literature has been primarily normative in orientation, but has been buttressed by a large amount of empirical evidence. The putative goals of the sentencing process retribution (just deserts), general deterrance, specific deterrance, rehabilitation and incapacitation -- have all been examined intensely. Many of the reform proposals have been rigorously attacked both from a strictly normative perspective (the goal is inappropirate) and from a policy perspective -- the goals may be appropriate in an abstract sense, but as we cannot achieve it in practice the result is inappropriate "unintended consequences."

What is the current evidence on the appropriateness of these goals? This question cannot be answered directly here. Only the second, related question can be addressed: what is the current evidence on the achievability of the goal. Thus, for example, we address the question: what evidence is there that incapacitation can work? We do not address the direct question: should incapacitation be a goal of sentencing. We do, however, make the vital assumption that no-one would favour a goal which cannot be implemented.

Much has been written on retribution, deterrance, rehabilitation and incapacitation in the last decade. This section, therefore, is a summary of this evidence.

(1) Incapacitation[1]

Incapacitation involves removing an offender from general society

and thereby reducing crime by physically preventing the offender from committing crimes in that society. The incapacitative effect of a sanction refers exclusively to that preventive effect and does not include any additional reduction in crime due to deterrence or rehabilitation impacts.

Decisions on whether or not to send individuals to prison are based on the offences for which the individuals were convicted and their prior criminal records. Once imprisoned, they are prevented from committing further crimes in general society. Under more stringent sentencing policies more convicted offenders might be sent to prison or they would be sentenced to longer average terms. The question, thus, becomes how effective such increased in sentences might be. If offenders who are incarcerated would have continued to commit offences if they had remained free, there is a direct incapacitative effect: that is, the number of crimes at any time is reduced by the crimes avoided through the imprisonment of some criminals. The magnitude of the incapacitative effect is directly related to the rate at which an offender commits crime (defined as λ crimes per year). If the criminal would have continued to commit crimes during a period of incarceration (described as S years) the potential number of averted crimes is λS crimes. There are obviously, however, a number of critical assumptions in this approach. If the individual "naturally" stopped committing crimes the incapacitative value of imprisonment would be reduced.

Estimating the incapacitative effect of an imprisonment policy also depends on the probability of being sentenced to prison if a

crime is committed. This probability consists of the conditional probabilities of arrest given a crime, of conviction given arrest, and of a prison sentence given conviction.

The incapacitative effect can be estimated from the proportion of a career that a criminal spends in prison. Denoting the individual crime rate by λ, the probability of conviction upon committing a crime by q, the probability of imprisonment after conviction by J, the average time free between incarcerations is then $1/\lambda qJ$. If the average time served per incarceration (S) is short relative to the length of a criminal career, the proportion of time spent incarcerated is:

$$\frac{S}{\frac{1}{\lambda qJ}+S} = \frac{\lambda qJS}{1+\lambda qJS}$$

The stochastic process models include a number of additional assumptions, which specify the dynamic features of the process and identify the mechanics for aggregating the behaviour of individuals to obtain estimates of total effects. The principal assumptions that are questionable are thos relating to the stability of the process over time, the relationships among the parameters, and the degree of similarity among individuals in the population. Typically, the model parameters are assumed constant over time and over all individuals, and they are assumed to be independent of one another.

Under the assumptions of the models, an additional manyear in prison (e.g., one more individual serving one year in prison or two more individuals each serving six months) will prevent λ crimes, since

λ is the number of crimes that each imprisoned individual would commit in a year if not imprisoned. However, the relative impact of λ crimes prevented per man-year in prison will vary with the crime rate and with the current prison population. Not surprisingly, the models suggest that the incapacitative impact is greatest when the expected number of years incarcerated is high and where the individual crime rate is high.

The Panel on Research on Deterrent and Incapacitative Effects of the National Research Council (U.S.) after extensively reviewing the evidence on incapacitation concluded:

> The literature on incapacitation contains a number of studies offering widely divergent estimates of the incapacitative effect of imprisonment. Some argue that these incapacitative effects are negligible, while others claim that a major impact on crime is possible through increases in the use of imprisonment. In reviewing these studies, the Panel has found that there is more inconsistency among the analyses that their opposite policy conclusions would suggest; they are in general agreement about basic assumptions, but differ in the particular parameter valued used. The principal disagreement is over the value of the individual crime rate, an issue that can only be resolved empirically. This is a task that should be given high priority.[2]

Apart from this their main substantive conclusion was incapacitation was likely to be most useful when utilized to control violent crimes:

> "Under the assumptions of the available models, the figures ... indicate that such a strategy could reduce violent crimes with reasonable increases in the population of violent offenders in prison."[3]

Another empirical study, however, is somewhat less optimistic about incapacitative benefits even for violent offenders: [t]his experiment demonstrates that the strategy of incapacitation of violent offenders fails to reduce street crimes of violence by a significant

margin, and, if applied as recommended by some commentators, would result in enormous human and economic costs far out of proportion to the volume of crime prevented."[4]

Additionally it is important to consider one further issue, the relationship between incapacitation and prior record. While a strict just deserts argument is sometimes made for increased sentences for repeat offenders, most observers would admit that there is usually an implicit incapacitative (utilitarian) rationale: If individuals with high individual crime rates (λ) could be isolated and incarcerated the incapacitative effect would be increased. However, such a selection requires a prediction as to future criminality. There are enormous statistical problems involved, especially when the event predicted has an inherently low probability.[5] Monahan concludes, after reviewing eight studies[6] which attempt to validate predictions of violence:

> The conclusion to emerge most strikingly from these studies is the great degree to which violence is overpredicted. Of those predicted to be dangerous, between 54 and 99 per cent are false positives - people who will not, in fact, be found to have committed a dangerous act. Violence, it would appear, is vastly overpredicted, whether simple behavioural indicators or sophisticated multivariate analyses are employed and whether psychological tests or thorough psychiatric examinations are performed.[7]

The Panel itself concluded that the only predictive variable that might be justifiable is prior record:

> The information to distinguish among offenders could be based on the individual's criminal record (including the current crime type and the number of previous convictions and incarcerations, also by crime type). The use of information other than prior criminal record in determining sentences may be unjust because of the discriminatory or capricious quality of such variables.[8]

(2) Deterrence

Deterrence is based upon the utilitarian notion that individuals respond to incentives. In the context of criminal justice this implies that criminals will be responsive both to certainty and to the severity of sanctions. Special deterrence refers to the impact upon the subsequent behaviour of the specific individual sactioned, while general deterrence refers to the impact other potential offenders that information on penalties creates.

Given the utilitarian bent of deterrence the crucial questions are empirical: how much do increases in penalties deter? There is only minimal, confusing evidence in the case of special deterrence. In a recent review Nagin concludes:

> On balance, recent evidence tends to suggest that special deterrence, which observationally is difficult to distinguish from other forms of "rehabilitation", is not operating. This tentative conclusion is suggested by the apparent invariance of recidivism to any type of special rehabilitative program. The figures suggest that recidivism rates cannot be affected by varying the severity of punishment, at least within acceptable limits. The evidence, however, is still only preliminary.[9]

The main evidence for this conclusion rests upon the findings of Robert Martinson and his co-researchers.[10] However, in this context special deterrence usually only refers to rehabilitative efforts within prisons. More correctly, then, Nagin might have said that "treatment programs" do not appear to have much impact in terms of special deterrence. Even this conclusion, however, may be premature. Martinson in a recent article has modified his previous conclusions:

> My [previous] conclusion was: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far had no appreciable effect on recidivism"...
>
> On the basis of the evidence in our current study, I withdraw this conclusion. I have often said that treatment added to the networks of criminal justice is "impotent," and I withdraw this characterization as well. ...

> But for all that, the conclusion is not correct. More precisely, treatments will be found to be "impotent" under certain conditions, beneficial under others, and detrimental under still others.
>
> The most interesting general conclusion is that no treatment program now used in criminal justice is inherently either substantially helpful or harmful. The critical factor seems to be the conditions under program is delivered.[11]

The evidence on special deterrence, more broadly defined, is almost non-existent. Indeed there would be enormous normative problems involved in conducting such research. Ideally it would require varying the penalties for similar offenders and observing any differing rates of recidivism (after controlling for differences in the incapacitative effects.) It would certainly not be surprising if special deterrence was found not to be effective. According to the economic theory of crime an individual maximizes his utility by commiting crime. Having once been caught the costs of legitimate activities go up (the offender now has a record) and the costs of future crime are likely to decrease (the offender acquires new criminal skills).

There is generally more empirical work on general deterrence (or simply deterrence). In a recent review Forst et. al. conclude "the vast majority of studies documented within the last fifteen years report findings that support deterrence theory. These studies find both the certainty and severity of sanction levels to be negatively correlated with the crime rate based on data that fluctuate both from jurisdiction to jurisdiction and over successive time periods."[12] Tullock reaches similarly unequivocal conclusions.[13] However another recent survey, by Nagin,[14] is more cautious in its conclusions, mainly

because of the inadequacies of previous studies. Three of the most serious problems identified are inadequate data, the simultaneity (identification) problem and the potential confounding of deterrence effects and incapacitation effects.[15] The only study based upon Canadian data - conducted by Avio and Clark[16] - found a negative and generally significant correlation between clearance rates and crime rates. The association of conviction probability and crime rates is generally negative, but frequently not statistically significant. Surprisingly they found that a measure of sentencing severity had a positive and significant correlation with theft and robbery rates.

While the theory behind general deterrence remains plausible the main problem may relate to the behavioural difficulty of enforcement. As will be seen in the discussion of mandatory sentencing, increased threats of deterrence may, in fact, not be exercised (for example because of prosecutorial discretion, jury unwillingness to convict etc.) Once again we would expect that the impact of general deterrence changes would depend upon: (1) the existing level of penalties; (2) the existing probability of apprehension and conviction; (3) the nature of the crime;[17] and (4) attitudes as to the appropriateness of the penalties.

(3) Rehabilitation

As will be seen in a subsequent part of this analysis there is little evidence that rehabilitation works, especially within an incarcerative setting. The only encouraging note recently has been struck by Martinson. He suggests that a national study currently nearing completion in the United States demonstrates that the conditions of any given rehabilitation program may determine whether

it is beneficial, "impotent" or actually detrimental. The preliminary discussion by Martinson mainly deals with juveniles, but he does suggest that parole supervision may be an effective treatment: "we are able to make eightly controlled comparisons between parolees and roughly comparable offenders released [without supervision]. In seventy-four of these eightly comparisons, parolees had lower reprocessing [recidivism] rates than those released without parole supervision".[18] These findings suggest that the value of parole boards as supervisory agencies should be treated separately from the issue of their value as sentence-setting agencies.[19]

(4) Retribution -- "Just Deserts"

Given the fuzzy evidence on the usefulness of utilitarian goals of sentencing it is perhaps not surprising that the concept of retribution -- or "just deserts" -- has come back into vogue. One commentator has claimed:

> There are four commonly accepted goals of criminal punishment: Retribution, deterrence, rehabilitation, and incapacitation isolation. However, only retributivism contains a valid philosophical premise upon which a coherent, organized system of just punishment can be built: It is the sole penal rationale concerned exclusively with doing justice. A retributive punishment scheme is not inherently incompatible with other enumerated penal goals. Indeed, any incidental deterrent, rehabilitative, or preventive effects which result from just punishment are certainly welcome. However, these additional socialutilitarian goals cannot morally justify the imposition of criminal sanctions.[20]

The appropriateness of retribution has been advocated widely in the last decade.[21] Von Hirsch has argued that retribution requires that punishment should be based both upon the culpability of the offender and the harm done.[22] Von Hirsch and Hanrahan argue that the conditions for such a model are:

> The commensurate-deserts principle imposes [two] kinds of constraints on the severity of penalties. First, it imposes a rank-ordering of penalties. Punishments must be

> arranged so that their relative severity corresponds with the comparative seriousness of offenses ... Second, the principle limits the absolute magnitude of punishments. A penalty scale ... must also maintain a reasonable proportion between the quantum of punishment and the gravity of the crimes involved. The scale should not be so much inflated that less-than-serious offenses receive painful sanctions ... Nor should the entire scale be so much deflated that the gravest offenses received only slight punishments.[23]

One of the "unsolved" problems of the just deserts approach is the role of prior record (and implicitly current criminal status -- i.e. commission of a new offence while on parole or probation). Some proponents have argued that prior record is a reasonable component of a moral culpability, while others argue that punishment should be based purely upon the current offence.

The appeal of retribution is obvious. First, the theory not rest does upon an empirical base, although empirical research might be useful in the practical development of such a system.[24] Second, the argument has a clear (Kantian) moral appeal. Third, the theory does not necessarily suggest policies that contradict other rationales. Fourth, the approach dovetails well with the concomitent concern with fairness and the reduction of disparity while avoiding the pitfalls of "gross" uniformity.

Given the difficulties of assessing the efficacy of utilitarian goals directly it is not surprising that recently efforts have been made to circumvent the problem of directly assessing effectiveness. The idea is to analyse the decisions of decisionmakers in order to extract what they believe to be the appropriate determinants of sentencing. This is a somewhat reductionist approach as it is obviously not a true test of effectiveness, rather a test of what decisionmakers <u>believe</u> to be effective.

B. Decisionmaker-derived Criteria

There are two major sources of decisionmaker-derived criteria: (1) empirical analyses of the previous decisions of decisionmakers involved in the "sentencing" process judges, parole officers and even prosectors; (2) "reconstructions" of sentencing principles, as articulated both by judges and appellate judges.

Once again our approach here is exemplary; it would be impossible to review all these sources. However, fortunately, in the United States there has been a major experimental effort to utilize multivariate analysis to develop both sentencing criteria and guideline models. Additionally in Canada there has been a recent study on the criteria utilized by one appellate court engaged in sentencing review.

(1) Empirically-derived Decisionmaker Criteria: Denver (Colorado), Vermont, Essex County (N.J.)

Empirical studies are potentially of value because they provide information on what decisionmakers actually do and/or say they do. Multivariate studies are one type of empirical study that helps identify which factors are currently utilized in sentencing and what is their relative weighting.[25] Evidence from a recent project conducted in Denver and Vermont to begin the development of such guidelines suggests that multivariate studies can play a role in developing guidelines. However, the study also demonstrates the dangers, and limitations, of such an approach. It is thus both a case study of how one research group actually moved from multivariate analysis to "guidelines" (they have not been implemented as yet) and a case study of the advantages and disadvantages of such an approach.

As this is the first time jurisdictions have relied heavily upon an empirical analysis of actual sentencing decisions in the development of guidelines, it is worth reporting in detail.

In the study some 205 items of information from 400 randomly selected sentencing decisions (200 in Denver, 200 in Vermont) were collected.[26] The information was then analysed, utilizing multiple regression, to determine which offence/offender characteristics explained the largest percentage of variation. An attempt was made to collect all the data which was available to the sentencing judge. However approximately 25% of the 205 data items were not available in over 25% of the cases. Often the missing data related to socioeconomic characteristics of the offender.

Based upon these regression models the researchers then developed five preliminary models. These models attempted to predict what the average, or "modified" average sentence of all judges in that particular jurisdiction was. Only one of the five models was literally based on a regression equation, and the researcher points out that "the others were based on both empirical and theoretical evidence",[27] i.e. variables were added which the researchers hypothesized were causally or normatively important (see below). All of these models were presented to a Steering and Policy Committee. The Committee instructed the staff to further test the models against a sample of cases currently coming before the judiciary. This validation was conducted utilizing a new one hundred case samples. The models were found to be correctly "predicting" approximately 80 per cent of the "in" (the decision to incarcerate) or "out" (the decision to grant probation or otherwise not incarcerate) of the sentencing decision.

The Committee then asked the research team to formulate a synthesis of the five preliminary models in a demonstration model. Pedicted sentences based on the model were then to be given to the Denver judiciary, after actual sentencing had taken place, for their own consideration and review during a statutory period available for that purpose. The demonstration model was developed by the staff of the research project on the basis of analysis of nearly 400 sentencing decisions made by the Denver District Court over two and one-half years, input from the Steering and Policy Committee, and once again, a review of both the theoretical and empirical literature on sentencing.

The researchers claim that the basic design objective was that the model be computationally simple, yet efficient in charting which underlying factors have influenced decisions in the past and in estimating what weights have been accorded each of these factors.[28] Offences within each class were divided by estimated seriousness into three or four groups. Rankings were determined by consensus among staff members on the basis of their analysis of the statutory definition of each offence. The higher the group's rank, the more serious the offence. The offender score consists of five items of information: prior incarcerations; probation or parole revocations; legal status of the offender at time of offence; prior convictions; and employment history. The first four variables attempted to provide a measure of the offender's prior adult criminal history record. Although the inclusion of juvenile records would have improved the model's performance, the researchers excluded these records in light of the moral arguments against their use. For related reasons, arrest records (both adult and juvenile) were excluded from the model.

The Denver model penalizes certain general categories of prior convictions more heavily than others according to the following tariff:

(1) a felony against a person, then four points were added to the score;

(2) a felony not against a person, then three points were added to the score;

(3) a misdemeanor against a person, then two points were added to the score;

(4) a misdemeanor not against a person, then one point was added to the score.

The final variable (in two parts) in the model reflected judicial concern for the offender's social stability. Current employment/school was selected over other items because of its statistical significance and its potential as the least biased of an assortment of such indicators. Four points were deducted from an offender's score if at the time of sentencing (or prior to detention if detained), the offender was employed or attending school on a fulltime basis. Three points were decuted for part-time work or school. (An additional two or three points could have been deducted if such activity was for a period of over two months or over one year.)

The model is designed to classify the offender on the basis of both an offense and offender score. The Y axis (or offense score) is the sum of the intraclass rank of the offense at conviction and a "harm/loss modifier". The X axis (or offender score) is the total of the sum of the offender's prior conviction, legal status, revocation, and incarceration scores minus the sum of the two parts the social stability status score.

The cells of the grid contained the guideline sentence. By plotting the Offense Score against the Offender Score one is directed to the cell in the grid which indicated the suggested length and/or type of sentence.

The Denver model used a grid system with one grid for each category of offense. Each grid placed a measure of offense seriousness of the vertical axis and an offender score on the horizontal axis. The model sentences (in terms of the "in/out" decision) were given to the Denver jueges only after formal imposition of sentences so as to minimize the possibility of interjecting some bias into their decisions. When the model sentence differed from the actual decision, the judges were asked to indicate why they thought the model decision did not correctly estimate their actual "in/out" decision.

The models developed in Denver and Vermont have not yet been fully implemented as guidelines in either jurisdiction. The preliminary response, however, appears to be enthusiastic.

District Court Judge Critelli, chairman of the judiciary is consultative body associated with the project concluded:

> I have ... had the opportunity to see a lot of doubting judges become "true believers" once they have been able to take the time to sit down with these guidelines and become familiar with them. One of those doubters - I don't think he would mind my saying so - was Newark Judge John Marzulli, another of my colleagues on the project, who now says that he sees the guideline project as "an exciting thing which has the potential for being the greatest contribution that I could make to the criminal justice system in my lifetime ... We judges have always wanted that extra piece of information that guidelines provide - knowledge of what our colleagues are doing and would do in the same circumstances.[29]

Obviously in these pilot projects the predicted sentence only operates as a "guideline" to the extent that a particular judge uses

it as an ex post facto check on the imposed sentence. As there is a statutory review period it may have actually influenced some sentences. However the study does not report whether any judges actually changed their sentence during the statutory review as a result of examining a model sentence.

At the time the researchers published their monograph (1978) the "guidelines" were not actually being utilized as guidelines. Obviously, however, they could have been implemented and may yet be implemented. Given that states such as Oregon, Pennsylvania and Minnesota have already mandated quidelines, it seems possible that several jurisdictions will follow the Denver/Vermont approach. A central question is, therefore, to what extent are the Denver/Vermont "guidelines predicted sentences or model (normative) sentences? The second paragraph of the Critelli quote -- "[w]e judges have always wanted ... knowledge of what our colleagues are doing and would do in the same circumstances" -- suggests that judges may wish to stress (and may totally believe) that such guidelines are almost totally based upon the empirical data (i.e., that they are predicted sentences).

The judges in both jurisdictions appear to have been reasonably content with the variables which were presented to them as being causally significant.[30] In neither jurisdiction was a variable identified as being causally significant, which would also clearly be regarded as normatively inappropriate.[31] Presumably the absence of such variables eased any doubts that the judges may have had in moving from the empirical regression equations to the sentencing models. The researchers also emphasize that they are primarily involved in

description: "...[i]t should here be emphasized that we did not employ our own prescriptive indicators as to what underlying factors have influenced the sentencing decision and what weights have been accorded of those factors".[32]

Yet the "translation" from variables (in the regression equation) to "factors" in guidelines involves implicitly normative choices. This is clearly revealed at numerous points in the study. A serious problem arises if one believes that the guidelines are very closely based on the original regression equations, they are not. The researchers downplay their model-building role and stress their descriptive role (this is, of course, understandable in terms of "selling" guidelines to the judiciary). However, given this tendency, policymakers may well underestimate the relative importance of norms of the researchers.

There is a further data selection problem. Researchers inevitably work under severe time and budget constraints. Ideally they would like to attempt to measure all the variables which they have a priori hypothesized as influencing sentencing outcome. This would involve enormous effort if the proposed sample is large. Only rarely do researchers collect such data. Much more frequently they have to work with preexisting data. Unfortunately this data was usually collected for a completely different purpose than the current interest of the researchers and is illsuited to the present purpose. A perusal of the study suggests that this was certainly the case in Denver and Vermont. 205 variables relating to the offender and the offence are described as being "collected". One suspects that the vast majority of these items were collected by, or for, the courts for other purposes.

The data collecting limitation can have important consequences. For example, the stepwise multiple regression in Denver explains approximately 53% of sentencing variation. The explained variation in Vermont is considerably smaller. In other words, the Denver equation does not explain 47% of sentencing variation. This low R^2 highlights the danger of attempting to move directly from such equations to model and guideline construction. The researchers are attempting to move to the normative dimension (what a sentence should be) directly after discovering that they cannot explain approximately half the variation in existing sentences. This is not to say, of course, that even if they could predict correctly in 100% of the cases, that the predictive model should be the basis for the normative model.

Such a problem presents a dilemma. Either guideline creation will be "driven" by obviously imperfect empirical models or, in the transition from equations to guidelines, criminal justice researcher will subtly insert variables which they believe are normatively appropriate and which they believe would have substantively and statistically significant if they had been measured.

The Denver/Vermont project is one example of a methodology for both articulating criteria and developing guidelines. The main problem with this approach is that researchers may be tempted to claim that a set of guidelines can be totally based on multivariate studies of existing behaviour. The guidelines developed in Denver and Vermont were developed with the concurrence of all judges in both jurisdictions and the active participation of some judges (via the Policy and Steering Committee). The judges have complete discretion

as to how they will utilize the guideline sentence. An additional concern is that, under some circumstances, an overt consideration of the normative elements involved in sentencing standards will be de-emphasized.

The Denver/Vermont experiment provides some tentative evidence on the advantages and disadvantages of utilizing multivariate studies in the development of sentencing guidelines. Some of the advantages appear to be: (1) the approach is relatively incremental in the sense that it purports to move from "average" current practice to future policy. However, Denver/Vermont suggests that this approach may appear to be more incremental than it actually is. This appearance of incrementalism is likely to make implementation easier. (2) The predicted/ideal sentence is based upon the previous sentencing behaviour of all judges in a given jurisdiction, therefore it (partially) represents the mean of previous behaviour. Guidelines based primarily on such data therefore represent "mean" uniformity. (3) The multivariate studies may reveal that judges are currently utilizing variables that they may overtly decide to eliminate in future. Thus, in Denver/Vermont arrest record was eliminated from the models even though they were causally significant. (4) The multistage nature of guideline development using multivariate studies allows input at various points of development. Judges and legislators could be incorporated into the decision-making in a relatively low-key research environment.

The disadvantages of this approach are, in some respects, the mirror images of the advantages. The disadvantages, or dangers are: (1) multivariate analysis naturally highlights current practices,

therefore debate will tend to be defined by that current practice. Debate will focus on whether to include or exclude all variables found to be causally significant. It will probably be much harder to introduce discussion of other potential differentiating criteria that the empirical data (for whatever reason) did not reveal as being significant. (2) This approach is highly dependent on both the competence and the honesty of the researchers that develop the regression equations and then translate them into models and guidelines. For example, they might not include a variable that would, if included, have been found to be significant. (3) Closely related to the last point is the fact that the researchers are dependent on the data they have available. They may not have the time, resources or knowledge to collect variables that would increase the variation explained. Most cross-sectional studies of the empirical determinants of sentencing outcomes retain considerable unexplained variation, thus, while the predictive equation may be relatively accurate in predicting "in" or "out" they may be much less successful in predicting length of sentence.

(2) Sentencing Criteria Derived from Judicial Statements and Behaviour: Appellate Cases in British Columbia

A recent study by Vining and Dean[33] has examined the sentence appeal decisions of the British Columbia Court of Appeal. The Department of Justice is conducting further study along the same lines in other provinces. There are two views of this kind of study. First, that it represents how appellate judges actually make sentence review decisions. The alternative hypothesis is that these decisions only represent statements that appellate judges believe are

appropriate and that their behaviour is different. This question is impossible to resolve. Probably these decisions are both a manifestation of how judges actually sentence and what sentencing principles and factors the learned justices think should be espoused. Thus, they may provide a unique synthesis of what is and what should be. Obviously, to the extent that the "statement hypothesis" is accepted, it is inappropriate to describe these decisions as "empirically-based" - normative analysis "disguised" up as empirical study would be better description.

Here we only briefly summarize the results of this study. Appeals on sentence in British Columbia between January, 1974 and June, 1978 were examined. The cases analysed included appeals both by the offender and by the Crown. The objective was not to select a statistical sample, but to construct, in a qualitative manner, a taxonomy of the factors B.C. appellate judges utilize in sentencing. 103 robbery cases, 76 breaking and entering cases and 40 fraud, false pretenses and forgery cases were included in the study. It was found that there were four "types of factors": These four categories are: (1) factors relating to the offence; (2) factors relating to the offender before the offence; (3) factors relating to the offender after the offence; and (4) factors relating to broad societal goals. Table III-1 provides a basic outline of the analysis. Each of the three offences is dealt with under the four factor categories. As the table shows, factors relating to the offence of robbery had to be quite finely differentiated to make sense of the data. Thus, robberty had to be broken down into (1) robberies of businesses, and (2) robberies of persons. Robbery sentences imposed on offenders convicted of robbing

Table III - 1: FACTORS MENTIONED BY THE B.C. COURT OF APPEAL AS EFFECTING SENTENCE OUTCOME

I. Factors Relating to the Offence
- (A) Robbery
  - (1) Robberies of a Business
    - (a) Banks and similar institutions
      - (i) Degree of sophistication
      - (ii) Vulnerability of victim
      - (iii) Probability of large number of victims
      - (iv) Fact that a hostage was taken
      - (v) Avoidance of actual violence vis-a-vis potential violence
      - (vi) Degree of violence
      - (vii) "Size of the take"
      - (viii) Passive participation
      - (ix) Successfulness of the robbery
    - (b) Small Shop Robberies
      - (i) Degree of violence
      - (ii) Degree of sophistication
      - (iii) Use and type of weapon
      - (iv) Amount of harm imposed on the victim
      - (v) Vulnerability of victim (in terms of time, place, physical conditions)
      - (vi) Number of perpetrators
      - (vii) Successfulness of the robbery
      - (viii) Passive participation
      - (ix) Purpose and need for application of violence
  - (2) Robberies of Persons
    - (i) Degree of violence
    - (ii) Use and type of weapon
    - (iii) Brutality and necessity of violence
    - (iv) Vulnerability of victim (in terms of time, place, phusical condition)
    - (v) Successfulness of robbery
  - (3) Fact-Neutral Factors Relating to the Offence
    - (i) Number of counts and multiplicity of offences
    - (ii) Alcohol or drugs
- (B) Breaking and Entering
  - (a) Degree of sophistication
  - (b) "Size of the take"
  - (c) Type of premises
  - (d) Possession of a weapon
  - (e) Any application of violence
  - (f) Sexual implications
  - (g) Vulnerability of the victim
  - (h) Knowledge of the premises (breach of a position of trust)
  - (i) Successfulness of the offence
  - (j) Passive participation
  - (k) Number of counts and multiplicity of offences

Table III - 1 (continued)

(C) White-collar Crimes
- (a) Degree of sophistication
- (b) "Size of the take"
- (c) Breach of a position of trust
- (d) Passive participation
- (e) Successfulness of the scheme
- (f) Multiplicity of offences and number of counts
- (g) Character of the victim

II Factors Relating to the Offender Before the Offence
- (a) Age
- (b) Sex
- (c) Record (violence, developing pattern, etc.)
- (d) Responses to previous leniency
- (e) Professional criminal
- (f) Association with criminal
- (g) Criminal status
- (h) History, and mental and physical condition of the offender
- (i) Impetus of the offence

III Factors Relating to the Offender After the Offence
- (a) Effort at rehabilitation
- (b) Possibility of employment or training upon release
- (c) Assumption of responsiblities
- (d) Support of family or others
- (e) Attitude and conduct in court and respect for the law
- (f) Remorse
- (g) Guilty plea
- (h) Ability to cope with prison life

IV Factors Relating to Broad Societal Goals
- (a) Protection of the public
- (b) Deterrence
- (c) Punishment
- (d) Rehabilitation

Soucre: Vining and Dean, 1980.

businesses was further divided into offences against banks and other large institutions, and robberies of "small shops." The elements of each factor - such as degree of violence and use of weaponry are listed in their order of importance.

Table III-1 reveals that it is possible to develop a taxonomy of sentencing factors. There are, however, five main problems with such an approach: (1) appellate judges typically do not discuss all the relevant factors in a case; they naturally tend to concentrate on those factors where they disagree with the trial judge - this necessarily "skews" the resulting analysis; (2) the researchers necessarily assume a normative role in their interpretation of the cases; (3) the precedential nature of these cases is hazy as no appeal lies to the Supreme Court of Canada; (4) because there is no effective information system even appellate judges themselves cannot learn from these decisions, i.e. there is a problem of "bounded rationality."

This section has dealt with effectiveness (and to some extent equity) at a relatively abstract level. The fourth part of this report analyses attempts to implement sentencing objectives.

FOOTNOTES PART III

1. This summary is largely drawn from A. Blumstein, J. Cohen and D. Nagin, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington D.C.: National Academy of Sciences, 1978).

2. Ibid., 66.

3. Ibid., 73

4. S. Van Dine, John Conrad, and Simon Dimitz, Restraining the Wicked (Lexington, Mass: D.C. Heath, 1979).

5. i.e. The "false positive" problem is discussed further in Part IV For reviews of this literature see: J. Monahan, "The Prediction of Violent Criminal Behaviour: A Methodological Critique and Prospects" in Blumstein, Cohen and Nagin supra note 1.; J. Monahan "The Prediction of Violence" in Violence and Criminal Justice, edited by D. Chappell and J. Monahan Lexington Books, 1975); J. Monahan and L. Cummings, "Social Policy Implications of the Inability to Predict Violence," 31 Journal of Social Issues 153 (1976).

6. The eight studies are: H. Kozol, R. Boucher and R. Garofalo "The Diagnosis and Treatment of Dangerousness" 19 Crime and Delinquency 18 (1972); E. Wenk, and Emrich, Assaultive youth: an an exploratory study of the assaultive experience and assaultive experience and assaultive potential of California Youth Authority wards." 9 Journal of Research in Crime and Delinquency 171 (1972) E. Wenk, J. Robinson, J., and G. Smith, "Can violence be predicted?" 18 Crime and Delinquency 393 1972 (3 studies); State of Maryland, Maryland's Defective Delinquency Statute -- A Progress Report Dept. of Public Safety (1973); H. Steadman and J. Cocozza Careers of the Criminally Insane (Lexington, Mass: Lexington Books, 1974); T. Thornberry, and J. Jacoby, The Uses of Discretion in a Maximum Security Mental Hospital: The Dixon Case. Paper presented at the annual meeting of the American Society of Criminology, Chicago, Illinois, 1974; J. Cocozza and H. Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence", 50 Rutgers Law Review 1084 (1976).

7. Monahan (1978) supra note 5 at 250

8. Blumstein et al. supra note 1 at 77-78.

9. D. Nagin, "General Deterrence: A Review of the Empirical Evidence" in Blumstein, Cohen and Nagin supra note 18 at 95-96.

10. D. Lipton, R. Martinson and J. Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (New York: Praeger, 1975); R. Martinson, "What Works? Questions and Answers about Prison Reform." Public Interest 22 (Spring 1974). See also Bailey, "Correctional Outcome: An

Evaluation of 100 Reports" 57 Journal of Criminal Law, Criminology and Police Science 153 (1966) and Fishman, An Evaluation of Eighteen Projects Providing Rehabilitation and Diversion Services 3 Crime and Justice (2nd. Ed., edited by L. Radzinowicz and M. Wolfgang. (1977).

11. R. Martinson, "New Findings, New Views: A Note of Caution Regarding Sentencing Reform (Symposium on Sentencing, Part II) 7, Hofstra Law Review 243 (1979), pp. 253-4.

12. B. Forst, W. Rhodes and C. Wellford, "Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines: (Symposium on Sentencing, Part II) 7, Hofstra Law Review 355 (1979), p. 363.

13. G. Tullock, "Does Punishment Deter Crime?" 36, Public Interest (Summer 1974).

14. Nagin supra note 9 at 98.

15. Ibid., 111-135.

16. K. Avio and S. Clarke, Property Crime in Canada: An Ecometric Study Ontario Economic Council (1974).

17. One would hypothesize that crimes run by highly-organized gangs would be less susceptible to deterrance.

18. Martinson (1979) supra note 10 at 257.

19. The other issue is whether it makes sense to regard parole supervision as a rehabilitary "treatment", it would seem more logically to be a deterrent.

20. R. Pugsley, "Retributivism: A Just Basis For Criminal Sentences" (Symposium on Sentencing, Part II) 7 Hofstra Law Review 379 (1979), p. 381.

21. See: Silving, "A Plea for a New Philosophy of Criminal Justice", 35 Rev. Jur. U.P.R. 401 (1966); Harris, "Disquisition on the Need for a New Model For Criminal Sanctioning Systems" 77 West Virginia Law Review 263 (1975); A. von Hirsch, Doing Justice (1976); most recently(and most extensively) R. Singer, Just Deserts (Cambridge, Mass.: Ballinger (1979).

22. von Hirsch op. cit.; these concepts are discussed at length in Chapter 2, Singer op. cit.

23. Quoted in Singer op. cit. at p. 28. This quote is from a draft, the exact words are not reproduced (although the concepts are unchanged) in A. von Hirsch and K. Hanrahan The Question of Parole (Cambridge, Mass.: Ballinger, 1979).

25. Where the independent variables are dummy variables, the coefficients can be interpreted as units of the dependent variables, and, therefore, their relative weighting can be assessed.

26. Wilkins, L.T., J. Kress, D. Gottfredson, J. Calpin, A. Gelman, Sentencing Guidelines: Structuring Judicial Discretion (Washington, D.C., National Institute of Law Enforcement and Criminal Justice, 1978), xiv. The 205 items (variables) initially examined included (1) offence characteristics (e.g. statutory charge, harm inflicted, weapon usage, type of victim); (2) offender characteristics (e.g. age, sex, race, prior record, employment, druguse, etc.); and (3) "process" factors (e.g. plea, pre-sentence report available, etc. (see Table7).

27. Ibid., XIV

28. The normative decision to alter the variables which were found to be empirically important is discussed below.

29. Preface by Judge A. Critelli in Wilkins et al. supra note 26

30. For example, in Denver the most causally important variables were found to be: (1) number of offences of which the offender had been convicted; (2) number of prior incarcerations; (3) seriousness of the offense at conviction; (4) weapon usage; (5) legal status of offender at time of offence; (6) employment history; (7) number of probation revocations.

31. At least, not in any of the regression equations published in the study.

32. Wilkins, et al. supra note 26 at XIV

33. A.Vining and C. Dean. "Towards Sentencing Uniformity: Integrating the Normative and the Empirical Orientation", Chapter 7 in New Directions in Sentencing, pp. 118-154, edited by B. Grosman, (Toronto Butterworths, 1980)

PART IV MAJOR ISSUES IN SENTENCING: RECENT REFORM -- EITHER PROPOSED OR IMPLEMENTED

The objective of this section of the paper is to examine recent reform proposals. In the Canadian context the focus is both upon problems and recently proposed reforms. In the United States the focus is upon recent proposals, recent experiments and, in some cases, recently implemented reforms. As many sentencing reforms, similar to recent Canadian reform proposals, have already been implemented (and evaluated) in the United States they potentially provide valuable lessons for Canada. Therefore, the division between Canadian proposals and American proposals is one of convenience and there is considerable "switching back-and-forth."

A. The Background to Reform in Canada

1. The Influence of the United Kingdom and the United States

The most prominent influences on sentencing in Canada have been the sentencing laws of the United Kingdom and the United States, although not necessarily in a straightforward or predictable manner. For example, reforms which were initially introduced in both countries for juveniles were eventually adopted for adults in Canada. All told many reforms including suspended sentences, probation, conditional and absolute discharges, the extension of compensation and restitution, have all subsequently been adopted in Canada.

The variety and vitality of these influences can be illustrated by the provincial implementation of the Prison and Reformatories Act. The primary intellectual antecedent of the Act was the British Borstal Act (for young offenders). British Columbia closely parallaled the British approach. Ontario, on the other hand, was also influenced by

by the indeterminate sentence approach then currently popular in the United States. Consequently Ontario effectively established indeterminate sentences for adults and granted wide release powers to the parole board.

While it is clear that Canada has been strongly influenced by Britain and the United States it is equally clear that the Canadian Constitution places this country in a unique position. There are several major problems with the wholesale adoption of foreign "reforms". There are two problems in adapting British reform. First, Britain has no codified Criminal Code. Second, the complex division of powers between the Federal government and provincial governments embodied in the B.N.A. has no parallel in the highly centralized, unitary British criminal justice system. Of course, such a centralized unitary system is most feasible in a small, densely-populated country where problems are literally under the noses of Parliamentarians.

A general observation on the British influence is that it has been both a powerful force in favor of the status quo and a powerful force for change. This is not as paradoxical as it may first appear; indeed, arguably, these two forces go together. The chief conservative force emanating from the British system is the centrality of the judge to the sentencing process. Indeed, some British commentators have argued that it would be unconstitutional for the legislature to interfere with the sentencing discretion of the judge. Such a perception, though unstated, appears to pervade the deliberations of the (British) Advisory Council on the Penal System.[1]

Parliament itself may share such a perception as the following remarkable statement by the House of Commons Expenditure Committee suggests:

> "The starting point of our discussion must be recognition of the constitutional position of the judiciary as independent of the executive arm of the government and the legislature.... It is the courts who decide into which of the various categories described the offender fits, in the light of his offence and his previous behaviour. The Sub-Committee firmly believe in the principle of judical independence and accept its consequences in terms of our recommendations.[2]

However, this unwillingness to directly deal with judical discretion appears to have generated the impetus for other changes -- for example, "innovative" penalties -- that increase the sentencing options of judges. A review of the reports of the recent Advisory Council on the Penal System suggests that there is little inclination to challenge the basic rationales of wide judicial discretion in the United Kingdom.

Within the last decade United States experiences appear to have become relatively more visible and influential in Canada. This partly reflects both some weakening of historical links with Britain and the proximity of the U.S. More importantly, however, this orientation is a natural consequence of intense U.S. activity -- both legislative and administrative -- in sentencing. Yet once again there are important differences between the Canadian and United States sentencing systems. The primary locus of criminal dispositions in the United States is at the state level. Sentencing is thus highly decentralized and "reform" is often the result of imitation and mutation.

In spite of the differences between Canada and these two countries it is clear that their sentencing policies have strongly influenced

Canadian Law. These influences have varied enormously: from general philosophies about the nature of sentencing to the almost word-for-word "lifting" of specific pieces of legislation.

However, two developments in the last twenty years have injected a Canadian counterpoint to these foreign influences. The first development has been the emergence of Canadian criminology and penology. With the publication of Stuart Jaffary's The Sentencing of Adults[3] Canadian criminologists and penologists began to raise an independent voice. The second major development was the creation of the Law Reform Commission of Canada (and its provincial counterparts). Although there has been criticism of the substantive recommendations of the Commission's various reports on sentencing there can be no doubt that these reports have reinforced an awareness of the specifically Canadian nature of these problems.

2. The Process of Incremental Change in Canadian Sentencing Laws

A perusal of the historical development of sentencing laws in Canada brings home the incremental, narrow and "borrowed" nature of changes in laws relating to sentencing.[4]

The Canadian Criminal Code was itself largely based on a draft code submitted to the United Kingdom Parliament by a nineteenth century Royal Commission. Ironically the code was never enacted in the United Kingdom. The Code was first enacted during a utilitarian, "Benthamite" period when human beings were regarded as rational, mechanistic beings, motivated by pleasure and pain. During that time there was considerably greater consensus on moral issues. For example, there was wide consensus on the appropriateness of incarceration for a wide range of offenses.

Since the Code's enactment in 1892 amendments have been introduced in almost every session. MacLeod comments:

> As a result, by 1947 the Code was a remarkable collection of prohibitions, punishments, and procedures. It was a jungle of verbiage, its language drawn from nineteenth-century British style, and in many respects it dwelt more upon detail than upon principle.[5]

In 1947 the federal government appointed a Criminal Code Revision Committee to review the Code, but unfortunately its mandate was narrow. Subsequent to these revisions one eminent commentator commented in 1967:

> The numerous amendments presents a shocking indictment of the process of criminal legislation. Maximum penalties have been fixed without the slightest regard for the objectives in mind; major alterations have been based upon the panic induced by isolated criminal activities; compromises between the Senate and the House have resulted in legislation supportable on no grounds; and absurd formulas adopted which disguise real aims. The only revision, that of 1953, should not be underestimated for the Commissioners did, indeed, remove anomalies, rationalize punishments and make procedural reforms. But their terms of reference were limited in the extreme and did not change the fundamental reflection of the Code. Thus, tampered with and tinkered with it remains the monument of the eminent Victorian, Sir James Stephen.[6]

This indictment remains equally true today. This orientation has also strongly influenced the terms of reference of the various Royal Commissions. The most important consequence of all this is that no commission has had a broad mandate to examine the purposes of sentencing or to consider these purposes in the context of the existing sentencing system. Prior to the establishment of the Law Reform Commission the only attempt to consider a wide range of substantive sentencing issues was the omnibus Criminal Law Amendment

Act of 1968-9 introduced by Pierre Trudeau. The bill, as several members predicted, demonstrated that many issues are unlikely to be adequately debated in a Parliamentary contest. Only "high visibility" issues such as homosexuality and abortion received much attention.

3. The Royal Commissions

These Royal Commissions are not extensively discussed here. Many of the substantive issues are considered subsequently in this section. Here only highlights are presented.

(a) The Archambault Commission

The Commission's report in 1938 recommended: (1) the reorganization of the penal system; (2) the establishment of an adult probation system (based on the British system); (3) the expanded use of parole; (4) habitual criminal legislation; (5) the abolition of imprisonment for non-payment of fines. No action was taken until 1947. By the time the habitual offender provisions were enacted academics were already criticizing the legislation on the grounds that it had already failed in Britain.

(b) The Fauteux Commission

The Fauteux Commission was originally appointed to investigate the granting of tickets-of-leave under the Remission, but took the unusual step of expanding its terms of reference. The Commission recommended: (1) the expansion of probation; (2) mandatory pre-sentence reports for offenders between 16 and 21 or facing sentences of two years and more; (3) the abolition of indeterminate sentences; (4) the establishment of a national parole board.

(c) The Ouiment Commission

This report began by noting:

> The greatest obstacles to the development of a unified system of criminal law and corrections have been the absence, to date, of any clearly articulated sentencing policy and inadequacy of the services and facilities available to a judge responsible for the key operation in the entire process".[7]

Yet the main contribution to the Commission was a call for an expanded range of dispositions other than incarceration. These included even greater use of probation, fines, suspended sentences and restitution, and introduced conditional and absolute discharge as well as intermittent confinement (i.e., serving sentences on weekends or evenings).

The Commission also attempted to being the process of formulating sentencing principles. The concluded:

> The Committee recommends that the Criminal Code be amended to provide Canadian courts with statutory direction on their approach to sentencing and that this legislation be framed to encompass the principles contained in section 7 of the Model Penal Code.[8]

The Model Penal Code's principles (which are discussed and critiqued extensively below) are:

(1) The court shall deal with a person who has been convicted of a crime without imposing a sentence of imprisionment unless, having to the nature and circumstance of the crime and history, character and condition of the defendant, it is of the opinion that his imprisionment is necessary for the protection of the public because:

   (a) there is undue work risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

   (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

   (c) a lesser sentene will depreciate the seriousness of the defendant's crime.

For the first time, then, a Royal Commission began to question the unfettered discretion of sentencing judges (this may well stem from the unusually broad terms of reference the Commission received). Their view has strongly influenced the Law Reform Commission (see below). Their concern on disparity was also reflected in the recommendation for the establishment of specialized appeal courts for sentences.

The Ouimet Committee represents a major advance in the discussion of sentencing in Canada. A comparison of the report does show a much greater concern for underlying normative issues that the earlier commissions with a narrow administrative perspective, lacked. Yet it is certainly arguable that the Committee never addressed the fundamental dilemma of "reform": the choic between structure and judicial discretion. The Committee both recommends that:

> The Committee recommends that the Government of Canada establish in the near future a Committee or Royal Commission to examine the substantive criminal law. The Committee or Roval Commission should also direct its attention to the classification of crimes that would distinguish between illegal acts on a more realistic basis.[9]

and also concludes that "[d]iscretion in the application of the criminal law should be allowed at each step in the process: arrest, prosecution, conviction, sentence and corrections."[10] This remains one of the major issues in Canadian sentencing law.

In summary, then, no federal legislation provides a guide to the rationales for punishment or the purposes of sentences. Symptomatic of this is the fact that there has been no comprehensive revision to the Criminal Code (Code) since it was enacted in 1892. Thus, a

comment by the Canadian Bar Association at the time of the Archambault Report appears to remain accurate:

> Since 1892, the Code has been amended year after year, here and there, something added to one section, something taken away from another, with many entirely new sections and even new statutes of a criminal nature were added. One is reminded of an ancient edifice to which additions have been made, planned by many architects and carried out with little regard to the appearance of the completed structure.[11]

B. Canadian Reform Proposals

An analysis of Canadian reform proposals can be divided into several parts: (1) those reforms dealing with the sentencing process itself: sentencing guidelines, sentencing councils, judicial conferences, written reasons for decisions; (2) those dealing with the "early release of offenders": parole and remission; (3) those dealing with "special" groups of offenders: dangerous offenders and sexual offenders: (4) those dealing with innovative penalties: pre-trial diversion, restitution, probation and fines. (5) Finally, a consideration of the impact of plea bargaining on the sentencing process.

1. The Sentencing Process

The concerns about the sentencing process itself have tended to concentrate on the potential for disparity generated by the wide sentencing ranges currently embodied in the Criminal Code. For example, breaking and entering a dwelling house is punishable by any term of imprisonment up to life imprisonment; theft over $200 is punishable by any of imprisonment up to ten years[12]

There are several conceptual reasons for believing that the Canadian sentencing system does not encourage uniformity. There is also empirical evidence of considerable disparity. John Hogarth, for example, has conducted an extensive study of the sentencing practices of magistrate's courts, which deal with over ninety-four percent of all indictable cases, and he concludes that:

> "Wide variation in sentencing practice appears to exist between courts in different provinces and between courts within particular provinces. In 1964, courts in Ontario varied in using probation, from one court using this form of disposition in nearly half the cases coming before it, to another never having used it ... On their face, these differences appear to be too large to be explained solely in terms of differences in the type of cases appearing before the courts in different areas."[13]

Robert Evans has reached similar conclusions. Table VI-1, reproduced from Evans, illustrates some of the inter-provincial differences in sentencing outcomes.

Table IV-1: Sentences in Canada, 1968[14]

	Percentage Convictions, Indictable Offences	Percentage of Convicted			If Tried Probability of Being Incarcerated
		Sentenced to Incarceration	Incarcerated 0-3 Months	Incarcerated in Federal Penitentiary	
Newfoundland	97.3	47.7	20.1	6.4	.464
Prince Edward Island	97.5	29.4	6.4	8.9	.286
Nova Scotia	89.9	33.5	10.6	9.5	.301
New Brunswick	96.9	40.9	19.3	6.0	.396
Quebec	84.3	43.7	24.3	7.7	.368
Ontario	86.6	38.4	11.6	5.7	.384
Manitoba	87.8	45.0	13.6	6.9	.345
Saskatchewan	92.9	42.0	14.7	5.7	.387
Alberta	89.9	45.9	12.9	6.0	.412
British Columbia	83.1	51.1	14.2	6.9	.424
Canada	86.8	42.6	14.8	6.6	.369

Evans concludes:

> Here we should re-emphasize the lack of equity as illustrated in Table IV-1. There it will be seen that there are extensive differences in the use of incarceration among various province. In Nova Scotia only about one-third of those convicted are sent to a jail or prison in the province, but a very high proportion of those incarcerated are sent to a federal prison. In Saskatchewan, 42 per cent end up behind bars, but the federal prison rate is only 60 per cent of that of Nova Scotia. The most interesting information in the table is probably in the last column, which shows the probability of being incarcerated if tried on an indictable offence. There it can be seen that Prince Edward Island's probability of .286 is almost 38 percent less than Newfoundland's .464.[15]

These findings are hardly surprising, given the wide discretion embodied in the present system and the lack of guidance as to how that discretion should be exercised by judges and prosecutors. Professor Hogarth, in the aforementioned study, extensively examined judicial attitudes and concluded:

> Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information, and in the sentences that they impose. In a variety of ways it was demonstrated that magistrates interpret the world selectively in ways consistent with their personal motivations and subjective ends. Regardless of what position one takes with regard to the social purposes that sentencing should serve, it is likely to be repugnant to the average man's sense of justice if such differences are allowed to persist.[16]

Given these concerns about the sentencing process it is not surprising that considerable effort has been devoted to considering reform alternatives in the last decade.

(a) Sentencing Guidelines

Various working papers of the Law Reform Commission of Canada have addressed the issue of judicial discretion. The Commission has made two primary recommendations. First, sentence ranges for given

offences should be reduced considerably. In practice, this means reducing the maximum imposable sentence for a considerable number of offences ("[i]n fact, these maximum terms appear to be disproportionately high")[17]. Second, "[c]larity and uniformity of approach in sentencing should be encouraged by clear and precise sentencing guidelines[18] and express criteria for decision-making."[19] The Commission working papers have stressed the importance of both "explicit" principles and "express" guidelines.

However the Commission's attempts to define these principles and guidelines operationally lack conviction. For example, it recommends that before imprisonment is imposed two necessary conditions be satisfied:

> (1) the offender has been convicted of a serious offence that endangered the life or personal security of others; and
> (2) the probability of the offender committing another crime endangering the life or personal security of others in the immediate future shows that imprisonment is the only sanction that can adequately promote the general feeling of personal security.[20]

One might agree with the first condition without being any closer to an explicit set of principles or guidelines. Without accompanying definitions of a "serious offence" or personal security of others", the "condition" appears to be virtually meaningless. Is, for example, breaking and entering a serious offence? Does "endangering life" always mean that the offence was serious? however, it is not obvious why one would agree with the first condition. For example, why is a short prison sentence necessarily inappropriate if the offender did not commit a serious offence but has an extensive

criminal record?

There is, however, a series of conceptual problems with the second condition, especially if one also examines the Commission's recommendations as to the factors that should be used to determine the "probability and degree of risk." The Commission recommends that the judge should consider:

> (1) the number and recency of previous offences that represented a threat to the life or personal security of others;
> (2) the offender's personality
> (3) the police report on the offender's prior involvement with the criminal law;
> (4) a pre-sentence report;
> (5) all material submissions including expert opinion and research from the behavioural sciences.[21]

This list is worth examining in detail because only the first factor makes obvious sense in determining sentence and because it is not clear that any of the factors could, in fact, be utilized to determine "the probability and degree of risk" with any accuracy.

Perhaps the major problem is that prediction is a difficult, inherently stochastic process. Stanley has summarized the problem:

> The trouble with prediction is simply that it will not work -- that is, it will not work for individuals, only for groups. A parole board may know that of a hundred offenders with a certain set of characteristics, eighty will probably succeed and twenty fail in parole. But the board members do not know whether the man who is before them belongs with the eighty or the twenty. Therefore they release some who succeed and some who fail and they keep in the damaging, often destructive, prison environment some who would have succeeded outside as well as some who would have failed. Those potential successes who are kept in prison are called, in research terminology, "false positives".[22]

It is not that some evidence is not available on the characteristics

of recidivists. As Stanley further points out: "[T]he studies demonstrate some things that would seem obvious to anyone: for instance, that people who drink heavily or who have many previous convictions are more likely to return to prison than are offenders who do not have such histories.[23] This, however, does not solve the problem of prediction errors.[24] The Law Reform Commission is not unaware of the problems with prediction. It points out:

> [P]redictions of future risk are likely to be inaccurate. For example, as a result of research it would appear that for every twenty persons predicted to be dangerous, only one, in fact, will commit some violent act. The problem is in knowing which one of the twenty poses the real risk . This should lead to caution in making a finding of risk, and has implications for conditions of sentence and release.

A judge with the best intentions in the world of implementing the conditions might well throw up his hands in despair at this statement. Judges, therefore, are asked to predict future dangerousness after being told that they are likely to be wrong in nineteen out of twenty cases! The warning to be "cautious" is unlikely to lend assurance to judges in the real world. Judges are also unlikely to receive much comfort from the proposed "expert opinion and research from the behavioural sciences"[26] in the defendant's personality.

The second major problem with prediction is that those variables that do appear to have some predictive validity often have no normative or jurisprudential value. Take, for example, the second factor -- the offender's personality. Should a surly or introverted

personality be a factor in rejecting parole? Similarly, the fourth factor -- the pre-sentence report -- may contain some information on items such as education, work habits and drug usage[27] that have some predictive validity (although, as a subsequent section argues, not much). However, many commentators would argue that utilizing these essentially socio-economic factors todetermine incarceration is discriminatory.

The difficulty with most of the Law Reform Commission's conditions is that they lack both statistical validity and normative appropriateness. Only the third factor -- the number and recency of prior offences -- can escape this double censure. Commentators such as von Hirsch have argued that prior record can be used justifiably to increase sentences independently of predictive considerations.[28] He argues that prior record affects the culpability of the offence while other predictive elements, such as education and employment, obviously do not. Again, the Commission is not unaware of this problem, recommending that "(i)n determining the probability and degree of risk the court should place considerable weight on the most reliable predictive factors (sic) now available -- past conduct."[29]

From a more narrow, legal perspective, the third factor -- the police report -- could be the most problematic. The report is likely, for example, to contain details of arrests that were not subsequently prosecuted. A possible rationale for its inclusion is that prior charges or accusations that were not proved should be relevant to the sentence. While there is considerable evidence that parole boards in many jurisdictions do, in fact, utilize such information in the paroling process,[30] the efficacy of codifying such a procedure is doubtful.

In its own proposals, the Commission has made occasional, albeit peripheral, reference to United States model codes and a comparison of the Commission's recommendations and these codes suggests that the latter's influence has been central. For example, in one working paper, the Commission suggested that a sentencing guide might list "factors such as those proposed in the New Draft Code (U.S.).[31] An examination of these codes demonstrates, not surprisingly, their great influence on the Commission's formulation of guidelines. For example, the proposed guidelines paraphrase closely Article 7 of the Model Penal Code.[32] The Commission is not, however, alone in its admiration of these codes.

The Canadian Criminology and Corrections Association came to similar conclusions in its 1973 brief to the Law Reform Commission, recommending that "all offences in the Criminal Code be grouped for sentencing purposes under a limited number of categories",[33] and that such guidelines be included explicitly in new legislation. The Association cites with approval the American Law Institute's Model Penal Code, the National Council on Crime and Delinquency's Model Sentencing Act, and the National Commission on Reform of the Federal Criminal Law's Study Draft on a New Federal Criminal Code.[34] The National Conference on the Disposition of Offenders in Canada, composed of eminent practitioners and commentators, came to similar conclusions, specifically endorsing the Model Penal Code.[35]

Of course, all of these codes have been criticized recently in the United States on the grounds described above. Certainly the concept that incarceration may have rehabilitative features has been largely discredited.[36] Several states have recently explicitly

denied the rehabilitative efficiency of imprisonment. For example, in California, the recent sentencing law (S.B. 42), in its preamble, specifically rejects such a view, stating: "[t]he legislation finds and declares that the purposes [sic] of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offence ...[37] As we shall see, reforms with predictive elements still are being considered, and in some cases implemented, but even here the predictive criteria, and their weighting, are usually articulated much more clearly than the model codes.

The three main criticisms, then, of these kinds of guidelines -- including the Canadian proposals -- are that: (1) the predictive criteria utilized are statistically problematic; (2) many of the predictive criteria would be normatively inappropriate even if statistically valid; (3) the suggested criteria are often so vague and elastic that, in practice, they would not assist judges in differentiating amongst offenders. These criticisms suggest that considerably more developmental work needs to be done. It is important to stress that the argument is not that the concept of a sentencing guideline is inherently flawed, but rather that much more consideration needs to be given to the issue. Indeed, the new generation of sentencing guidelines emerging in the United States represent a much greater effort at "structuring" guidelines -- sometimes partially based on empirical models of how judges already sentence.[38]

(b) Sentencing Councils

While the federal Law Reform Commission has recommended structuring the discretion of the trial judge via guidelines, others

have suggested that more than one person should make the sentencing decision. Further examination of such sentencing councils, or boards, has been endorsed by the National Conference on the Disposition of Offenders in Canada, the John Howard Society, the Canadian Criminology and Corrections Association and by Evans.[39] The Law Reform Commission has, itself, vaguely endorsed the concept: "[i]t is desirable that sentencing councils or meetings of sentencing judges be held prior to the imposition of sentences in such cases as the judges may determine.[40] The proposals typically mandate that the sentencing decision be made either by the sentencing judge with the assistance of lay assessors who are "experts" in the behavioural sciences, or by several judges acting jointly.

There is considerable evidence in the United States with sentencing councils consisting of several judges. In 1960, judges of the Eastern District of Michigan instituted the first sentencing council in the United States. Federal courts in the Eastern District of New York, the Northern District of Illinois and the District of Oregon subsequently adopted the practice.

The structure of these sentencing councils is similar, although there are minor differences. In Michigan, the sentencing judge and at least two fellow judges receive copies of the pre-sentence report. After all have studied the report, each formulates a tentative sentence and they then meet to discuss the details of the case. The presiding judge, however, retains full sentencing power and makes the final sentencing decision. The results of his decision are then communicated to other members of the council.[41]

Empirical evidence on the impact of sentencing councils is

provided by Levin, and Diamond and Zeisel. Chief Justice Levin of the Eastern District reached the following conclusions about the Michigan Council after 3000 cases and five years: (1) the judges impose sentence on the basis of relatively simple criteria, although initially they did not recognize this; and (2) the court appears to be developing a more unifrom sentencing philosophy and consequently more agreement on sentencing policy.[42] Levin's data, however, do not appear to confirm his conclusion that agreement on general principles is increasing over time. In the first year, there was a change in the original judge's tentative sentence in 29.8 per cent of all cases brought before the Council, while in the fifth year there were changes in 32.7 per cent of all cases.

Diamond and Zeisel examined the operation of sentencing councils in the Northern District of Illinois and the Eastern District of New York in 1973. In general, the authors are pessimistic about the contributions that the councils made to disparity reduction:

> In each court the council is able to reduce about 10 per cent of the sentence disparity in the cases that come befor it. In Chicago, since only one-third of the cases are brought before the council, the reduction in all cases is under 4 per cent.[43]

They also deal indirectly with the question of the development of sentencing principles by using their own measure of sentencing disparity. They compared the judges of the Eastern District with judges in the Southern District (who did not participate in a sentencing council) and found that "disparity in the Eastern District is not smaller, and is even somewhat larger, than in the Southern

District."[44] They conclude that "the near uniformity of disparity levels suggests that further research may not disclose that the disparity significantly declines over time in a court with a sentencing council."[45] They also found, consistent with Levin's observations, that sentencing judges in both courts change their sentences in only about one-third of the cases that they bring before their councils. Diamond and Zeisel did find that there was most likely to be a change where initial disagreement was greatest:

> For the 73 per cent of the cases in which the sentencing judge does not change his original recommendation, the average deviation in each court is 20 per cent. In the 27 per cent of the cases in which the judge does change, his original deviation averages 33 per cent in Chicago and 36 per cent in New York, from which the changes remove 9 percentage points (of 33 and 37 per cent, respectively), or about one-quarter of the deviation (27 and 25 per cent, respectively).[46]

This, again, is consistent with Levin's findings, both in that changes occur more frequently when initial disagreement is greatest and in that these changes are often relatively minor.

One of the serious weaknesses of sentencing councils is that they do not appear to develop sentencing principles. Although Levin suggests that they do in Michigan, there does not appear to be a great deal of empirical support for the claim. Diamond and Zeisel suggest that such a development is unlikely, and their conclusion is not surprising. It would be extremely difficult to develop coherent sentencing principles when each case is decided incrementally and when there is no method of institutionalizing what has been "learned" from previous decisions. Diamond and Zeisel make one concrete suggestion

in this respect:

> Courts could set up internal reporting systems of all sentences imposed by their judges of their circuit. Already used in many courts, computers could provide the judges with the distribution of sentences, together with their means and medians for any combination of crime and offender. Eventually, such data could form the foundation for meaningful sentencing guidelines ... One might consider developing such an information system either as a supplement to the council or as a substitute for it.[47]

One other interesting point about the Eastern District of Michigan is that it commits more offenders under the federal indeterminate sentence law than any other district court in the country. This may mean that the group has tended to resolve difficult cases by passing the problem along to the United States Parole Board.

While there has been little overt criticism of sentencing councils, there appear to be several problems with them: first, they are costly in terms of judicial resources -- three judges are involved in reviewing all cases; second, because the discussions are informal and unstructured, there is little development of sentencing principles; third, the high number of indeterminate commitments suggests that a small, closely-knit group of judges is likely to have a low tolerance for conflict; and fourth, although disparity is reduced somewhat, there is still a high level of disparity, especially in those cases where initial disagreement is greatest.

(c) Sentencing Conferences

Another proposal that appears to have achieved almost total support within the professional criminal justice community is that of the sentencing conference. The endorsement of the National Conference on the Disposition of Offenders is typical:

> While an "average" sentence for a particular offence was felt to be a useful guide in exercising sentencing discretion there was general opposition to a legislative enactment of such a "tariff". Rather the group tended to the view that the "average" could better be developed through judges meeting at sentencing conferences ...
>
> Sentencing conferences were felt to be necessary and to be encouraged through some financial assistance from the governments concerned. In Ontario the regional sentencing conferences were favourably commented on, it being noted also that judges in Alberta met regularly but discussed sentencing problems only to a limited extent.[48]

Once again, there is considerable American operational experience with sentencing conferences -- "sentencing institutes" -- which were first introduced in the federal courts in 1958.[49] The statutes authorize the attorney general and/or the chief judge of each circuit at any time through the administrative offices of the courts "to convene such institutes and joint councils for the purpose of studying, discussing and formulating the objectives, policies, standards and criteria for sentencing.[50] The statute provides that the agenda of the institutes may include, but shall not be limited to:

> (1) The development of standards for the content and utilization of pre-sentence reports;
> (2) The establishment of factors to be used in selecting cases for special study and observation in prescribed diagnostic clinics;
> (3) The determination of the importance of psychiatric, emotional, and physiological factors involved in crime, and their bearing upon sentences;
> (4) The discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal sex behaviour, addiction to drugs or alcohol, and mental or physical handicaps;
> (5) The formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.[51]

The pilot federal institute was convened in Colorado in 1959, and

meetings have been held on a regular basis since that time. Since 1960, the institutes usually have taken the form of "university seminars", with workshops, discussions of actual cases, and question and answer periods.[52] Initial hopes for the institutes were considerable, if not utopian. James Bennett, Director of the Federal Bureau of Prisons, stated: "The institute program by 1964 had virtually ended the flagrantly disparate sentence."[53] The Deputy Attorney General, a former district judge, believed that "the institute program also should eliminate the need the need for further consideration of legislation giving the appellate courts power to modify sentence."[54]

Frankel, on the other hand, has described succinctly limitations and weaknesses of sentencing institutes:

> "The institutes are of some utility. But their worth could easily be overstated. They serve to inform the judges of sentencing options and alternatives that might otherwise be overlooked (at least in the absence of a competent probation officer). They supply occasions for deliberate, connected exchanges of differing premises and attitudes. While that much is worthwhile, it is a small thing after all. The sharp limitations include the infrequency and brevity of these convocations. Without knowing exactly how typical it is, I imagine my own experience cannot be utterly atypical. In six years on the largest of our federal district courts I have spent two afternoons at sentencing institutes, one within my own Circuit, the other at a national seminar for "new" judges to which I was invited after two and one-half years on the bench and some hundreds of years of prison sentences imposed.
>
> The subjects treated in the institutes are somewhat random and disconnected. The results of the dis cussions are quaintly inconclusive. The goals of the statute providing for the institutes include the hope of achieving "a desirable degree of consensus" among the judges. If this has happened, it is not patent."[55]

He declares that "sentencing institutes have been, as was foretell-

able, fairly limited enterprises."[56] They seem to have been most useful in informing judges of tactical rather than strategic issues in sentencing, and this is confirmed by a selected reading of the recent proceedings of the state sentencing institutes, for example, in California. A perusal of preliminary results from recent sentencing conferences in Ontario and Quebec (1980) also suggests that that they are much more useful at identifying disparity than they are at solving the problem.

This is not to say that sentencing conferences might not be useful under other circumstances. There is no reason why such sentencing confrences should not play an important role in the development of sentencing principles; but it would require a very different organizational format from that currently typically utilized.

(d) Sentencing Reasons

The professional criminal justice community also seems to agree on the desirability of a statement of reasons for the penalty imposed by the sentencing judge. For example, the National Conference on the Disposition of Offenders in Canada thought it "essential that a judge passing a custodial sentence should give his for doing so as part and parcel of the judgment, this being sufficiently important to justify a mandatory requirement to that effect being included in the Criminal Code."[57] Appellate judges also have, from time to time, stressed the of value the trial judge's reasoning as to sentence.

In general, in the United States, there are no requirements that courts state reasons for their decisions. Indeed, the Supreme Court of the United States has held that the "only purpose of such a requirement would be to facilitate appellate supervision of, and thus to

limit, the trial court's sentencing discretion."[58] Several judges, however, have suggested that a disclosure would serve a useful purpose by "...rationalizing the sentencing process and ... decreasing disparities in sentences."[59] Ironically, in the United States since Wolff V. McDonnell,[60] this is one of the areas in which an inmate applying for parole is in a better position than the inmate who is before the court for sentencing. In Wolff, the Supreme Court held that the due process clause requires that the parole applicant be provided with "a 'written statement by the factfinders as to the evidence relied on and the reasons' for the disciplinary action."[61]

However, several critics have argued that sentencing reasons would not have a major impact on sentencing in the United States. As Weigel points out:

> "The ABA advisory committee and the last few bills in Congress would require the sentencing judge to state reasons for the imposition of each sentence that might later be subject to review. The object of these provisions, of course, is to encourage carefully considered and reasoned sentences by the trial judge and to inform the reviewing court of the factors that led to the particular sentence imposed. However, I doubt that these objectives would be very well served by such a requirement. Most judges do state their reasons for sentences, and these statements are readily available to the courts of appeals.[62]

While sentencing reasons may not be an effective "first-line" method of generating greater sentencing uniformity they may have an important "second-line" role. Recently several states have established sentencing commissions with the responsibility of establishing sentencing guidelines (see below). The legislation has mandated that these guidelines are discretionary, but that where a

judge deviates he or she must provide written reasons. In a context such as this -- where the "reasons" do not become a mere formula (the usual case) -- sentencing reasons might play a more central role in the delineation of sentencing standards.

It is also possible, that a requirement of sentencing reasons would have a considerably greater impact in Canada than that predicted in the United States, as appeal on sentence does lie in Canada. A statement of reasons might conceivably, therefore, assist the appellate courts in their review process. It is submitted, however, that unless the "appropriate" reasons for imposing a given sentence are delineated explicitly beforehand there are likely to be serious weaknesses in a "reasons" scheme. The nature of the weakness is likely to be related to the response of the particular judge. Some judges are likely to respond to this new requirement, as many do now, by discussing in relatively abstract terms the trade-offs between retribution, deterrence and rehabilitation. A reading of appellate cases on sentences suggests that appellate judges tend to place little emphasis on this level of analysis.[63] It is almost inevitable that appellate judges do so, as these are statements about conflicting values about which reasonable men may differ legitimately if there is no a priori prescribed standard, whether emanating from legislation or case law. Indeed, it is almost impossible to envision how practical guidelines could be written at this level of abstraction. If judges can meet the requirement for reasons with such statements, they are likely to achieve the quality of perfunctory incantations quickly.

On the other hand, many judges may be a good deal more specific: "I gave two years instead of four years because the offender is young

and has no prior record." Here one would ask why guidelines of this nature should not be mandated legislatively rather than asking the trial judge to play "blind man's bluff" with the appellate courts.

2. Early Release of Offenders

The second group of reforms that require consideration are reforms concerning early release of prisoners.

(a) Parole

Probably the most important factor, in practical terms, that alters the "fixed" nature of prison sentences is the National Parole Board. The parole process is particularly problematic because it does not affect all sentences. Thus only thirty-five per cent of all inmates released after serving between one and five years were released on parole, and forty-five per cent of those inmates serving between five and fifteen years were released on parole -- the majority of inmates, in fact, serve out their sentences.[64] However, several important questions are raised by the parole process: first, why are some inmates released on parole and not others; second, what release criteria are used by the Parole Board?; and third, are the criteria appropriate?

There appears to be considerable consensus that the parole process results in differential sentencing. For example, a working paper of the Law Reform Commission of Canada gloomily concluded that "parole is applied by different authorities, has different goals and purposes and may be applied under different terms and conditions."[65] On the other hand, there appears to be disagreement as to whether the parole process is inherently unsound, given its present orientation, objectives and structure. This question can be addressed in two ways: first, by determining whether the objectives of the Board are

conceptually appropriate and practically attainable; and second, by reviewing the empirical literature on the actual operation of the Parole Board.

The first major conceptual difficulty arises from the fact that the Parole Board does not even admit that it is, in fact, sentencing offenders. At various hearings, the National Parole Board has maintained steadfastly that "the Board is not concerned with the propriety of the conviction or the length of the sentence."[66] The Board maintains that its function is primarily to evaluate the "progress" of the offender since his incarceration. All of the evidence suggests that this is an unrealistic assessment, especially when one examines the factors that the Board reviews.[67] Unfortunately, this refusal to accept the true nature of its role, understandable though it may be from a political perspective, has important practical consequences. For example, the Board does not appear to regard uniformity as an important goal. This can be contrasted with the sentencing process itself, where uniformity is one of the criteria utilized in appellate review of sentences.[68] The Parole Board is unlikely to develop rational sentencing criteria to institutionalize uniformity if it consistently denies that it is sentencing offenders.

This particular problem is compounded by the enormous discretion granted to the Parole Board by the Parole Act of 1959: "[t]he National Parole Board has, with two exceptions, exclusive jurisdiction and absolute discretion to grant, refuse to grant, or revoke parole in the case of any person who is under a sentence of imprisonment pursuant to an Act of the Parliament of Canada."[69]

Additionally, the present parole system appears to be vulnerable in terms of its own criteria, namely that "the inmate has derived maximum benefit from prison, that reform and rehabilitation of the inmate will be aided by parole and that the release of the inmate does not constitute an undue risk to society."[70] The overt reason for much of the present discretion in sentencing is that the penalty should be tailored to take into account the likely future behaviour of the offender, i.e., the likelihood that he will recidivate or, put positively, the likelihood that he will be "reformed." There is a growing disillusionment with this approach based on both practical and normative grounds. A recent comprehensive study on parole release decision-making came to the following conclusion on "rehabilitation":

> Extensive social science research strongly suggests that rehabilitation -- defined as an increasing likelihood of successful adjustment upon release -- cannot be observed, detected or measured. When inmates with similar backgrounds and past records are compared, neither institutional program participation and achievement, nor disciplinary record, nor the level and type of pre-incarceration or post-release supervision any measurable impact on the probability of successful rehabilitation, the rate of recidivism, or the likelihood of later parole success. Holding other factors constant, time served in an institution appears to have, if anything, a slightly negative effect on the inmate's chances for success once he or she is released. Nor do "expert" decisions by parole officers or psychologists appear any more accurate in discerning likely success than decisions by lay people. There simply is no way to know when "rehabilitation" has occurred in an individual.[71]

Given the inability actually to implement rehabilitation criteria, many critics in the United States have argued that parole boards primarily utilized the potentiality for release as a means of social control within the prison.[72] For example, in Maryland,

Prettyman concluded: "[i]f the inmates thought that those who ran their lives were stupid, misguided and wrong -- but **fair** -- the therapeutic concept could perhaps get off the ground."[73] In a recent study of four American states by the Council of State Governments, the parole situation, as it then existed, was summarized as follows:

> The critical commentary in the States studied suggests that, by and large, parole board decision-making is marked by undefined procedures, unpredictability, and rulelessness. Essentially, parole board decisions are drawn from fragmentary information relating to an inmate's reincarceration history, institutional behaviour, and participation in and responsiveness to treatment, education and vocational programs, together with a brief interview averaging fifteen minutes in most States. (In California seven minutes per inmate is the cited norm.) Seldom do parole boards apply these criteria with uniformity.[74]

The situation is no different in Canada. Indeed, the Report of the Task Force on the Creation of an Integrated Canadian Corrections Service has endorsed the strong statement of a leading United States commentator, Norval Morris, who argues: 'Rehabilitation, whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction."[75] Yet such a purpose still is required legislatively.

The practical difficulties of predicting future propensity to criminality have provided plentiful additional ammunition to those, such as Andrew von Hirsch, who have argued that consideration of future behaviour should be normatively irrelevant in the sentencing process.[76] If one accepts either of these propositions -- that future criminal behaviour cannot be predicted or should not be predicted -- then the rationale for the paroling process is weakened considerably.[77]

Finally, it is worth pointing out that the Parole Board does not, on its face, limit itself to predicting either rehabilitative potential or future dangerousness. Rather, it appears to engage in a complete resentencing, albeit without any of the traditional procedural safeguards associated with sentencing. For example, some of the evidence used by the Parole Board, as described by a senior parole official includes:

> The R.C.M. Police Fingerprint Section record is forwarded to us automatically by that force in each case. This document gives a history of the individual's criminal record.[78]
>
> Certain police forces supply us automatically with reports outlining the circumstances of the offence and other details surrounding the commission of the offence.[79]
>
> In all other cases, we request reports from the investigating force. The Board places great stress on having an official version of the offence. The necessity for police reports becomes clear when it is realized that the inmate (like all humans) generally wishes to place himself in the best possible light and is therefore likely to repress certain the facts surrounding the commission of the offence.[80]
>
> Certain types of cases involve additional inquiries. For example, in cases involving drugs, we request a report from the Division of Narcotic Control, Department of National Health and Welfare and inquiries are made of the Department of Manpower and Immigration about the citizenship status of individuals who may be deportable.[81]

These particular quotations illustrate the resentencing nature of the parole process. For example, presumably the judge was aware of both the prior record of the offender and any mitigating or aggravating circumstances of the offence at the time of the trial. In considering these issues, the Parole Board inevitably must cover ground already considered by the judge. It is clear also that these factors are not relevant to the offender's progress in prison. It is possible that they are relevant in deciding whether release

"constitute[s] an undue risk to society,"[82] but, presumably, this factor is as determinable at the time of initial sentencing as at any other. Consequently, the question arises, why examine them again? The relevance of the citizenship status of an offender to parole is obscure, relevant though it might be to the sentencing process itself.

Two empirical studies of the National Parole Board are particularly pertinent. One argument in favour of parole might be its impact in reducing the traditionally long (relative to European jurisdictions) sentences of Canadian judges. However, Mandel has questioned seriously whether the parole process does, in fact, reduce sentence lengths. Two of his findings are that: (1) the average direct reduction in sentence lengths attributable to parole is probably only about ten per cent; and (2) there may be an indirect increase in sentences. "[S]entencers have merely lengthened the sentences they would otherwise have imposed in view of the fact that offenders may be paroled before the entire sentence is served."[83] Mandel also found that 63.3 per cent of the parole budget is used for selecting parolees, and only 36.7 per cent for supervising parolees after their release. In other words, almost two-thirds of the parole budget is spent on a function that is both normatively and empirically suspect. The two important conclusions that can be drawn from these findings are, first, that the overall direct reductions are relatively small given the percentage of the budget allocated to this function and, second, that these direct reductions may, in fact, be offset by indirect increases. While Mandel makes no estimate of these indirect increases, he points out that in Hogarth's sentencing study, 59.2 per cent of Ontario magistrates admitted taking into account the

possibility of countervailing activity by the Parole Board. Mandel concludes that as long as the correct language is employed, this is legally permissible:

> "In considering the effect of prolonged incarceration on the possibility of the offender being rehabilitated, the sentencer can consider the fact that the Parole Board is empowered to release the offender in the interests of his rehabilitation before his time is up. Any similarity between this and a delegation os sentencing duties to the Parole Board is purely a product of the reader's imagination and mine as well."[84]

Finally, and perhaps most importantly, a relatively comprehensive examination of the parole process has been carried out recently for the Law Reform Commission of Canada. Ironically, the authors explicitly claim that "[t]he study does not consider the effectiveness of parole decision-making",[85] while this reader's conclusion is that implicitly they present a severe indictment of the status quo. Their criticisms are directed at two areas: first, that relating to the preparation of documentation for each inmates file that eventually is reviewed by the Parole Board; and second, the parole hearing itself. Their criticisms of the documentation are that it was: (1) repetitious and disorganzed; (2) the information contained was often vague and lacked "clarity"; (3) there were numerous internal inconsistencies; (4) the quality and quantity varied enormously from case to case; (5) the documentation rarely contained information provided by the accused; (6) the documentation usually did not contain input from the inmate; (7) the role of documentation preparer was important in determining the parole outcomes, and yet the preparer had wide discretion as to what information to include; and (8) Parole Board

members rarely read the documentation completely. Their criticisms of the hearings themselves are equally broad: (1) there is, in fact, no legal requirement for the Board to see or hear the inmate at all; (2) inmates did not understand the nature of the process or the evaluation criteria; (3) there was no transcript of record and any written comments or reasons for the decision in the inmate's file were usually incomprehensible; (4) there were no explicit guidelines or criteria for making the release decision; (5) frequently the inmate had inadequate ("ten minutes") notice of the hearing; (6) frequently the person who had prepared the documentation was not present at the hearing; (7) the hearings themselves were brief; (8) the "decision" conference was extremely brief; (9) the Board appeared to be influenced by inappropriate factors such as publicity; (10) both the decision and the reasons for the decision given to the inmate were vague and frequently misunderstood; and (11) Parole Boards in different geographic locations appear to utilize different criteria. The authors also note some efforts by the Board to clarify its release criteria and these reforms will be discussed below.

In general, then, the present parole process is suspect. The crucial question, however, remains: can the parole process be reformed? This question is of particular interest because parole boards recently have enjoyed something of a critical revival in the United States. For example, Franklin Zimring has pointed out the possible advantage of parole boards in alleviating disparity in those jurisdictions in which judges have wide discretion:

> Reducing the power of the parole board increases the power of the legislature, prosecutor and judge. If the abolition of parole is not coupled with more concrete legislative directions on sentencing, the amount of discretion in a system will not decrease; instead, discretionary power will be concentrated in two institutions (judge and prosecutor) rather than three. The impact of this reallocation is hard to predict. Yet parole is usually a statewide function, while judges and prosecutors are local officials in most states. One function of parole may be to even out disparities in sentencing behaviour among different localities. Abolishing parole, by decentralizing discretion, may increase sentencing disparity, at least as to prison sentences, because the same crime is treated differently by different judges and prosecutors. Three discretions may be better than two!"[86]

Before discussing the relevance of the United States experience to Canada, it is necessary to point out important differences between the National Parole Board in Canada and the typical American parole board. Most American parole boards traditionally have operated in jurisdictions with indeterminate sentence structures. Thus, an offender receiving a prison sentence does not receive a specified sentence as he does in Canada. Rather, he is sentenced for some indefinite period, for example "two years to ten years." Consequently, for all practical purposes, the parole board was the "judge" to a much greater degree than in Canada. The exercise of this broad sentencing authority has come under severe criticism because of its use of the rehabilitative and predictive criteria, because of its use of the release decision as a means of social control,[87] and because of the adverse psychological impacts on prisoners that indeterminacy appears to generate.

Given these weaknesses there appears to be little support for the continuation of "old" parole.[88] Kannensohn reports that Florida, Indiana, Missouri, Nevada, North Carolina, Oregon, Tennessee, West

Virginia and Wisconsin have all enacted some form of parole restructuring during the last two years, while Montana, New Jersey and Washington are considering reform.[89] These restructurings have ranged from outright abolition (in Indiana) to the introduction of quidelines (in Oregon). These "new" parole approaches will be considered in the next section.

(b) Remission

Under amendments introduced in 1977 distinctions between earned and statutory remissions were abolished.[90] Additionally the discretion of correctional authorities to revokke remission were also limited. These reforms, substantial though they are, however, are unlikely to satisfy many critics of remission. There is a near unanimity on the intrinsically dysfunctional nature of remission. For example, a working paper of the Law Reform Commission of Canada has concluded:

> "Because it no longer meets its original objectives, and because penitentiary practices provide other means for motivating inmates, statutory and earned remission should be completely abolished and withdrawn from our penal system.[91]

Similar conclusions on the dysfunctionality of remission have been reached by the Canadian Criminology and Corrections Association[92] and Justice Hugessen's Task Force on the Release of Inmates.[93] Both recommended abolition in 1974 before a Senate Committee that was considering these matters. The Senate Committee itself came to similar conclusions.[94]

The third set of reform proposels concern "special" groups of

offenders -- dangerous offenders and sexual offenders.

3. "Special" Offenders: Dangerous Offenders and Sexual Offenders

One area where there has been widespread consensus on the inequity of the present system is the dangerous offenders legislation -- the only area where indeterminacy in sentencing is mandated formally in Canada. There is considerable evidence that these provisions are both unnecessary (even after recent "reforms") and disparately implemented. A working paper of the Law Reform Commission of Canada came to very strong conclusions on dangerous offender legislation:

> "(T)he consensus is that they are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice. ..." The requirement of consent of the Attorney General to the initiation of habitual criminal proceedings has clearly not served even rough uniformity in practice.[95]

The empirical evidence on the use of preventive detention has been summarized by Evans as follows:

> "Another imprisoned group whose rights to equity have been ignored are men sentenced to preventive detention. In an analysis of those 80 persons sentenced to prefentive detention in federal prisons during February 1968, the Canadian Committee on Corrections concluded that 40 per cent did not pose threats to the personal safety of the Canadian public; perhaps one-third were threats; and, for the rest, it was impossible to say. In addition, it was quite clear that many were there primarily because they were nuisances. A geographical lack of equity was also shown by the fact that almost 50 per cent of all those sentenced to preventive detention were sentenced in Vancouver.[96]

Even if such penalties could be handled more uniformly, it is not clear that they are justifiable morally. The main rationale for such

sentences appears to be that existing sentence ranges are so broad that many serious offenders could, and do, receive obviously inadequate sentences. Most criminal lawyers have seen, during their careers, at least one offender escape with a grossly lenient sentence. Thus, dangerous offender legislation can be seen as an admission of the inadequacies of existing sentence ranges and the lack of differentiation therein.

While the Commission's recommendations with respect to dangerous offenders -- abolition of the provisions -- are straightforward, they seem inadequate. The Commission believes that these offenders can be handled adequately by the normal sentencing procedures, but as we have seen in the section on sentencing guidelines,[97] the proposed differentiation criteria are exceedingly vague.

Whatever the merits of the Commission's proposals, the legislature has reacted differently. In response to the criticisms of the Law Reform Commission, and others, Parliament recently amended habitual criminal legislation. These amendments are to be found in the Criminal Law Amendment Act.[98] Cynics might claim that the primary contribution of the new legislation is a labelling change -- from "habitual criminal" and "dangerous sexual offender" to simply "dangerous offender".

In brief, the Act attempted to deal with reported abuses in three ways: (1) by limiting the penalty to offences that are considered to be a "serious personal injury offence"[99] and where "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons..."[100]; (2) by requiring that the Attorney General of the province in which the offender was tried has

consented to an application to impose this sentence;[101] and (3) by requiring that the National Parole Board review the case after three years for the purpose of determining whether parole should be granted.[102]

These restrictions obviously represent an attempt to reduce discretion and to curb some of the abuses described earlier.[103] It is not clear that they will actually do so. Previously, the legislation was, at least partially, based on an extensive prior record, namely "he has previously ... on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life," or, "he has been previously sentenced to preventive detention."[104] Admittedly, under the current law, the penalty is restricted to serious personal injury offences in which there was "the use, or attempted use, of violence"[105] or conduct endangering or likely to endanger the life and safety of another person,"[106] but the evidence to be utilized in such an assessment is considerably more vague and subjective than an extensive prior record. To cite only a few examples, section 688(a) now refers to "a pattern of persistent aggressive behaviour by the offender," and "any behaviour...that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restrain."[107]

The review requirements by the Attorney General is likely to produce an even greater disparity, both between provinces and, over time, in any particular province. The Attorney General's consent is likely to be determined by both political pressure and moral

principle; refusal to consent to the application becomes a form of clemency with its attendant problems of disparity.

The requirement for periodic sentence review obviously has a humanitarian motivation, but will have dysfunctional consequences. Again it effectively transfers the sentencing authority to the Parole Board.

4. Innovative Penalties

The fourth category of sentencing reform that requires analysis is "innovative" penalties or the innovative use of existing penalties. Within this category we can include pre-trial diversion, restitution, and the increased use of probation and fines.

(a) Pretrial Diversion

The Law Reform Commission of Canada has argued for the increased use of diversion in the criminal justice system:

> "[T]here is a need to examine diversion at this time if only to discover again that there is much value in providing mechanisms whereby offenders and victims are given the opportunity to find their own solutions rather than having the state needlessly impose a judgement in every case.[108]

The Commission, however, appears to have ignored the potential normative inconsistencies of attempting to reduce discretion at the sentencing stage while increasing discretion at the arresting and prosecutorial stages. Revisionists increasingly have become concerned about the power thus placed in the hands of police and prosecutors. Ericson, for one, has cogently criticized the Law Reform Commission's recommendations on diversion. He concludes, after reviewing the evaluative literature on diversion, that "the liberals who advocate diversion are themselves engaged in myth-making. While giving the

appearance of change toward deinstitutionalization, they are in fact changing us in the direction of retributive punishment without legal safeguards."[109] One recent U.S. article pointed out: [r]evocation of diversion status is a highly discretionary decision in some jurisdictions and may involve factors unrelated to the actual treatment for which the program is administered."[110]

Empirical research in the United States is now beginning to document some of the biases introduced by diversion, in terms of the income, occupation and education of those who are diverted.[111] Most recent research, in both the United States and Canada, suggests that diversion is ineffective as a means of reducing recidivism and controlling delinquency.[112]

(b) Probation and Restitution

The Law Reform Commission of Canada, in another report[113] comments favourably on both probation and restitution, claiming that it expects future innovations. However, after an extensive review, Boyd concludes that "[t]he official justifications of probation are without support. Probation does not primarily exist as an alternative to incarceration; it has no demonstrated corrective efficacy."[114] Klein is equally skeptical concerning restitution.[115]

5. Plea Bargaining

Finally, we turn to "process" issues of sentencing reform. By far the most important is plea bargaining.

In Canada there appears to be considerable disagreement on both the prevalence and appropriateness of plea bargaining.[116] Thus while the Canadian Bar Association appears to recognize the propriety of the practice,[117] both the Canadian[118] and Ontario Law Reform Commission's[119] have contended that plea bargaining is highly improper

and that it should be abolished. In 1974, the Canadian Bar Review published an article by Gerald Ferguson and Darryl Roberts,[120] whose analysis of the issues raised by plea bargaining effectively influenced the Law Reform Commission of Canada to adopt an "abolitionist" stance.

Verdun-Jones and Cousineau conclude:

> "Although the article was clearly one of the most thorough and comprehensive reviews of the relevant issues, the authors were unable to relate their analysis to any significant body of empirical research dealing with plea bargaining as it is practiced in Canada. Furthermore, they did not conceive "of their task as including a systematic review of the extensive research literature published in the United States. Since the Ferguson and Roberts article appeared, the findings of at least four significant studies of plea bargaining in Canada have been published. ... by the practice of plea bargaining. It is submitted that the quality of the debate on plea bargaining would be enhanced immeasurably were more attention paid to the fruits empirical of research."[121]

They also argue that there has been considerable semantic confusion as to what is meant by plea bargaining. Within the last five years, three major bodies -- the Law Reform Commissions of Canada and Ontario, and the Canadian Bar Association -- have expressed strong views as to the propriety of plea bargaining. A major problem raised by analysis of these views is the inherent ambiguity that surrounds the very concept of "plea bargaining." While the Law Reform Commission of Canada calls for the abolition of "plea bargaining", the Canadian Bar Association's Code of Professional Conduct clearly legitimizes the practice by approving of "tentative agreements." To add to the semantic confusion, the Ontario Law Reform Commission calls for the abolition of plea bargaining, but nevertheless presents a

series of ten guidelines for "plea negotiation" or "plea discussions". Only the Law Reform Commission of Canada furnishes a definition of plea bargaining -- "any agreement by the accused to plead guilty in return for the promise of some benefit. However, none of these bodies attempts to draw any clear boundaries between plea bargains and plea negotiations, discussions, or agreements. The one thread that appears to unite them is a revulsion against the notion that a prosecutor may grant some concession to the defendant on sole ground that it is "expedient" to do so."[122]

Verdun-Jones and Cousineau point out that in this decade, courts in both Quebec and Alberta have dealt with the plea bargaining issue. In Quebec, there have been two cases in which the practice has been condemned unequivocally. In Perkins V. The Queen,[123] the Court of Appeal held that it could not accept the practice, whether the initiative for plea bargaining came from the Crown or the defence.[113] In Perkins, Rinfret J.A. contends, at least where offences carry a mandatory minimum sentence, that the Crown should not charge a lesser offence solely to avoid the imposition of the penalty prescribed by the statute. However, it is not clear whether the Court wished to establish a general principle restricting the power of the Crown to reduce charges in cases where it has the means to prove the greater offence at trial. Of course, the uniform application of such a principle would constitute a effective device for decreasing the incidence of plea bargaining. The English courts have long exercised a similar power as a means of controlling prosecutorial discretion. In effect, they have insisted that the actual charges laid in a

criminal case should reflect accurately the particular factual background of the case.

In R. V. Wood,[125] the Supreme Court of Alberta appears to have adopted a similar position with respect to the propriety of plea bargaining. In this case, the court quotes, with approval, the view of the Law Reform Commission of Canada that plea bargaining is incompatible with a "decent system of criminal justice."[126] In none of these cases did the court attempt to define what it meant by plea bargaining, nor did it attempt to specify what it regarded as a "proper" pre-trial relationship between prosecutor and defence counsel. To date, these three cases represent the only explicit judicial pronouncements as to the propriety of prosecutorial plea bargaining in Canada.

Of course the practical importance of plea bargaining in terms of sentencing is highly dependent upon it's incidence. Here again Verdun-Jones and Cousineau have reviewed the recent Canadian evidence on the extent of guilty pleas. Friedland reported that in the 1,476 cases he observed before the Magistrates' Courts of the City of Toronto in 1964, 69 per cent of the defendents pleased guilty.[127] The Canadian Committee on Corrections stated in 1969 that while statistics as to the rates of guilty pleas are lacking, "it is believed by law enforcement officers that at least from 40 to 50 per cent of all convictions for indictable offences are the result of pleas of guilty."[128] The Canadian Civil Liberties Trust conducted a study of Magistrates' Courts in the cities of Halifax, Montreal, Toronto, Vancouver, and Winnipeg during the month of January, 1970, and concluded that the overall rate of guilty pleas was 68 per cent, with

a high of 80 in Winnipeg and a low of 59 in Toronto.[129] Hogarth studied a sample of Magistrates from 37 jurisdictions in Ontario during 1966.[130] On the basis of a sample of some 2,396 cases, Hogarth concluded that nearly four out of five of those persons who were convicted had entered a plea of guilty; however, the author does not indicate the per centage of persons charged who pleaded guilty. Hana's study of the Magistrates' Courts in Toronto during the years 1970 and 1971 unearthed a significantly lower rate of guilty pleas; on the basis of a sample of 1,655 cases, he concluded that 43.5 per cent of accused persons pleaded guilty.[131] Similarly, Mackaay found in Montreal that of some 555 cases dealt with by the "Court House" and 200 cases processed by the "Municipal Court," 63.5 per cent of defendants pleaded guilty at the Court House while 31.4 per cent was the corresponding figure at the Municipal Court.[132] Finally, a recent study of the B.C. Provincial Courts provides a detailed profile of the fate of accused persons in the court process.[133] In an analysis of 50,000 cases which passed through the Provincial Courts during the first six months of 1976, it was revealed that 49 per cent of defendants entered guilty pleas while the Crown withdrew or stayed the charges in 22 per cent of cases.

Unfortunately the incidence of guilty pleas alone does not determine the extent of plea bargaining. Several studies have attempted to assess the extent of plea bargaining in Canada. Grosman brought the attention of the Canadian criminal justice community to this issue.[134] Additionally Wynne and Hartnagel,[135] Hagan[136] and

Klein[137] have all addressed the issue. Wynne and Hartnagel found that plea bargaining took place in 27% of the indictable cases they examined. Hagan found that plea bargaining was significant if the defendant faced multiple charges. Klein found that 53% of offenders claimed that they had been enmeshed in "deals" of various kinds. The "deals" occurred primarily in the relationships between the offenders and the police, while only a minority of such "deals" were the outcome of the involvement of Crown counsel. The bargains allegedly struck involved such significant benefits to the offender as the dropping of charges against his accomplice, particularly where his partner happened to be his girlfriend or wife, the dropping of charges against the offender himself, the facilitation of bail, and arrangements for the securing of a lenient sentence. In exchange for these benefits, the police allegedly gained by the recovery of such items as illegal explosives, firearms, stolen property, and drugs. Furthermore, the police benefited in a more general sense because they improved their clearance rates and, preserved the flow of information.

Finally Verdun-Jones and Cousineau conclude:

> Ironically, the Law Reform Commission's approach to the question of plea bargaining indicates not only a failure to consider the practice within the context of the total justice system, but also an apparent inability to relate its views on plea bargaining to its published stance on other issues in criminal justice. For example, the Commission blithely ignores the potential for prosecutorial bargaining that is clearly inherent in the process of pre-trial settlement or diversion -- a practice that it has enthusiastically espoused.[138]

Thus the Law Reform Commission's reforms in this area have been severely criticized. The crucial point is that the existence of plea

bargaining needs to be considered in any reform proposal. The Law Reform Comission's failure to recognize the interrelationship between diversion and bargaining is just one example of the dangers of ignoring its role. As we shall see in the next section there may be numerous unintended consequences associated with reforms if the probable consequences of plea bargaining are not dealt with.

C. United States Sentencing Reform

It is clear that sentencing reform is one of the most topical areas of criminal justice reform in the United States. Many state legislatures have abolished, or are considering abolishing, their indeterminate sentence laws.[139] There is emerging a consensus on the undesirability of the indeterminate systems, however, there are differing percentions as to the causes of their failure. Consequently, there is much less agreement on appropriate replacements. Some legislatures are emphasizing the substitution of punishment for rehabilitation; others, certainty for uncertainty; still others, fairness and uniformity for disparity and discretion; and still others, "long" sentences for "short". Ambitious legislators in some states appear to be attempting to change on all of these dimensions. It is not the intention here to address all of these issues, but rather to analyse these changes in terms of their impact on sentencing (including parole).

Briefly, the following is attempted in this section: first, a broad classification of the American proposals in terms of their objectives, structure and normative framework. It should be cautioned that the taxonomy is illustrative rather than exhaustive; new

legislation is pending in several states, and each bill has particular idiosyncracies. Second, a preliminary analysis is made of the success of these reforms in achieving their objectives.

This, again, is obviously a tentative enterprise, given the recency of the reforms and the fact that empirical evaluation is, at present, premature. Many of the legislative reforms, both proposed and enacted, share a superficial similarity: they transfer sentencing authority from parole boards to judges. If we posit that the great dichotomy in sentencing schemata is between determinate and indeterminate structures, most of the reforms opt unequivocally for determinacy; that is, at the time of incarceration the prisoner knows the length of the sentence. However, in several states it is the so-called "parole board" which now, in fact, decides on the determinate sentence.

It is clear that the similarity of determinate schemes is, in many cases, more apparent than real. The critical factor is whether the sentencing authority that is returned to the judge is "structured" or not. Conceptually, then, there is a continuum of proposals ranging between those legislative models that transfer to the judge a great deal of unfettered discretion to those that provide detailed, mandatory sentencing instructions. This continuum needs to be analysed in terms of both the legislative intent and the probable legislative impact. This highlights the fact that the legislative intent may be to introduce structured discretion, but, as so often happens, legislative mechanisms alone are not sufficiently powerful actually to bring about such structuring. It is not simple that the implementers are recalcitrant; it may be that they have been asked to do something that

they cannot do -- because nobody knows how to do it.[140] The reforms will be categorized and described in terms of their intent, but analysed in terms of their probable impact, that is, the probability that they will actually reduce disparity.

One group of states has returned sentencing authority to the judge, attaching almost no conditions to the exercise of discretion, while a second group has made a serious attempt to deal with the twin problems of explicit sentencing principles and disparity. In neither group have the consequences of these reforms yet been extensively analysed empirically. Consequently, an analysis of these reforms must consist largely of extrapolation. While some of the consequences seem reasonably foreseeable, others are more problematic -- for example, how a given sentencing commission will interpret a mandate to develop sentencing guidelines. Those states that are at the unstructured end of the continuum -- for the sake of convenience, they are labelled as "high discretion" -- are examined first. Those proposals that are at the other end of the continuum -- the "low discretion" proposals -- are examined next.

While the high discretion states are relatively clear and uniform, the low discretion states can be broken down into at least four sub-categories: (1) those that have introduced extremely loose guidelines that are not likely to "bite"; (2) those states which have developed "presumptive" sentence structures; (3) those states which have mandated detailed sentencing guidelines; and (4) those states which have developed mandatory sentences for specific kinds of offenders (this will usually overlap with other categories).

A second dimension we need to consider is the body which is

responsible for defining sentencing standards. The potential sources of sentencing rules (apart from judges themselves) are: (1) a legislature; (2) a "Parole" Board (we use quotation marks because the board's role may be only loosely linked to historical ideas of parole; and (3) a sentencing commission or council (which may utilize decisionmaker-derived guidelines). Table IV - 2 presents the alternatives that these two dimensions generate.

Table IV - 2

Taxonomy of Sentencing Models

AMOUNT OF SENTENCING DISCRETION

Source(s) of Principles or Guidelines		"High" Discretion	Low Formal Discretion: "Loose" Guidelines	Presumptive Structure	Detailed Guidelines	Mandatory Sentences
	Legislature	1	4	7	10	13
	Parole Board	2	5	8	11	14
	Sentencing Commission	3	6	9	12	15

The first group of states are those that have introduced determinate sentencing statutes with wide sentencing ranges and no specified criteria.

1. High Discretion States

Indiana, Colorado, Illinois, Tennessee, Missouri, and Maine[141] have all recently passed high discretion sentencing statutes. Previous to May 1, 1976, the Maine criminal code called for the judge to set minimum and maximum terms; the minimum could not be more than one-half the maximum. An inmate was eligible for parole after serving the minimum term less good time. It appears that under the old de jure indeterminate sentence system, the Maine board of parole operated a de facto determinate sentence system by releasing ninety per cent of all prison inmates upon completion of their minimum term.[142] It also appears that, in Maine, primary concern centred around perceived existing short sentences rather than offender uncertainty, sentencing disparity, or lack of sentencing principles.

Under the new Code, there are five broad classes of crime encompassing all crimes except murder, which is treated separately. Only the maximum sentence for each class of crime is specified. The judge may impose any sentence length up to the maximum for that class. An examination of Table IV - 3 shows that sentence ranges are large, especially as the judge retains discretion to impose a fine or probation in lieu of a prison sentence (except in the case of of murder).[143] One assessment of the new Maine law concluded: "Even though it abolished indeterminate sentences, the Maine legislature did not choose to address the issue of disparity in sentencing, and judges

are left with total discretion to impose any sentence up to the maximum."[144]

Table IV - 3: New Maine Penalty Structure[145]

Class of Crime (and examples)	Maximum Penalty
Murder	Life
Class A (armed robbery, rape, armed burglary)	20 years
Class B (aggravated assault, arson, theft over $5,000)	10 years
Class C (breaking and entering a business, perjury, unarmed escape, bad checks)	5 years
Class D (incest, forgery, possession of heroin or LSD)	1 year
Class E (possession of burglary tools, prostitution, gambling)	6 months

Superficially, in terms of its language and terminology, the Indiana law appears to be further along the continuum towards low discretion. The language of the statute is that of "presumptive sentences" and "aggravating and mitigating circumstances," phrases typically associated with an approach that structures discretion. Upon close inspection, however, there is less structure to this law than appears at first glance.

The new law is based loosely upon the work of a special state

commission that recommended a purely maximalist strategy with forty, thirty, twenty, and ten years being the maximum sentences for the various classes of crime. Under these recommendations, the judge would have had complete discretion up to the maximums. The legislature, however, opted for "presumptive" sentence language. Crimes other than murder are divided into four categories of seriousness. Table IV - 4 summarizes the presumptive sentence for each class as well as the potential range. If a judge deviates from the presumptive sentence, he must state his reasons on the record. Thus, under the Indiana statute, an offender convicted of forgery with no mitigating or aggravating circumstances must be sentenced to five years in prison (see the presumptive sentence for a class C offence in Table IV - 4).

Table IV - 4: New Indiana Penalty Structure[146]

Class of Crime	Presumptive Sentence	Range in Aggravation	Range in Mitigation
Murder (non-capital)	40 years	+20	-10
Class A (child molesting, kidnapping, major narcotics)	30 years	+20	-10
Class B (rape, forcible robbery with injury, narcotics dealing under 10 grams)	10 years	+10	- 4
Class C (armed robbery, forgery, promoting prostitution, drug possession)	5 years	+ 3	- 3
Class D (simple burglary, credit card deception, non-support)	2 years	+ 2	none

Sentences can be varied from the presumptive sentence if there are either mitigating or aggravating circumstances. The degree of alteration in sentence length that can result from such circumstances is very large. This range could well be described as a virtue if the

factors that the judge should consider in determining the presence of mitigation or aggravation were defined and described. However, the decision as to whether a circumstance should be considered as aggravating, mitigating, or irrelevant is entirely within the discretion of the judge. Effectively, then, the only serious limit placed upon the judge is the upper bound of aggravation. This essentially transmits presumptive sentences into maximalistic sentences. Not surprisingly one conclusion is that "the law in Indiana is the harshest" and "ample opportunities for disparities sentencing and time served remain."[147]

The conclusion must be that neither Maine nor Indiana has placed much emphasis on the elimination of disparity. The only potential for improvement in both states lies with the respective appellate courts. In Maine, the appellate courts might redefine "excessive," while, in Indiana, the appellate courts might develop principles relating to mitigation and aggravation. In general, however, these states have moved in the direction of existing Canadian sentencing system.

The second high discretion category -- high discretion/parole board (cell 2 of table IV-2) essentially is the equivalent of "old" parole, i.e. parole under an indeterminate sentence system without guidelines. The third cell -- sentencing commission/high discretion -- is obviously an empty set; it is unlikely that any reform would specify that a commission should come up with broad sentencing ranges.

(2) Formal Low(er) Discretion

As Table IV - 2 demonstrates there are a wide range of potential schemes that claim to partially, or substantially, reduce the amount of sentencing discretion. We have included cells 4, 5, and 6 to

represent those instances where the language of the legislation may be guideline-orineted, but where the evidence suggests that the guidelines are so broad or vague that the judge effectively retains almost complete sentencing discretion. As we have seen in the Canadian context the Reform Commission of Canada's guidelines would fall in cell 4. Below we will argue that the dominant proposal at the federal level would fall into cell 6. The National Parole Board probably falls in cell 5 -- i.e., guidelines that are so vague and broad that they form no effective constraint.

When we look at presumptive sentence structures (cells 7,8,9) we find a great deal of recent activity at the state level. Within the last few years Alaska, Arizona, California, New Jersey, New Mexico and North Carolina have all passed legislation of this kind.[137] Typically, rather than assigning the development of the guidelines to any single initiating body there is "hybrid" responsibility -- for example in California the legislature has laid out in some detail the factors to be considered, but it has also delegated guideline-development responsibilities to the Judicial Council (acting as a form of sentencing commission) and the Sentence Review Board (the old parole board). Additionally the method in which the Judicial Council has interpreted its mandate may mean that part of the California system should be classified in cell 6, rather than cell 9.

Similarly, several of the states falling in the detailed guidelines column have elected for a system whereby both the legislature and some other body (whether it be a commission or

"reformed" parole board) develops the detailed guidelines. Two states which have recently adopted the legislature-sentencing commission/detailed guideline approach are Pennsylvania and Minnesota. States recently adopting the legislature-parole board/detailed guideline approach are Oregon and Florida.

First we examine the new California law -- typically presumptive in character.

(a) California - S.B. 42

Although each code has unique features, the new California statute S.B. 42 can be treated as illustrative of reform in this group of state codes, and, accordingly, is considered in detail. The analysis is organized as follows: (1) a description of S.B. 42; (2) the role of the Judicial Council; (3) the role of sentence review; and (4) an analysis of the weaknesses of S.B. 42 in terms of its ability to reduce disparity.

Under S.B. 42, which went into effect in California on July 1, 1977, the length of stay in state prison is no longer decided by the Adult Authority (the "parole" board). There are three possible state prison terms for each offence; the middle, or "normal," term must be applied except when the prosecution or defence files a motion before the court and proves, upon a preponderance of evidence, the existence of a mitigating or aggravating circumstance. Thus, for robbery, the state prison sentences are two, three, and four years. In the absence of either mitigation or aggravation, the prison term is three years; if mitigated, it is two years; and if aggravated, four years. The term that is imposed (either mitigated, normal or aggravated) is known

as the "base" term. The judge must impose either the mitigated or aggravated sentence if the alleged circumstances are found by the trial judge to be true based on the evidence introduced at the hearing on the motion. Once a motion has been made, the trial judge may consider any evidence previously heard at the trial. If the judge holds that either the mitigated or aggravated sentence is applicable, he must set forth, on the record, his factual findings and supporting reasons.

Additionally, sentences are liable to "enhancement" upon the motion of the district attorney. Any one of the following factors can lead to an enhancement: (1) a prior record of imprisonment; (2) "excessive" taking or damage; (3) being armed with a deadly weapon; (4) use of a firearm; or (5) the infliction of great bodily harm. Under the original terms of S.B. 42, a prior prison term would lead to a one-year enhancement; taking or damage between $1000,000 and $500,000 to an enhancement of one-half the base term; taking or damage above $500,000 to an enhancement equal to the base term; being armed with a deadly weapon to a one-year enhancement; use of a fire-arm to a two-year enhancement; and finally, the infliction of great bodily harm to a three-year enhancement. The aggregate of all enhancements relating to prior imprisonment and consecutive terms could not exceed five years, and the court could impose only one enhancement from among the offences of being armed with a deadly weapon, use of a firearm or causing great bodily harm. There apparently is some discretion as to which enhancement will be imposed. Finally, the aggregate prison term (base term plus enhancements) is limited to double the base term, except where the enhancement relates to being armed with a deadly

weapon, using a firearm or causing grievous bodily harm.

Several of the penalties associated with these enhancements now have been increased by an amending Act, and proposed amendments could increase penalties even further. A prior prison term now can also give rise to a three-year enhancement when both the previous crime that led to imprisonment and the present offence are defined as "violent" crimes. A violent crime includes any felony resulting in great bodily injury or involving the use of a firearm. The amendment also provides for a separate one-year enhancement for each prior prison term, unless the defendant has been free of felony convictions for the last five years. In addition, where the charge is robbery, rape or burglary, the court may now impose both the enhancement for weapons and the enhancement for great bodily injury. Thus, the amendment increased sentences for accused with serious prior records, especially for violent prior records and for persons charged with crimes involving the threat or use of physical violence.

Under S.B. 42, "If the court determines that there are circumstances in mitigation of the punishment prescribed, the court may strike the additional punishment, provided that reasons therefore are stated on the record."[138] The statute does not describe what these factors in mitigation are, or how they relate to the "mitigating circumstances" that may be used to impose the lower base term. This discretion not to impose an enhancement is the only overt discretion that the judge retains once he has decided to imprison an accused.

The new law also provides the Judicial Council (the chief administrative body of the courts in California) with an important role. First, the Judicial Council is required to develop mandatory

guidelines for the exercise of judicial discretion in the granting of probation. Second, the Council has the responsibility of developing criteria for the imposition of mitigating or aggravating circumstances and enhancements. Third, it is to "collect, analyze, and quarterly distribute and publish ...relevant information to trial judges relating to sentencing practices in this state and other jurisdictions." Fourth, the Judicial Council is charged to "continually study and review the statutory sentences and the operation of existing criminal penalties and shall report ... to ... the Legislature its analysis regarding this matter and as to all proposed legislation affecting felony sentences."[139] Section 1170.6 specifically mandates that such review and analysis shall take into account: (a) the nature of the offence and the degree of danger that the offence presents to society, (b) the penalty of the offence as compared with penalties for offences that are in their nature more serious, (c) the penalty for the offence as compared with penalties for the same offence in other jurisdictions, and (d) the penalty of the offence as compared with recommendations for sentencing suggested by national commissions and other learned bodies.

Thus, at least on paper, the Judicial Council is to play a very important role in both the daily implementation of sentencing practice via the guidelines and the development of broad sentencing policy via its advisory/analytic role for the legislature. This, in itself, is a major departure from past practices -- no state has had continuous monitoring of sentencing practices. The switch from "not-so-benign neglect" to "activism" is perhaps one of the most remarkable features of recent and ongoing sentencing reform in California (and, as we see,

also at the federal level).

The first set of guidelines for the exercise of judicial discretion in the granting of probation was adopted by the Judicial Council on May 13, 1977. Because of the centrality of these guidelines in the actual implementation of the new law, the next step is a description and analysis of the sentencing rules prepared by the Judicial Council.

The Judicial Council has interpreted the Act to mean that it has the authority to develop criteria only for the grant or denial of probation and the length of prison sentences and not for the imposition or length of jail sentences. It held that:

> The operative portions of section 1170 deal exclusively with prison sentences; and the mandate to the Judicial Council in section 1170.3 is limited to criteria affecting the length of prison sentences and the grant or denial of probation. Criteria dealing with jail sentences, fines, or jail time and fines as conditions of probation, would substantially exceed the mandate of the legislation.[151]

Thus, whether a jail sentence should be 30 days or 12 months is not dealt with by the guidelines, although in practice jail sentences are an important intermediary sentence between probation and state prison. For most prisoners in California, the length of their jail sentence is the most important sentencing decision.[152]

The Judicial Council also interpreted the Act to mean that the Council's criteria for both the grant or denial of probation and mitigating and aggravating circumstances are non-exclusive, and the stated criteria may sometimes be irrelevant. Thus:

> Enumerations of criteria in these rules are not exclusive. The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all inclusive. (Cf., Evid. Code, 351.) The relative significance of various criteria, will be decided by the sentencing judge.[153] Relevant criteria are those applicable to the facts in the record of the case; not all criteria will be relevant to each case. The judge's duty is similar to the duty to consider the probation officer's report.[154]

The judge, therefore, must apply his own criterion or ignore a stated criterion if he believes it to be irrelevant. The relative weighting of the various criteria is also discretionary.

The Judicial Council re-emphasized the discretionary nature of the probation decison by noting:

> The decision whether to grant probation is normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community. Each criterion points to evidence that the likelihood of success is great or small. A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.[155]

There are four main categories of factors that are relevant to the probation decision: (1) existing statutory provisions relating to the grant or denial of probation, (2) the likelihood that, if not imprisoned, the defendant will be a danger to others, (3) facts relating to the defendant, which include whether the defendant is remorseful and relating to the crime, which include great provocation or taking advantage of a position of trust, and (4) facts relating to the whether a financially able defendant is willing to make restitution to the victim. Altogether the Council lists eight "non-exclusive" criteria relating to the offence and ten criteria relating to the defendant.

The factors to be considered in the probation decision are both highly subjective -- the extent of remorse, for example -- and highly speculative -- for instance, the danger of addiction to drugs or the likely impact of imprisonment on a defendant's family. The Judicial Council also expressly states that "willingness and ability" to comply with probation terms include both "apparent sincerity"[156] and "the defendant's work environment and primary associates."[157] The Council even lists criteria for the grant of probation in "unusual cases" where probation normally is prohibited by law.[158]

The Council also has published a set of criteria related to the finding of mitigating or aggravating circumstances. To some extent, these circumstances overlap with the criteria to be applied in the probation decision. For example, demonstrated criminal sophistication is a factor to be considered bo th in the probation decision and in aggravation. However, the factors to be utilized in determining aggravation and mitigation generally appear to be less subjective and speculative than those included in the probation decision. In addition they must be demonstrated at a hearing.

It is clear that the Judicial Council does not limit its definition of aggravation to factors relating to the crime itself:

> By providing that the defendant's prior record and simultaneous convictions of other offenses may not be used both for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases. This resolves whatever ambiguity may arise from the phrase, "circumstances in aggravation ... of the crime". The phrase, "circumstances in aggravation or mitigation of the crime" necessarily alludes to extrinsic facts.[159] (Emphasis added.)

An examination of the aggravating circumstances reveals that they include all of the factors that could also lead to an enhancement of sentence.[160] The Council has concluded that there is a prohibition only against imposing a double sentence for the same fact,[161] and that therefore each enhancement could alternatively be held to be an aggravating circumstance -- "The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used in aggravation."[162] This is an important interpretation for, as noted, there are different penalties for aggravating circumstances and enhancements.

S.B. 42 introduces two separate modes of sentence review, although not for sentencing appeal.[163] The sentencing court may, upon the recommendation of the Director of Corrections, the Community Release Board (the replacement of the Adult Authority)[164] or at its own discretion, resentence a defendant committed to state prison within 120 days of commitment to the custody of the Director of Corrections. The Act states that "the resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing."[165] The Community Release Board is charged with a separate review process. It must review the sentence of all convicts within the first year of their respective imprisonments and may recommended resentencing if it determines that "the sentence is disparate."[166] Once again, the Board, in making its decision will "apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons

convicted of similar crimes so as to eliminate disparity of sentences to promote uniformity of sentencing."[167]

How effective will the new determinate sentence law be in reducing or eliminating disparity? It will be argued that while the new law is likely to reduce disparity in some areas, it has serious weaknesses.

The major and probably fatal weakness of the determinate sentencing law in terms of eliminating disparity is that it ignores the central role of prosecutorial discretion and plea bargaining in the sentencing process. Considerable empirical evidence from California demonstrates that there are large sentence differentials between those defendants who plead guilty and those who go to trial.[168] This partially reflects the fact that in most cases the district attorney (and judges) wish to avoid trials and thus penalize those who go to trial and reward those who do not. The new law increases the bargaining ability of district attorneys substantially because, while "charge bargaining" remains, it is now joined by "mitigating bargaining", "aggravating bargaining" and "enhancement bargaining". It is of course very unlikely that the defence will introduce evidence on aggravating circumstances and enhancements; it will only result from motions of the prosecution. It is very likely that these additional features will not be "alleged" when a defendant pleads guilty. Alternatively, the prosecution may agree to a "mitigated" (that is, lower bound) sentence in exchange for a guilty plea, even though there are in fact no mitigating circumstances. Under the new law, then, the district attorney cannot directly offer a reduced sentence in exchange for a guilty plea. Indirectly, however, especially in serious cases, there are excellent opportunities to

offer a reduction in sentence. Indeed, such plea-bargaining opportunities are much more extensive than under the old law. The source of the problem is that the legislation does not control any of the behavioural incentives that lead to plea bargaining. Two of the reasons for such "deals" are scarce resources[169] and weak cases,[170] neither of which is addressed by the legislation. The result is likely to be that district attorneys will remain more interested in guilty pleas than in congruence between the offender's actual behaviour and statutory labels. Consequently, district attorneys probably will offer normal (middle) sentences in exchange for a guilty pleas even where there were, objectively speaking, aggravating circumstances that "should" have resulted in an upper bound sentence.

The evidence on the pervasiveness of plea bargaining in the United States in plentiful. Unfortunately, as we saw earlier, in Canada, empirical research on the topic is relatively sparse.[171] There is considerable impressionistic evidence, however, that plea bargaining is fairly common and leads to the same kind of inequities as in the United States.[172] Indeed, the availability of prosecutorial appeal against sentence perhaps results in even greater inequities in Canada. The Crown has appealed against sentence on occasion, even though the original sentence was the result of an agreement between the Crown and the accused.[173]

Additional problems arise from the sentence review process. Under the first process, the sentencing court may review the sentence of any accused receiving a state prison sentence. This review also may be initiated by the Director of Corrections or the Community Release Board. Two problems with this process are: first, the review

is purely discretionary, and second, it applies only to offenders receiving state prison sentences. The latter review process -- to be conducted by the Community Release Board -- is mandatory. There are also several problems associated with this process. It applies only to offenders receiving state prison sentences.

In addition, while the review by the Board is mandatory, it may take place up to a year after incarceration and seems to be defined as a purely administrative process rather than a quasi-judicial function. Thus, it is not clear that the prisoner would be able to present evidence on the presence of disparity and enforce implementation of Judicial Council guidelines.

A third problem arising from those described above is that, given charge bargaining and mitigating bargaining, how will a review agency be able to detect the presence or absence of disparity? The problem is that, superficially, the data that either the court or the Release Board examines will suggest uniformity. For example, in jurisdiction A, because of scarce resources, the district attorney does not file a motion to secure an aggravated sentence, although the facts would support such a motion. In jurisdiction B, the district attorney does file and prove such a motion. To a review process these will seem like different defendants. Given differential bargaining, the "reality" with which the Release Board will be dealing will be a paper reality. It is somewhat like the reality of indeterminate sentence uniformity where the argument was that because everyone received the same sentence range there was no disparity!

If the Board simply follows the convicted offence, the proved mitigating or aggravating circumstances and any enhancements, there

will be no evidence of disparity. For example, all those convicted of burglary without mitigating or aggravating circumstances and with a one-year enhancement (say, for a prior prison term) will receive the same sentence. On the other hand, if the Board goes behind the formal record (as the Federal Parole Board does) and examines the actual behaviour of defendants, a different set of problems will arise. It might emerge that a given jurisdiction, say Los Angeles, is routinely dropping enhancements in exchange for guilty pleas, while other jurisdictions are not. What should the response of the Board be? It is highly unlikely that it can send Los Angeles offenders back for resentencing, as they have received determinate sentences, and this would clearly be a case of double jeopardy. They have not waived this constitutional protection because they have not appealed their sentence. Equally, to send back the prisoners from other jurisdictions would be inappropriate; there, the courts had followed both the letter and the spirit of the new law. Given this dilemma, an educated guess is that the Board will confine itself to insuring against errors on the record. This "data reality" problem is also likely to bedevil the Judicial Council's mandate to analyse relevant sentencing information.

The next problem is also a major one, as the new Act does not address directly the issue of when an offender should be sent to state prison. Once the decision has been made to send an offender to state prison, the considerations of mitigating and aggravating circumstances and enhancements come into force. However, if the offender is not sent to state prison, they are not explicitly relevant. As was seen, the Judicial Council has used its discretion to the full in its

interpretations. It also appears to have reintroduced some concepts explicitly rejected by the legislature. S.B. 42 states that "the legislatiure finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.[174] The Act, therefore, explicitly rejects the rehabilitative ideal. On the face of it, this statement thus would seem to be a clear "just deserts" argument along the lines proposed by von Hirsch,[175] one that eschews both rehabilitative ideals and predictions of future dangerousness. According to Johnson and Messinger, however, the Judicial Council has introduced into its guidelines criteria that "are directly contrary to the spirit many proponents hoped was built into S.B. 42, namely criteria which permit the court to decide the issue on the basis of its judgement of the offender's 'dangerousness'."[176]

One further area where the decision of the Judicial Council has emphasized discretion is in the relationship of aggravating circumstances to enhancements. The Council has held that circumstances that lead to an enhancement may also be treated as aggravating circumstances. As the penalties associated with these two conditions are usually different, the judge and district attorney are provided with added discretion. Thus, the court can either treat great bodily injury as an aggravating circumstance leading usually to one extra year in prison or as a great bodily injury leading to a three-year enhancement. The Judicial Council notes this, but suggests that it "may work to the defendant's benefit, when the enhancement would carry

an added term to 3 years or more, as aggravation cannot increase the term more than 1 year."[177] It seems equally likely, however, that it will work against the defendant's interest. As we have seen, in most circumstances, use of a firearm and great bodily injury both could not be filed as enhancements. However, now one could be utilized as an aggravating circumstance while the other could be utilized as an enhancement. More important, perhaps, the Council's interpretation once again does not appear to conform with the spirit of S.B. 42.

The Judicial Council's interpretation that it has no power to develop criteria for the imposition of jail sentences highlights an important anomaly.[178] The length of the jail sentence is the most important sentencing decision that many offenders face. However, because jail sentences in many cases can be imposed only as a "condition" of probation, they are formally an addendum. In practice, of course, from the defendant's perspective, this is his "real" sentence. While the court may formally sentence an offender to probation with "jail as a condition," the offender sees it as jail with some probation "thrown in." It is worth noting that if the percentage of convicted offenders going to state prison remains approximately as at present in California, only a relatively small percentage of all accused will be sentenced under these detailed provisions. The great majority of offenders, for crimes such as burglary, receiving stolen property and forgery, would continue to receive county jail and probation sentences and will be sentenced outside the Council guidelines.[179]

It may well be, however, that prison commitments will increase. The lowest mitigated sentence provided by the new law is sixteen

months, which, given "good time", would result in eleven months of incarceration. If a district attorney wants to send an offender to state prison, he now has a good bargaining "counter." Under the old law, the accused would have had considerable incentive to go to trial if the district attorney insisted upon state prison. Now the district attorney would simply threaten to oppose a plea of mitigation if the accused went to trial. As Johnson and Messinger put it, "the increase would easily be very large indeed in view of the fact that currently only 10 per cent or so of those the court could imprison are sent to state prison."[180] Alschuler adds that one consequence of these "intermediate" offers "may be an increase -- perhaps even a dramatic increase -- in the population of California's state prisons."[181] Finally, it should be pointed out that whatever the failings of S.B. 42 in relation to uniformity, it is likely to have an important, beneficial impact in terms of the highly excessive sentence.

This review of California suggests that there is considerable room for ongoing sentence disparity. Unfortunately there is as yet little empirical evidence. The U.S. Department of Justice (through the Law Enforcement Assistance Administration) has commenced an extensive two year study of the California system which is examining the new law's impact on both sentence lengths and sentence disparity. Singer, however, has conducted a preliminary analysis based upon 1978 data. He concludes:

> [The tables] provide some disturbing data for the advocate of equality in sentencing. As was true in prereform days, it appears that the vast bulk of offenders, and clearly the majority

of all offenders except for homicides and robberies, are receiving no prison sentence at all. Thus, only 27 per cent of assaults, 31 per cent of sexual offenses, and 9 per cent of family offenses resulted in prison sentences. In property crimes, not a single offense resulted in more than a 40 per cent imprisonment rate, and in many instances, the rate was well below one-third. In such a situation, the availability of probation appears to have undermined the notion that persons who commit similar crimes should be punished similarly.

In fact, the facial appearance may be misleading. Although the records indicate a high per centage of "nonincarceration," other information from that same report declares that of persons placed on probation, between 70-85 per cent were required, as a condition of probation, to spend some time in jail. Indeed, the overall incarceration rate, both jail and prison, was somewhere near seventy-five per cent. This figure, however, is still misleading, for it does not acknowledge that the amount of time spent in jail or on probation is surely much less than the average time spent in prison, if the sentence is one of imprisonment. A supporter of controlled sentencing might then analyze the California data to suggest that, in effect, notwithstanding the legislation, the presumptive sentence in most crimes has in fact become probation, with only the serious offender receiving any time in state prison at all. Although this would contradict the notion that aggravating circumstances should be used only to increase the duration of sentence, and not the type of sanction, if the data show that persons sent to prison were receiving durational sentences only slightly longer than the duration of probation imposed on the average offender (whether or not considering the jail term as well), perhaps the practice would be tolerable.

Unfortunately, the data demonstrate that even this second level hope is not fulfilled. For second degree burglary, for example (the most numerous conviction offense), 70 per cent are not incarcerated in state prison, but of those, 55 per cent receive probation. Of that 55 per cent, 81 per cent receive some duration of jail sentence. Thus, 45 per cent of all second degree burglaries lead to jail incarceration and another 30 per cent to prison incarceration. What, then, is the average prison sentence for this crime? Table 10 - 4[not reproduced] shows that for this crime the mean sentence, to state prison, is thirty-two months. If we convert that to "actual time likely to be served" (i.e. subtracting the good time earnable under California law), we conclude that persons sentenced to state prison will serve approximately twenty-one months incarceration.

The conclusions, of course, are exceptionally tentative. Nevertheless, this one example indicates that:

1. The average sentence for second degree burglary is (an assumed six-eight) months in the county jail, followed by probation.
2. Thirty per cent of persons committing this crime are sent to state prison for twenty-one months, roughly three and one-half times that of the average sentence, not even

counting the physical differences between state prison and county jail.

3. Of those sentenced to state prison, 57 per cent were sentenced to at least three years, which, when discounted by good time, is twenty-seven months -- four and one-half times that of the normal sentence.
4. Some number of persons, incalculable from the data, received five year sentences, that,

when discounted, amount to forty-eight months -- six to eight times the normal sentence of incarceration.

If the differences in sentence can be so great under a system that attempts somewhat scrupulously to follow the notion of presumptive sentences, for a crime that is relatively innocuous and for which there ought to be only minor variations in sentence, the possibilities of variations for major offenses would seem to abound.

The figures are more difficult when dealing with other crimes, however, since we must, in addition to guessing at the probation-jail time, make rough guesses as to other factors. Nevertheless, let us take robbery. Forty-one per cent of robbers received probation, but virtually all of those (90 per cent) did receive some jail time as a condition of probation. Let us, then, assume that this time was eight months. Table 10 - 4 shows that another 9 per cent of all robbers sentenced to prison received a sentence at the lower penalty range (two years, discounted to eighteen months). Conveniently, this sums to 50 per cent. Thus, we can roughly say that the average robber received ten ten months incarceration. But Table 10 - 4 tells us that the average sentence imposed on robbers sentenced to the state prison was 4.27 years. With the removal of 9 per cent at the bottom, this will indicate that the remaining half of the robbers sentenced to the state prison was 4.27 years. With the removal of 9 per cent at the bottom, this will indicate that the remaining half of the robbers in the sample received a prison sentence of roughly 4.3 years, which, again discounted by good time, suggests that the mean time then served was thirtynine months -- four times the average robber. Similarly, there were some robbers who received sentences of 10.33 years. Again, we do not know, from Table 10 - 4, how many fit into this category. But it demonstrates that even for those incarcerated (not including the 16 per cent who were given "other disposition"), the time of incarceration, discounted for good time, ranged from (roughly) eight months to ninety-three months eleven time multiple.

Thus, the absolute range is disquietingly wide under this theoretically rigid California system. Moreover, even within the range of prison sentences, the numbers of persons sentenced outside the range, and sentences, the numbers of persons sentenced outside the range, and sentences double and triple the normal sentence, is substantial.[182]

These results are perhaps not surprising given the "weak links" that we have already analysed in the California system. Weaknesses in the California scheme also illustrate the emerging problems of such an approach, and all appear to have relevance for Canada. Perhaps most importantly, an S.B. 42 model might greatly increase plea bargaining incentives, for the reasons discussed above. Second, as the role of the Judicial Council demonstrates, ongoing pressures to maintain, or revert to, discretion are enormous, regardless of legislative intent. Third, an S.B. 42 solution ignores the "incarceration/no incarceration" decision while concentrating on the decision as to the length of incarceration, thereby removing many sentences from the reformed process. Overall, it may be concluded that primary reliance on a legislative approach potentially presents problems if procedures are not included for ongoing change. Current Canadian proposals demonstrate little concern with providing for such flexibility.

(b) S. 1437 - The Proposed U.S. Federal Act

In February 1978, the Senate passed S. 1437, the proposed federal criminal code act.[183] However, the bill did not pass the House of Representatives and is currently in limbo, although there are periodic attempts at revival. S. 1437 illustrates the difficulty of classifying any sentencing proposal ex ante. Depending on its implementation the new statute could end up being either highly discretionary or somewhat reducing the exercise of discretion. If it did reduce the exercise of discretion the extent of reduction is highly uncertain: it could result in a loose guideline structure or a detailed guideline structure.

At first glance, the federal bill would allow almost total discretion. In terms of sentences, the bill would create five classes

The authorized terms of imprisonment are: (1) for a Class A felony, the duration of the defendant's life or any period of time; (2) for a Class B felony, not more than twenty-five years; (3) for a Class C felony, not more than twelve years; (4) for a Class D felony, not more than six years; (5) for a Class E felony, not more than three years. Thus, for each class or offence, there is a maximum sentence, but no minimum. Additionally, for all classes of offences except a Class A offence, the court may impose a sentence of probation or fine. In sentencing an offender, the court has to consider the following factors itself: (1) the nature and circumstances of the offence and the history and characteristics of the defendant; and (2) the need for the sentence imposed: to afford adequate deterrence; to protect the public from further crimes; to reflect the seriousness of the offence; to promote respect for the law; to provide just punishment; and to provide the defendant with needed educational training or medical care.[184] These statements are obviously very broad and would not provide specific guidance to judges.

The crucial additional factor that might change this vague, maximalist approach is the inclusion of a sentencing commission with the responsibility of developing mandatory sentencing guidelines. The bill lists a series of factors relating to both the offender and the offence that are relevant -- although not exhaustively so -- in the development of guidelines. A potential problem with the federal bill is the multiplicity of factors that can be taken into account. The Act distinguishes seven factors associated with the crime and eleven factors associated with the criminal. The relevant characteristics of the offense are: (1) the grade of the offense; (2) the circumstances

under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the nation as a whole. The relevant characteristics of the defendant are: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history, including prior criminal activity not resulting in convictions, prior convictions, and prior sentences; and (11) degree of dependence upon criminal activity for a livelihood.

Once again, these factors are very broad, including "public concern" over the offence and the offender's "community ties." Furthermore, the commission's guidelines are overtly "presumptive." Under section 2003(a), the judge retains independent discretion and could, for example, go outside the guidelines to "afford adequate deterrence to criminal conduct" or "to provide the defendant with needed educational or vocational training."

While a great deal would depend upon the make-up of the commission, the factors that the bill suggests should be considered would appear to make it unlikely that the guidelines would be very precise. Legally, however, there does not appear to be a bar to the development of more precise sentencing principles by the commission. For example, the commission might utilize the eighteen listed factors to develop a scale with various levels of mitigation and aggravation; most of the factors can, without much strain, be linked to mitigation or aggravation. The main problem in implementing such an approach are those factors specifically relating to the defendant's education, skills, prior employment record, and family and community ties. One possibility is that the commission could argue that these factors are not usually relevant, but may be under specific circumstances. As the listed factors are not exhaustive, the commission could also include prior record and criminal status in a relatively sophisticated manner.

Let us consider two alternative hypotheticals. The first assumes that the sentencing commission guidelines are broad, vague, discretionary, and non-exhaustive. As in California, a critical factor is that the legislation does not address directly the issue of plea bargaining. Thus, if this hypothetical were operational, it would be predicted that the new federal law would lead to similar results as in California; that is, extensive mitigating and aggravating negotiation. However, this kind of bargaining potentially could be more controllable at the federal level because, in California, S.B. 42 effectively allows the prosecutor to control the filing of aggravating circumstances and enhancements. The decision as to filing motions on these matters is entirely within the prosecutor's discretion. There

is no equivalent prosecutorial discretion of this issue in the federal bill -- it is the judge who would make any findings of mitigation or aggravation. He could refuse to accept pleas that did not specify aggravating circumstances when the facts suggested the presence of such circumstances.

In the second hypothetical, overt sentence bargaining may or may not be permitted. Assuming, first, that the judge allows specific bargains as to sentence length, this would provide almost infinite flexibility, given the wide range of offence classes. In the case of a Class C felony, for example, the prosecution and defence could negotiate any sentence length between probation and twenty-five years' imprisonment. The result is likely to be even greater disparity than under the present Parole Board system. An offender who accepts a sentence offer which he later believes to be (comparitively) excessive would have no recourse, as the bill does not allow sentence appeals where there has been a plea bargain.

If federal judges did refuse to allow overt sentence bargaining, charge (or, more correctly in this case, "class") bargaining would become even more important than under an indeterminate sentence system. If an accused wished to minimize his greatest possible loss, he would plead guilty to a lower class felony. The maximum sentence for each class varies greatly in magnitude. A person convicted of a Class C felony faces a maximum twelve-year sentence, while one convicted of a Class D felony faces a maximum sentence of six years. An accused charged with a Class C felony, then, has considerable incentive to plead guilty to a Class D felony, especially if he believes that the guidelines would place him in a high sentence

category. The consequences of either version of the second hypothetical, in terms of disparity, will be particularly serious, given the limitations of appeals to accused go to trial.

The kind of reform now being proposed at the federal level in the United States is more likely to be proposed in Canada than the S.B. 42 model. It is the "logical" next step following a model code approach. Again, the analysis suggests serious weaknesses: primarily broad, vague, normatively objectionable predictive criteria, increased incentives to plea bargain, and great uncertainty as to the actual operation of the sentencing process. We now switch to detailed guidelines. As Table IV - 2 suggests we have to consider detailed guidelines emanating from legislatures, parole boards and sentencing commissions (respectively cells 10,11,12). Once again several of the reforms do not fall neatly into a single cell. For example, the Oregon reform involves both a reconstituted parole board and a sentencing commission.

(c) Detailed Guidelines -- The United States Parole Board (Commission)

In 1973 the United States Parole Board introduced its first "guideline table". The table has subsequently been revised on several occasions. The latest version is reproduced in table IV - 5.

The Guideline Table consists of two indices from which a defendant receives a "score." His release date is based on this score. One index is the "Offense Severity"index, which measures the severity of the offense, and the other is the "Salience Factor" index, which, to some extent, attempts to measure the likelihood that the defendant will commit further crime. The "Offense Severity" index

Table IV - 5: United States Parole (Commission) Guidelines for Decision-making

Offense Characteristics—Severity of Offense Behavior (examples)	*Offender Characteristics—Parole Prognosis (salient factor score)*			
	Very good (11 to 9)	*Good (8 to 6)*	*Fair (5 to 4)*	*Poor (3 to 0)*
Adult				
Low Escape: open institution or program (e.g., CTC, work release—absent less than 7 d Marihuana, soft drugs, simple possession (small quantity for own use) Property offenses (theft or simple possession of stolen property) less than $1,000	6-10	8-12	10-14	12-16
Low moderate Alcohol law violations Counterfeit currency (passing possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses (forgery, fraud; theft from mail; embezzlement; interstate transportation of stolen or forged securities; receiving stolen property; with intent to resell) less than $1,000 Selective Service Act Violations	8-12	12-16	16-20	20-24
Moderate Bribery of a public official; offering or accepting Counterfeit currency (passing possession $1,000 to $19,999) Drugs Marihuana, possession with intent to distribute sale (small scale, e.g., less than 50 lb "Soft drugs", possession with intent to distribute sale, less than $500) Escape: secure program or institution, or absent 7 d or more—no fear or threat used Firearms Act, possession, purchase, sale (single weapon, not sawed-off shotgun or machine gun) Income tax evasion ($10,000 to $50,000) Mailing threatening communications Misprision of felony Property offenses (theft; forgery; fraud; embezzlement; interstate transportation of stolen or forged securities; receiving stolen property; $1,000 to $19,999) Smuggling, transporting of aliens Theft of motor vehicle, not multiple, theft or for resale	12-16	16-20	20-24	24-30
High Counterfeit currency (passing possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs Marihuana, possession with intent to distribute sale (medium scale, e.g., 50 to 1,999 lb) "Soft drugs", possession with intent to distribute sale ($500 to $5,000) Explosives, possession, transportation Firearms Act, possession, purchase, sale (sawed-off shotguns); machine guns); or multiple weapons) Mann Act (no force—commercial purposes) Theft of motor vehicle for resale Property offenses (theft; forgery; fraud; embezzlement; interstate transportation of stolen or forged securities; receiving stolen property) $20,000 to $100,000	15-20	20-26	26-34	34-40
Very high Robbery (weapon or threat) Breaking and entering (banks or post offices/safes or attempted entry to vault) Drugs Marihuana, possession with intent to distribute sale (large scale, e.g., 2,000 lb or more) "Soft drugs", possession with intent to distribute sale (over $5,000) "Hard drugs", possession with intent to distribute sale (not exceeding $100,000) Extortion Mann Act (force) Property offenses (theft; forgery; fraud; embezzlement; interstate transportation of stolen or forged securities; receiving stolen property) over $100,000 but not exceeding $500,000 Sexual act (force)	26-36	36-45	45-[illegible]	[illegible]-[illegible]
Greatest I: Aggravated felony (e.g., robbery; Weapon fired—serious injury; explosive detonation involving potential risk of grave injury to persons—no serious injury occurred; robbery, multiple instances; etc. Hard drugs, possession with intent to distribute sale—large scale (e.g., over $[illegible]); several acts—[illegible] (e.g., forcible p	40 to [illegible]	[illegible]	[illegible]	[illegible]
Greatest II: Aggravated felony—serious injury (e.g., injury involving substantial risk of death, or protracted disability, or disfigurement; aircraft hijacking; espionage; kidnaping; homicide (intentional or committed during other crime	Greater than those—however, [illegible] cases with the [illegible] within the [illegible]			

Source: Singer, 1980

attempts to rank the defendant's "offense behaviour" using seven ratings: low, low moderate, moderate, high, very high and greatest (I and II). The "Salience Factor" score is divided into four risk categories: very good parole prognosis (salience factor of 9 to 11); good (6 to 8); fair (4 to 5); and poor (0 to 3). The two indices form the axes of a matrix; each cell of the matrix contains a sentence range (the amount of actual time to be served before initial release). Thus, two indices determine the defendant's prison sentence.

The "offense severity" rating is not based on the offence for which the offender was convicted, but rather on the parole board's evaluation of the offender's criminal behaviour. The salience factor score was previously based on nine weighted personal characteristics that "were statistically determined to have high predictive power in discriminating between past groups of releases who 'succeeded or failed'."[185] The salience factors (see Table IV-6) were: the number of prior convictions, number of prior incarcerations, age at first commitment, whether the crime involved auto theft, prior negative experience on parole or probation, history of drug abuse, high school degree or equivalent, verified prior employment, and a release plan to live with a spouse or children. The number of prior incarcerations and prior convictions each count for two points; all other factors count for one point each.

Table IV - 6: Salient Factor Score, U.S. Parole Board

Salient Factor Score

Case name ..... Register No .....

Item A

No prior convictions (adult or juvenile) = 3
1 prior conviction = 2
2 or 3 prior convictions = 1
4 or more prior convictions = 0

Item B

No prior incarcerations (adult or juvenile) = 2
1 or 2 prior incarcerations = 1
3 or more prior incarcerations = 0

Item C

Age at first commitment (adult or juvenile)
26 or older = 2
20 to 25 = 1
19 or younger = 0

Item D

Commitment offense did not involve auto theft or checks (forgery, larceny) = 1
Commitment offense involved auto theft or checks = 0

Item E

Never had parole revoked or been committed for a new offense while on parole and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole or is a probation violator this time = 0

Item F

No history of heroin or opiate dependence = 1
Otherwise = 0

Item G

Verified employment or full-time school attendance for a total of at least 6 mo during the last 2 yr in the community = 1
Otherwise = 0

Total score

Source Singer, 1980

This earlier version of the "reformed" United States Parole Board has been studied by a group from Yale University.[175] As the Yale project group points out, after having studied the operation of the Guidelines in detail, all but two of the nine factors -- release plan and high school diploma -- are known to the judge at the time of original sentencing. None (unless one counts getting a high school diploma) represents institutional progress. The project group concludes that the actual decison-making process works reasonably well:

> The Guidelines generally seem to structure discretion quite well. Their explicit criteria for determining release dates cause the hearing panel to consider carefully why they think an inmate should be an exception and to provide reasons for the decision.[176] However, the Yale study also contains a series of

criticisms that are worth summarizing because they raise pertinent issues concerning sentencing in general. First, the Parole Board allows the defendant to think that other -- "rehabilitative" -- criteria are used in the decisionmaking process when, in fact, the matrix is relied upon almost completely. Second, the defendant is not informed of his score or his rating, and therefore cannot challenge their factual accuracy. Third, the salience factor scale is based on the behaviour of twenty-five per cent of those released from federal prisons in the first six months of 1970. No factor deterministically leads to "success" or "failure"; rather, it is a probabilistic model. Of the fair risk group, for example, 60.8 per cent are expected to succeed on parole. Almost certainly, then, some defendants receive a rating that implies recidivism when they would not, in fact, recidivate. Fourth, the Parole Board's classification of offence

severity is based on the defendant's actual behaviour rather than on the offence of which he has been convicted. This obviously makes a mockery of charge reduction in plea bargaining. The Yale group puts this somewhat mildly when it points out: "Defendants who believe they are 'getting a break' by pleading guilty to a conspiracy charge with a five year maximum that is lower than the maximum for the substantive offense may revise that opinion upon learning they might not be paroled because the Board may rate the offense severity as if they had committed the underlying substantive offense."[188] Given that the U.S. courts have held that judges and prosecutors must inform the accused of the likely consequence of their plea,[189] it would seem that plea-bargaining would be seriously impaired. Fifth, the procedural safeguards (including legal representation) are inadequate, expecially as the hearing has, in essence, become a sentencing procedure. Sixth, judges, as well as accused, still believe that the Parole Board primarily reviews the offenders' institutional progress when this is no longer the case. Seventh, the Parole Board's use of offence severity ratings bears no direct relationship to legislative categories of sentence lengths.

The review concludes that the Parole Board has potentially "reformed" itself out of a job. What it now does can be done as well, if not better, by the courts themselves. On the other hand, the courts have possible advantages that it cannot match, for example, procedural safeguards and the potentiality of ensuring equity between those going to prison and those not. As Coburn has put it: "In addition to imprisonment, most states authorize trial judges to impose other penal sanctions such as fines and probation."[190] Disparities in

the use of these alternative modes of punishment are "' at least as important' as the length of imprisonment because they 'allow (a) defendant to remain in the community without imprisonment' while his codefendant may be incarcerated for the maximum period authorized by statute."[191]

> Not surprisingly, the Yale Project concludes: The courts should assume primary responsibility for eliminating disparities in sentencing. The Board's attempt to do so cannot fully remedy systemwide disparities, and results in a seemingly senseless disregard of the favorable sentencing decisions some inmates receive. The Guidelines might serve as a model for such judicial action. The Guideline system reasonably addresses the dual needs of minimizing disparities and preserving opportunities for individualized consideration. However, any "sentencing guideline" system would have to provide substantive criteria to structure the decision whether to impose probation, as well as a mechanism to clarify the purposes served by particular types of sentences in order to guide later post-conviction decisions.[192]

There have now been some minor changes in the salient factor score. The release plan requirement and the high school diploma have now been dropped, but otherwise it remains substantially unchanged.

The Yale analysis provides a framework with which to analyse Canadian proposals on parole reform. The Law Reform Commission of Canada has proposed that a Sentence Supervision Board should replace the present Parole Board,[193] and that this Board should have, among others, the following duties:

> (a) to consult with prison officials, courts and police and formulate and publish policies and criteria affecting conditions of imprisonment release;
> (b) to automatically or upon request review important decisions relating to conditions of imprisonment and release;
> (c) to hear serious charges and determine the process for such charges against prisoners arising under prison regulations.[194]

Obviously, from the perspective of analysing this proposed new institution, the two most important tasks are the formulation of "criteria affecting conditions of imprisonment and release," and the review "automatically or upon request ... (of) important decisions relating to conditions of imprisonment and release."

It is conceivable that the proposed Sentence Supervision Board would avoid the errors of its United States counterpart. However, the elimination of institutional rehabilitation factors and predictive factors would also eliminate the need for such a Board. The Board would, following the Yale reasoning, have reformed itself out of a job.

Another, more incremental, perspective on parole reform is suggested by the Law Reform Commission report on parole.[195] The authors suggest a series of changes that are consistent with the emphasis of "pro-parole" reform in the United States. Briefly summarized, their proposed reforms include: legal representation, or at least some form of third-party representation, for the inmate at the hearing; "better" preparation of parole hearing documentation; an explicit set of criteria for release; a written statement of the reasons for a decision; and more and better information for inmates on the criteria to be utilized.[185] The authors make an eloquent plea for clear, consistent parole criteria, yet they seem to believe that the problem is one of declaration -- stating a set of criteria, rather than developing a workable (practically and normatively) set of criteria. Thus, they never ask whether the process is flawed inherently, and their efforts are an attempt to "clarify" something that cannot clarified under the present circumstances.

The Hugessen Report[197] is somewhat more explicit in both its criticism of the existing parole procedures and its version of a new, improved parole system. With respect the status quo, the Task Force concluded:

> At present, the criteria on which the National Parole Board bases its decision to grant or refuse parole are unclear. Neither inmates nor members of the Board are able to articulate with any certainty or precision what positive and negative factors enter into the parole decision.[198]

To overcome this lack of clarity, however, the Task Force essentially recommends the adoption of the parole principles laid down in the U.S. Model Penal Code. Some of the factors that the Task Force explicitly suggests should be adopted from the Code include "the inmate's ability and readiness to assume obligation and undertake responsibilities," the inmate's "mental or physical makeup", and the inmate's "attitude toward law and authority."[199] These are obviously intrinsically vague factors. Indeed, the Parole Board might justifiably claim that they are attempting to use these factors at present.

In summation, then, the proposed reforms on parole are not as extensive as reforms already implemented in the United States, where even those reforms have been subjected to severe criticism.

(d) Other Parole Board Detailed guidelines -- Washington and Oregon

Two other "parole board" approaches are worthy of special analysis: those of Oregon and Washington. Oregon is worthy of study for two reasons. First,it utilizes both a reconstituted parole board and a sentencing commission. Second, it is one of the most "just deserts" oriented pieces of legislation.

The recent Oregon Parole Reform Law[200] as the name suggests, places the primary responsibility for the development of sentencing standards in the hands of the parole board -- although with the formal input of the judiciary. Under the Oregon system the judge decides whether to impose a prison term or a lesser sentence such as a fine or probation. If he opts for prison, he specifies that the sentence will run for so many months or years. That time period operates, however, only as an outer limit. The new statute authorizes the judge to specify a minimum term of up to one-half of the sentence, which must be served in prison before release on parole although the parole board (by a vote of four of the five members) can order the offender's release prior to expiration of the minimum. Thus, the parole board is primarily responsible for deciding the length of stay prison.

The new law requires the parole board (after receiving the recommendations of a joint advisory commission, consisting of judges and parole officials) to set standards that prescribe specific ranges of duration-of-imprisonment before release on parole. The advisory commission consists of the five members of the parole board, five judges appointed by the chief justice of the state, and the governor's legal counsel (who has a tie-breaking vote). The statutory language states that the standards shall be designed to achieve the following aims: (1) the imposition of "punishment which is commensurate with the seriousness of the prisoner's criminal conduct"; (2) deterrence and incapacitation, but only to the extent that pursuit of those latter aims is "not inconsistent" with the requirements of commensurateness. The statute goes on to state that the board, in setting its standards, must give "primary weight" to the seriousness

of the prisoner's present offense and his criminal history.[201] In Oregon, then, sentencing responsibility is divided between the judge and the parole board. Judges do not directly utilize standards or guidelines in their sentencing. Only if a prison sentence is imposed will the standards be relevant.

In Washington the parole board has promulgated a set of guidelines most closely approximating a "telephone book". They establish fourteen classes of crimes, ranging from very specific (forcible rape) to generic terms (theft, drug offenses). Each crime carries a base term, the minimum of time to be served before considering action for parole. Each crime additionally carries a series of aggravating factors, some very detailed indeed, that increase the base term by a highly specific amount of time. Thus, the base time for murder is forty two months. There are nine aggravating factors, ranging from "victim forced to another location" (increase of twelve months) to "victim was vulnerable" (thirty-six months) to "weapon only by offender" (eighteen months).

The amount of increased time that a single factor will bring varies with the offence. Thus, "physical force by offender" increases the murder sentence by eighteen months, manslaughter by forty-two months, and a sexual molestation sentence by nine months. (The sentences in the first two cases therefore become sixty months for murder (forty-two base plus eighteen increase), but sixty-nine for man-slaughter (twenty-seven base plus forty-two for physical force).

Variations are allowed on the basis of aggravating or mitigating factors not otherwise declared. The variation allowed depends on the guideline term. Similarly, prior crimes increase the base term, but

again by a specific number of months depending both on the prior offense and the present offense. Thus, a prior crime of robbery adds twenty-four months if the present crime is murder, twelve months for assault, and six months for a drug offense. A prior conviction of assault adds twenty-four months for assault, manslaughter, or murder; twelve for or robbery; and six for property or drugs.

The detailed nature of the guidelines can be illustrated by reference to sexual molestation. The penalty is aggravated by specific increments when the victim is child or elderly:

Age of Victim	Permissable Increase
1 - 5 or 80+	36 months
6 - 9 or 70 - 79	30 months
10 - 12 or 60 - 69	24 months
13 - 17 or 50 - 59	18 months

Additionally the State of Washington is considering new sentencing legislation which would establish a parole board-dominated sentencing commission. It establishes a sixteenth person "criminal sanctions board" to promulgate "sentencing standards and guidelines." Seven of the members are members of the parole board; the other nine are the chief justice, the attorney general, the director of the department of social services, and six persons appointed by the governor (three of whom must be a sitting judge, a prosecutor, and a criminal defense attorney). The board's rules, once promulgated, take effect unless the legislature remands them for consideration. Once the standards are adopted, nine non-parole board members drop off.

The statute sets out the parameters of the guidelines and differentiates sentences for each class of offense and for recidivists

within that class. The additional sentence for prior offenses depends primarily upon the class of prior offense and the number of priors. There are explicit definitions of "violent offenses" and "persistently violent offenders" that increase the sentences or make an offender ineligible for probation.

The proposed act also establishes appellate review of sentences by regional "sentence review panels" of three superior court judges. The Standard for review is whether the sentence is "clearly excessive (or lenient)." No review of a sentence within the board's guidelines is allowed; any sentence not within the guidelines will carry with it an effective presumption of invalidity, must be overcome on appeal.

Probation is available only to persons not convicted of a "violent offense" or to a first offender of a nonviolent offense. Specific conditions of probation are listed. Good time appears to be abolished.

The penalties outlined in the act are generally quite low, Class B felonies carry a presumptive sentence of one year, if the offender has no priors, and a maximum of three years if the crime was not violent and if the offender has two or less priors and none of them is violent. A persistently violent offender convicted of a Class B offense may receive a sentence between eight and ten years, but only if the crime of conviction was a violent one; otherwise the maximum is five years. Similar restrictions are placed on other sentences, although the court may impose an "exceptional" sentence outside these ranges if "excessive danger" to the public would occur. The board is instructed, in establishing the sentences, to consider the conditions of prisons and jails, but not the bedspace available.

Finally, the act takes the first few tentative steps toward regulating plea bargaining, the first such attempt in the United States.[202]

(e) Sentencing Commissions -- Minnesota and Pennsylvania

Recently two legislatures -- Minnesota and Pennsylvania -- have established sentencing commissions. In Minnesota, a nine-member commission has a mandate to prepare guidelines for sentencing that are based on "reasonable offense and offender characteristics", and that "take into substantial consideration" current sentencing and releasing practices and correctional resources.[203]

The Minnesota sentencing commission consists of three judges, a prosecutor, a defense lawyer, the corrections commissioner, and the chairperson of the parole board. The guidelines must prescribe (1) when a sentence of imprisonment is appropriate, and (2) the duration of any prison sentence, (the commission is also authorized to issue guidelines on non-incarcerative sentences). While the guidelines are advisory, sentencing judges are required to give reasons for departures from the guidelines, and an appeal from sentence is established.[204]

In Pennsylvania, an eleven-member commission will write the guidelines, which must be based chiefly on "the degree of gravity" of the offense.[205] The Pennsylvania commission consists of four legislators (two appointed by the leader of each house of the legislature); four judges, appointed by the chief justice of the supreme court; and three gubernatorial appointments, one of whom must be a district attorney, one a defense attorney, and one a professor of law or a

criminologist.[206] In assessing the degree of gravity the Commission must:

(1) Specify the ranges of sentences applicable to crimes of a given degree of gravity.
(2) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or convicted of a crime involving the use of a deadly weapon.
(3) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances.[207]

As in Minnesota the guidelines are advisory, but sentencing judges would be required to give reasons for sentences outside the guidelines. The appellate court may vacate a sentence if:

(1) The sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.[208]

Thus in these two states the legislatures have mandated a considerable degree of sentence differentiation. Of the two Pennsylvania is the more specific as it expressly requires that the guidelines include prior record and mitigating or aggravating circumstances. Both states have broadly mandated a guidelines approach but have delegated the detailed implementation of such a scheme to sentencing commissions. There is still, therefore, considerable latitude as to the exact criteria to be utilized and their weighting. Both states have specified that such guidelines are advisory, but the guidelines will presumably be persuasive because of the requirements that reasons be given for deviations and also because

sentences outside the guidelines are appeallable.

(f) Mandatory Sentences

The final column in table IV-1 presented above refers to the use of mandatory sentences. A mandatory sentence typically involves the elimination of both judicial and parole discretion. A single, determinate sentence is imposed. In practice mandatory sentences have been introduced for specific offences or specific categories of offenders, although, of course, a complete penal code could be designed in this manner. Additionally, in general, mandatory sentences have emanated directly from legislatures.

During 1979 eighteen states in the U.S. passed one or more mandatory sentencing bills covering violent, drug, and/or repeat offenders. California (SB 469), Florida (Chapter 709), Louisiana (HB 926), and Tennessee (Chapter 318) included mandatory statutes for drug offenders. Idaho (no citation), Iowa (902.7), Maine (Chapter 513), Montana (Chapter 587), New Mexico (Chapter 158, Section 1), Ohio (SB 41), Tennessee (Chapter 318), and West Virginia (HB 807) took similar action for repeat offenders.

Violent offenses such as kidnapping, arson, rape, murder, and armed robbery were singled out for mandatory sentences in Arkansas (Act 1118), Arizona (Chapter 144), California (SB 406), Illinois (SB 32, 184, 208, 783; HB 919), Iowa (902.8), Kansas (Chapter 90), Louisana (SB 110), Montana (Chapter 322), Nevada (AJR 30), New Mexico (Chapter 152, Section 3), North Carolina (Chapter 749), Ohio (HB 267) Oregon (Chapter 2849), and Tennessee (Chapter 318).

A total of 27 states now have mandatory sentencing laws, including the following enacted in 1977 and 1978: for drug offenders,

Hawaii and Iowa; repeat offenders, Alabama, Arizona, Florida, Louisiana, Nevada, and Tennessee; violent offenders, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New York, North Carolina, and Texas.[209]

The objective of these acts has been to single out certain offenders -- for harsh treatment. Obviously, if implemented uniformly, such statutes would generate uniformity -- but of a very "gross", undifferentiated kind. In 1976 Ross[210] examined those previous studies -- Campbell and Ross, Robertson, Rich and Ross, Ross and Blumenthal, Ross[211] -- that attempted to measure the impact of mandatory, "severe" sentences. He has pointed out the two main difficulties with mandatory sentences: (1) prosecutorial discretion -- prosecutors usually have discretionary power whether to charge the mandatory offence; thus it is a very effective plae bargaining mechanism; (2) juries may be unwilling to convict if they consider the mandatory penalty to be unfair. He concludes:

> The studies described here do suggest that if levels of actual punishment are to rise as intended, it may be necessary for the law-giver simultaneously to limit the discretion of legal actors and reduce their ability to resist the initiated change. Bearing in mind the complexity of the legal system and the manifold points of discretion, this is no simple order. If it is to inflict the mandated punishment, the legal serpent may have to be grasped on every coil.[212]

D. Summary

The foregoing analysis suggests that sentencing reform requires considerable forethought. The central questions that emerge from a review of both Canadian and American experience are: (1) should an attempt be made to reduce discretion? (2) If the answer to question (1) is yes; how, structurally, can discretion be reduced? and (3) if discretion is to be reduced can sentences be equitably differentiated?

This analysis has, in part, addressed all three questions. However, question 1 cannot be answered completely here -- it is ultimately a question of the legislative and judicial views of the costs of vague sentencing principles and the costs of disparity. This part of the paper has been primarily concerned with the structural question -- what will, or will not, effectively introduce a set of sentencing principles and reduce discretion -- given that a decision has been made that such changes are desirable. We can briefly summarize the conclusions of the analysis by suggesting a series of questions that should be asked of any proposed reform. These questions are: (1) does the reform clearly and understandably articulate the criteria according to which offeenders are to be differentiated? (2) Does the reform explicitly deal with the incarceration/non-incarceration issue? In other words does the reform specify the criteria to be utilized in deciding upon prison sentences? (3) Does the reform explicitly specify the criteria which determine differences in the length of prison sentences? (4) Does the schema attempt to provide guidelines as to the sentences of all, or the great majority of, convicted offenders? (5) Does the reform explicitly develop a method of dealing with plea bargaining arising from limited prosecutorial and trial resources? (6) Does the scheme take into account plea bargaining that arises from "weak" cases? (7) Does the proposal provide for temporal flexibility? This criterion is an attempt to recognize that both societal and judical values change over time and, sometimes, quite rapidly. (8) Does the reform allow for some jurisdictional flexibility? While jurisdictional variation does present greater normative problems than temporal variation there

are some arguments on its behalf. For example, a given jurisdiction may be experiencing a rapid increase in the incidence of a particular offense. (9) To what extent does the proposed reform allow flexibility where there are "hard cases"?

These questions deal with many of the structural problems of any sentencing reform. However, in some respects they beg a central question: what should the nature of and source of criteria that might be utilized in formulating sentencing guidelines be?

FOOTNOTES: PART IV

1. Advisory Council on the Penal System, The Length of Prison Sentences (Interim Report), Sentences of Imprisonment: A Review of Maximum Penalties (Final) (H.M.S.O., 1977, 1978).

2. The Expenditure Committee of the Home of Commons, The Reduction of Pressure on the Prison System, 15th Report, 1977-78, H.C. 662 (H.M.S.O., 1978).

3. S. Jaffary, Sentencing of Adults in Canada, (Toronto: University of Toronto Press, 1963).

4. An appendix (available from the author) presents a detailed year by year description of major changes in the law of sentencing. The appendix is divided into eleven sections: (1) parole; (2) remission; (3) temporary absences; (4) preventive detention; (5) capital punishment; (6) corporeal punishment; (7) fines; (8) binding over; (9) suspended sentences (10) forfeiture, compensation and restitution; (11) indeterminate sentences. The appendix primarily chronicles developments since 1930.

5. A.J. MacLeod, "Criminal Legislation" in Crime and Its Treatment in Canada edited by W.T. McGrath (Toronto: MacMillan Co., 1976), pp. 112-3

6. A.W. Mewett, Canadian Bar Review 45 (1967) at p. 735.

7. Ouimet Report, p. 185.

8. op. cit. p. 191.

9. Ibid., p. 15.

10. Ibid., p. 16.

11. Included in Report of the Royal Commission to Investigate The Penal System of Canada, 1938, at 167f (hereafter referred to as the Archambault Report).

12. Criminal Code, R.S.C. 1970, c. C-34, s. 294(a) for theft; s. 306(1) for breaking and entering.

13. Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971) at 358.

14. Evans, Developing Policies for Public Security and Criminal Justice, Special Study No. 23 (Ottawa: Economic Council of Canada, 1973) at 88.

15. Id. at 89.

16. Supra note 12, at 385-86.

17. Law Reform Commission of Canada, Imprisonment and Release Working Paper No. 11, (Ottawa: Information Canada, 1975) at 21.

18. As we shall see the recent U.S. usage of the term "guideline" is somewhat different. It usually implies specific guidelines that lay down relatively precise rules (see below).

19. Working Paper No. 11, supra note 17 at 41.

20. Id. at 18.

21. Id.

22. Stanley, Prisoners Among Us (Washington: Brookings Institution, 1976) at 56. This issue is discussed further in this section as well as in Part V.

23. Id. at 50.

24. For a general discussion of the difficulties of predicting sentencing, see Fagin, "The Policy Implications of Predictive Decision Making" (1976), 24 Public Policy 490, which reviews several areas of "social science" prediction. More specifically, see O'Leary and Glaser, "The assessment of risk in parole decision making", in West, ed., The Future of Parole (London: Duckworth, 1972) at 135 . Also see Hoffman, "Mandatory Release: A Measure of Type II Error" (1974), 11 Criminology 541; and Robinson and Smith, "The Effectiveness of Correctional Programs" (1971), 17 Crime & Delig. 17. Also see von Hirsch, Doing Justice (New York: Hill and Wang, 1976), dealing specifically with sentencing.

25. Working Paper No. 11, supra note 17 at 18.

26. In the parole area, there is evidence that "experts" (parole board members or psychologists) usually do no better, and often do worse, in predicting recidivism than predictive indices. See, for example, Wenk and Emrick, "Assaultive Youth: An Assaultive Potential of California Youth Authority Wards" (1972), 9 J. Research Crime & Delig. 171; Kozol, Boucher and Gorofalo, "The Diagnosis and Treatment of Dangerousness" (1972), 18 Crime & Delig. 393; and Diamond, "The Psychiatric Prediction of Dangerousness" (1974), 123 U. Pa. L. Rev. 439.

27. As Stanley, supra note 22, at 52, observes: the California study concluded:

> [T]he absence of excessive drinking; the presence of a spouse, legitimate or common law; along with conviction for crimes against persons (as contrasted with crimes against property); are the factors which are associated with (parole) success ... California research also shows that inmates receiving more visitors while in prison tended to experince less difficulty on parole.

28. Supra note 22.

29. Working Paper No. 11, supra note 17, at 18.

30. See text accompanying note 26, infra.

31. Working Paper No. 11, supra, at 18.

32. American Law Institute, Model Penal Code (Philadelphia: The Institute, 1962)..

33. Canadian Criminology and Corrections Association, Toward a New Criminal Law for Canada: Brief to the Law Reform Commission of Canada (Ottawa: Law Reform Commission of Canada (Ottawa: Law Reform Commission of Canada, 1973) at 25.

34. Model Penal Code, supra note 30; Council on Crime and Deliquency, Model Sentencing Act, 2d ed. repr. in (1972), 18 Crime & Delinq. 335; and National Commission of Reform of Federal Criminal Laws, Proposed New Federal Criminal Code (Washington: U.S. Gov't Printing Office, 1971).

35. National Conference on the Disposition of Offenders in Canada (Proceedings) (Toronto: U. of Toronto Centre of Criminology, May 14, 1972) at 62.

36. s. 10(1)(a)(iii) of the Parole Act, R.S.C. 1970, c. p-2 invites the Parole Board to "consider reform and rehabilitation." Parole Board to "consider reform and rehabilitation." Parole Boards in both the United States and Canada state that they use such criteria. For example, circulated criteria of the District Offices of the Ontario region of the National Parole Board included "the effort made by the inmate at selfimprovement while in prison" and "present attitude and motivation" (described by Carri re and Silverstone, The Parole Process (Ottawa: Law Reform Commission of Canada, Administrative Law Series, 1977) at 124). For similar evidence in the United States (New York State), see Hawkins, Parole Selection: The American Experience (Ph.D. dissertation, University of Cambridge, 1971).
In California, one study concluded:

> The substantial correlations among the three variables above (institutional progress, discipline, and estimates of likely parole outcome) suggest that parole board members weigh heavily institutional behaviour in forming their estimates of parole risks. If so, this logic is open to question ... (A) random sample of 144 Youth Corrections Act parole releases from fiscal year 1969 was taken in order to examine the relationships between record of prison punishment and parole outcome (two year follow-up) compared with 48 per cent of the 60 cases with known prison punishment. The difference is not statistically significant.

Hoffman, Paroling Policy. Feedback (Davis, Calif.: National Council on Crime and Delinquency, Research Centre, Report No. 8, 1972).

37. The Penal Code of California 1872, c. 4.5, Art. 1, 1170(a)(1)(1977).

38. This issue is discussed more fully in the subsequent section on United States reforms, see also Part III above.

39. Evans, supra, at note 14.

40. Law Reform Commission of Canada, The Principles of Sentencing and Dispositions, Working Paper No.3 (Ottawa: Information Canada, 1974) at 25.

41. Levin, "Toward a More Enlightened Sentencing Procedure" (1966), 45 Nebr. L. Rev. 499.

42. Id.

43. Diamond and Zeisel, "Sentencing Councils: A Study of Sentence Disparity and its Reduction," in Guttentag, ed., Evaluation Studies Review, Annual Vol. 2 (Beverly Hills: Sage Publications, 1977) at 617.

44. Id.

45. Id. at 620.

46. Id. at 608-09.

47. Id. at 621.

48. Supra note 35, at 62.

49. Federal Sentencing -- Institutes and Joint Councils, Pub. L. No. 85-752, 72 Stat. 845 (1958).

50. Judiciary and Judicial Procedure 1948, 28 U.S.C. 334(a) (1964).

51. Judiciary and Judicial Procedure 1948, 28 U.S.C. 334(a) (1964).

52. Youngdahl, "Development and Accomplishments of Sentencing Institutes in the Federal Judicial System" (1966), 45 Nebr. L. Rev. 513 at 515-16.

53. Bennett, Bureau of Prisons Annual Report (Washington: U.S. Gov't Printing Office, 1964) at 16.

54. From An Expression of Interest on the Part of the Department of Justice, a paper delivered at the Pilot Institute on Sentencing Proceedings, 26 F.R.D. 231 (1959) at 251.

55. Frankel, "Lawlessness in Sentencing" (1972), 41 U. Cin. L. Rev. 1 at 19.

56. Id. at 18.

57. National Council on the Disposition of Offenders in Canada (Proceedings), supra note 35, at 51.

58. Dorszynski v. United States, 418 U.S. 424 at 441-2, 94 S. Ct. 3042 at 3052 (1974), rev'g 484 F. 2d 849 (1973).

59. Id. at 455 (U.S.), 3058 (S.Ct).

60. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974), which applied the doctrine of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972).

61. Wolff v. McDonnell, id. at 564 (U.S.), 2979 (S.Ct.).

62. Weigel, "Appellate Revision of Sentences: To Make the Punishment Fit the Crime" (1968), 20 Stan. L. Rev. 405 at 420.

63. See: A. Vining and C. Dean "Towards Sentencing Uniformity: Integrating the Normative and the Empirical Orientation", Chapter 7 in New Directions in Sentencing, pp. 118-154, edited by B. Grosman, Toronto: Butterworths, 1980. See also Part III.

64. Evans, supra at 95; data from 1969-70. Later evidence from Mandel, "Rethinking Parole" (1975), 13 Osgoode Hall L.J. 501 at 512 suggests approximately similar figures for more recent years.

65. Landreville and Carriere, "Release Measures in Canada" in Studies in Imprisonment (Ottawa: Law Reform Commission of Canada, 1976), at 84.

66. Street, Canada's Parole System, A Presentation to the Subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs (Ottawa: Information Canada, 1972) at s. II.

67. See text accompanying notes 78-81, infra.

68. See Decore, "Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity" (1964), 6 Crim. L.Q. 324.

69. Street, supra note 66, at 1. This is essentially a paraphrase of the Parole Act, R.S.C. 1970, c. P-2, s. 6: (T)he Board has exclusive jurisdiction and absolute discretion to grant, refuse to grant or revoke parole.

70. The Parole Act, s. 10(1) provides that the Board may:
(a) grant parole to an inmate subject to any terms or conditions it considers desirable, if the Board considers that

(i) in the case of a grant of parole other than day parole, the inmate has derived maximum benefit from imprisonment,
(ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
(iii) the release of the inmate on parole would not constitute an undue risk on society.

71. Project, "Parole Release Decisionmakers and the Sentencing Process" (1975), 84 Yale L.J. 810 at 826-27. See also notes 22, 24, 26, 27 and 36 supra, as well as Part III.

72. Commenting on "unreformed" parole boards (before recent changes) Rubin comments: "The California and Washington Boards not only fix, they may refix sentences. This gives them enormous power to punish prisoners not solely for their crimes but also for their behaviour in prison." Rubin et al., The Law of Criminal Correction (St. Paul: West, 1963) c. 4 at 14 (In general, see c. 4 and c. 14). Also see Prettyman, "The Indeterminate Sentence and the right to treatment" (1972), 11 Am. Crim. L. Rev. 7 at 35.

73. Prettyman, id. at 35.

74. Foster et al., Definite Sentencing: An Examination of Proposals in Four States (Lexington: Council of State Governments, 1976) at 8-9.

75. Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974) at 14.

76. Von Hirsch, Doing Justice: the choice of punishments (New York: Hill and Wang, 1976). See below the discussion in Part III on just deserts.

77. Remebering that both subsections (ii) and (iii) of s. 10(1)(a) of the Parole Act, R.S.C. 1970, c. P-2, imply prediction -- whether the offender will recidivate or not.

78. Street, supra note 66, s. IV at 3.

79. Id.

80. Id.

81. Id.

82. Parole Act, R.S.C. 1970, c. P-2, s. 10(1)(a)(iii).

83. Mandel, supra note 64 at 512.

84. Id. at 517.

85. Carriere and Silverstone, The Parole Process (Ottawa: Law Reform Commission of Canada, Administrative Law Series, 1977) at XV.

86. Zimring, Making the Punishment Fit the Crime -- A Consumer Guide to Sentencing Reform, Occasional Paper No. 12 (Chicago: U. of Chicago Law School, 1977) at 8.

87. See Prettyman, supra note 72.

88. See: A. von Hirsch and K.J. Hanrahan, The Question of Parole (Cambridge, Mass.: Ballinger, 1979).

89. M. Kannensohn, A National Survey of Parole-Related Legislation (Washington, D.C.: Bureau of Justice Statistics, U.S. Dept. of Justice, 1979).

90. Stats Can. 1977 C. 53, s. 41 and s. 45.

91. Landreville and Carriere, supra note 65.

92. Canadian Criminology and Corrections Association, The Parole System in Canada: an Official Statement of Policy (Ottawa: The Association, 1973).

93. Hugessen, Task Force on Release of Inmates Report (Ottawa: Information Canada, 1973).

94. Supra note 92.

95. Law Reform Commission, "Studies on Imprisonment," in Price and Gold, eds., Legal Controls for Dangerous Offenders (Ottawa: Ministry of Supply & Services, 1976) quoting from Wechler, "Sentencing, Correction, and the Model Penal Code" (1961), 109 U. Pa. L. Rev. 465 at 483.

96. Evans, supra note 14, at 90.

97. See text accompanying notes 17-38, supra.

98. Criminal Law Amendment Act, 1977, S.C. 1976-77 (2nd Sess.), c. 53.

99. Criminal Code, R.S.C. 1970, c. C-34, s. 687 as am. by S.C. 1976-77, c. 53, s. 14, says, in part: "serious personal injury offence" means

(a) an indictable offence (other than high treason, first degree murder or second degree murder) involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to inflict severe psychological damage upon another person, and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sexteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).

100. Criminal Code, R.S.C. 1970, c. C-34, s. 688 (a) as am. by S.C. 1976-77, c. 53, s. 14. The evidence for such an assessment is based upon:

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or ...

101. Criminal Code, R.S.C. 1970, C. C-34, s. 689(1)(a) as am. by S.C. 1976-77, c. 53, s. 14.

102. Criminal Code, R.S.C. 1970, c. C-34, s. 695.1(1) as am. by S.C. 1976-77, c. 53, s. 14.

(1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, forthwith after the expiration of three years from the day on which that person was taken into custody and not later than every two years thereafter, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under the Parole Act and, if so, on what conditions.

103. Supra notes 95-96.

104. Section 688(2) previously read:

(2) For the purposes of subsection (1), an accused is an habitual criminal if (a) he has previously, since attaining the age of eighteen years, on at least htree separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading

persistently a criminal life, or (b) he has been previously sentenced to preventive detention.

105. Criminal Code, R.S.C. 1970, c. C-34, s. 687, as am. by S.C. 1976-77, c. 53, s. 14.

106. Criminal Code, R.S.C. 1970, c. C-34, s. 687, as am. by S.C. 1976-77, c. 53, s. 14.

107. Criminal Code, R.S.C. 1970, c. C-34, s. 688 (a) as am. by S.C. 1976-77, c. 53, s. 14.

108. Law Reform Commission of Canada, Diversion, Working Paper No. 7 (Ottawa: Information Canada, 1975) at 23.

109. Ericson, "From Social Theory to Penal Practice, The Liberal Demise of Criminology Courses" (1977), 19 Can. J. of Crim.and Corr. 2 at 184. See generally Note, "Addict Diversion: An Alternative Approach for the Criminal Justice System," (1972) 60 Geo. L.J. 667 : Note, "Pretrial Diversion from the Criminal Process," (1974) 83 Yale L.J. 827 : Comment, "Pretrial Diversion: The Threat of Expanding Social Control," (1975) 10 Harv. C.R.-C.L. L. Rev. 180.

110. Note, "Pretrial Diversion. Problems of Due Process and Weak Cases" (1979) 59 Boston University Law Review 305, 311.

111. McBride and Dalton, "Criminal Justice Diversion for Whom?," in Cohn, Criminal Justice Planning and Development, Sage Research Progress in Criminology, Vol. 4 (Beverly Hills: Sage Publications, 1977).

112. For a recent review see: S. Moyer, Post-Charge Pre-Trial Diversion: A Bibliographic Review, (Report Submitted to the Solicitor General, Canada, Nov., 1978). Also: Lundman, "Will Diversion Reduce Recidivism?" (1976), 22 Crime & Deling. 428. Also see Dixon, An Evaluation of Policy-related Research on the Effectiveness of Prevention Programs (Nashville: George Peabody College for Teachers, 1974).

113. Can., Community Participation in Sentencing (Ottawa: Ministry of Supply and Services, 1976) at Working Papers -- Restitution and Compensation.

114. Boyd, "An Examination of Probation" (1977-78), 20 Crim. L.Q. at 380.

115. Klein, "Revitalizing Restitution: Flogging a Horse that may have been Killed for Just Cause" (1977-78), 20 Crim. L.Q. at 383.

116. The Following account of plea bargaining is largely taken from S.N. Verdun-Jones and F.D. Cousineau, "Cleaning the Aegean Stables: A Critical Analysis of Recent Trends in teh Plea Bargaining Debate in Canada." (1979) 17 Osgoode Hall Law Journal 1.

117. Canadian Bar Association, Code of Professional Conduct (Ottawa: C.B.A., 1974), chap. VIII, "The Lawyer as Advocate," Commentary No. 10, at 30-31.

118. Law Reform Commission of Canada, Fourth Annual Report (Ottawa, Information Canada, 1974-75) at 14. Also see Criminal Procedure: Control of the Process, Working Paper No. 15 (Ottawa: Information Canada, 1975) at 44-47.

119. Law Reform Commission of Ontario, Report on Administration of Ontario Courts, Part II (Toronto: Ministry of the Attorney General, 1973) at 119-25.

120. Ferguson and Roberts, "Plea Bargaining: Directions for Canadian Reform " (1974), 52 Can. B. Rev. 498.

121. Verdun-Jones and Cousineau, supra note 116 at 229.

122. Ibid. 238-239.

123. (1976) Que. C.A. 527 at 528, 35 C.R.N.S. 222 at 226 per Rinfret J.A.

124. See also Attorney-General of Canada v. Roy (1972), 18 C.R.N.S. 89 at 92 (Que. Q.B.).

125. (1976) 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta. C.A.).

126. Id. at 144-45 (W.W.R.), 108-09 (C.C.C.). Although McDermid J.A. dissented from the actual decision in Wood, the principles he expounded were approved by the majority of the Court. (See 147 (W.W.R.), 110 (C.C.C.) per Moir J.A.).

127. Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts (Toronto: University of Toronto Press, 1965) at 89.

128. Toward Unity: Criminal Justice and Corrections (Ouimet Report) (Ottawa: Queen's Printer, 1969) at 134.

129. Canadian Civil Liberties Education Trust, Due Process Safeguards and Canadian Criminal Justice (Toronto: Canadian Civil Liberties Education Trust, 1971) at 82-83. For an excellent critique of the methodological limitations of this study, see Wilkins and Jeffries, "Due Process Safeguards and Canadian Criminal Justice: A Critique" (1971-72), 14 Crim. L.Q. 220.

130. Sentencing as a Human Process, supra note 13 at 270.

131. Decision Making -- The Canadian Criminal Court System: A Systems Analysis, Vol. II (Toronto: University of Toronto Press, 1973) at 313.

132. Les chemins de la justice -- etude du fonctionnement des cours criminelles a Montreal (Montreal: Groupe de recherche en jurimetrie, Faculte de Droit, U. de M., 1976) at 32.

133. Ministry of the Attorney General for B.C., Monthly Court List for January to June 1976. (Unpublished Internal Report).

134. B. Grosman, The Prosecutor: An Inquiry into the Exercise of Discretion (Toronto: University of Toronto Press, 1969).

135. Wynne and Hartnagel, "Race and Plea Negotiations: An Analysis of Some Canadian Data" (1975) 1 Canadian Journal of Sociology 147.

136. Hagan, Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice (1975), 65 J. Crim. L. & Criminology 536.

137. Klein, Let's Make a Deal: Negotiating Justice (Toronto: D.C. Heath, 1976)

138. Verdun-Jones and Cousineau, supra note 116 at 259.

139. There is no universally accepted usage of the terms "determinate" and "indeterminate." By and large, "indeterminate" sentence systems are those where the primary release decision is made subsequent to the initial sentencing -- in other words, after the offender is already incarcerated. Typically, the judge decides the length of incarcerative sentences that are not longer than one year (i.e., jail sentences are determinate, while prison sentences are indeterminate). Determinate sentences are those in which the judge has the primary decision regarding the length of incarceration. According to this definition, Canada has a "hybrid" system because, although the judge sets the sentence, the Parole Board has considerable discretion as to the actual time served. See Mandel).

140. Wildvasky, "The Strategic Retreat on Objectives" (Summer 1976), 2 Policy Analysis 521.

141. Kannesohn, supra note 78 at 6.

142. Gettinger, Maine and Change But No Revolution (June 1977). Corrections Magazine, repr. at 2.

143. Id.

144. Id.

145. Id.

146. Gettinger, Indiana: A Harsh Compromise (June 1977), Corrections Magazine repr. at 1.

147. Id.

148. Kannesohn supra note 89 at 5-6.

149. The Penal Code of California 1872, c. 4.5, Art. 1, 1170.1(c) (1977) (repeated). Now rewritten as 1170.1(g) (1979).

150. The responsibilities of the Judicial Council are laid out in The Penal Code of California 1872, c. 4.5, Art. 2, 1170.3, 1170.4, 1170.5, and 1170.6 (a), (b), (c), and (d). This section is unaffected by A.B. 476.

151. Judicial Council, California Rules of Court, West's Annotated California Codes, Vol. 23, Pt. 2, Div. 1-A, Rule 403, Advisory Committee Comment.

152. For the empirical evidence, see Vining, The Limits of Individualization: Sentencing Variation and Disparity in California (unpublished Ph.D. thesis, Berkeley, 1979).

153. Judicial Council, supra note 57, Rule 408, Advisory Committee Comment.

154. Id., Rule 409, Advisory Committee Comment.

155. Id., Rule 416, Advisory Committee Comment.

156. Id., Rule 414, Advisory Committee Comment.

157. Id.

158. Id., Rule 416, Advisory Committee Comment.

159. Id., Rule 421, Advisory Committee Comment.

160. Id. See The Penal Code of California 1872, c. 4.5, Art. 1, 1170"1 (a), (c) (1977).

161. California Rules of Court, supra note 140, Rule 441.

162. Id.

163. Vining, supra note 152 at 286, describes these procedures.

164. The Adult Authority historically was the "paroling" or release body.

165. The Penal Code of California 1872, c.4.5,Art.1, 1170(a)(2)(d).

166. The Penal Code of California 1872, c. 4.5, Art. 1, 1170(a)(2)(f).

167. The Penal Code of California 1872, c. 4.5, Art. 1, 1170(a)(2)(f).

168. See Vining, supra note 152, c. IV, which also reviews other empirical evidence.

169. See Landes, "Legality and Reality: Some Evidence on Criminal Procedure" (1974), 3 J. Leg. Studies 287.

170. See Weimer, "Plea Bargaining and the Decision to go on Trial: The Application of a Rational Choice Model" (1978), 10 Policy Sciences 9. Also see Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts" (1975-76), 89 Harv. L. Rev. 293.

171. See Verdun-Jones and Cousineau, supra note 116

172. For the United States, see Newman, Conviction: The Determination of Guilt or Innocence Without Trial (Boston: Little, Brown, 1966); Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1975), 84 Yale L.J. 1179: and Alschuler, "The Prosecutor's Role in Plea Bargaining" (1968), 36 U. of Chi. L. Rev. 50.

173. This places the appellate court in a difficult position, as it can either abandon the responsibility of ensuring the appropriate sentence or it can participate in a "broken promise" to the accused. Several decisions of the appellate courts highlight this dilemma. In R. v. Kirkpatrick (1971) Que. C.A.337, and R. v. Mouffe, Unreported, Sept. 4, 1971 (Que. C.A.), the Quebec Court of Appeal increased the sentences in spite of the Crown's original bargain as to sentencing. This is obviously a very unfortunate outcome in terms of basic justice. On the other hand, in another Quebec case, A.G. Can. v. Roy, (1972), 18 C.R.N.S. 89 (Que. Q.B.), the Court of Queen's Bench refused to increase the sentence because of the Crown's bargain. Courts of appeal in other provinces also have refused to revise sentences in these circumstances, while at the same time stating that they believe the bargained sentence to be inappropriate.

174. The Penal Code of California 1872, c. 4.5, Art. 1, 1170(a)(1).

175. Von Hirsch, supra note 24.

176. Johnson and Messinger, California Determinate Sentence Statute: History and Issues (Berkeley: unpub. draft, April 1977) at IV-5.

177. California Rules of Court, supra note 151, Rule 441, Advisory Committee Comment.

178. In California all incarcerative sentences up to one year in length are in county jails, sentences greater then a year in length involve confinement in state prison.

179. Vining, supra note 152, at 296.

180. Johnson and Messinger, supra note 176, at IV-3.

181. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, paper delivered at the Conference on Determinate Sentencing, held at Boalt Hall, University of California at Berkeley, June 3, 1977, at 24.

182. Singer Just Deserts, New York: (Ballinger, 1979).

183. S. 1437, 95th Cong., 1st Sess. (1977). a large number of bills on sentencing reform have been introduced in the last several years; also see S. 1540, 90th Cong., 1st Sess. (1967); S. 2722, 89th Cong., 1st Sess. (1965); S. 823, 88th Cong., 1st Sess. (1963); S. 2879, 87th Cong., 2d Sess. (1962). S. 1437 was chosen for examination because of its recency, its typicality, and the prominence of its sponsor, Senator Edward Kennedy.

184. Id.

185. Project, supra note 186 at 824, from Hoffman and Beck, Parole Decision Making: A Salient Factor Score (April 1974), 13 U.S. Board of Parole Research Unit Report 2 at 9.

186. Project, "Parole Release Decisionmakers and the Sentencing Process" (1975), 84 Yale L.J. 810 at 824 n. 72 and 896, n. 416.

187. Id. at 868.

188. Id. at 881-83.

189. Bye v. United States, 435 F. 2d 177 (2d. Cird. 1970).

190. Coburn, "Disparity in Sentences and Appellate Review of Sentencing" (1971), 25 Rutgers L. Rev. 207 at 209.

191. Id. (Footnote omitted.)

192. Project, supra note 186 at 81.

193. Working Paper No. 11, supra note 17, at 41-42.

194. Law Reform Commission of Canada, Dispositions and Sentences in the Criminal Process: Guidelines (Ottawa: Information Canada, 1976) at 46.

195. Carriere and Silverstone, supra note 85.

196. Id. at 138-39.

197. Hugessen, supra note 93.

198. Id. at 32.

199. Id. at 33.

200. Oregon revised statutes (ORS) 144.110-114.125, 144.775-144.790.

201. For a complete description see: A. von Hirsch & J.F. Hanrahan, The Question of Parole (Cambridge, Mass., Ballinger, 1979), 92-97 and Appendix IV.

202. Washington information summarized from Singer supra note 182.

203. A. von Hirsch and K.F. Hanrahan, supra note 201 at 87.

204. Minnesota Session Laws of 1978, ch. 723.

205. von Hirsch and Hanrahan supra note 201 at 87.

206. Pennsylvania Session Laws of 1978, ch. 319.

207. Ibid, 1384.

208. Ibid, 1386(c).

209. Kannensohn, supra note 89 at 10.

210. H. Laurence Ross, "The Neutralization of Severe Penalties: Some Traffic Law Studies",(1976) 10 Law and Society Review 403.

211. See: D.T. Campbell, and H. Laurence Ross "The Connecticut Crackdown on Speeding:
Time-series Data in Quasi-Experimental Analysis," (1968) 3 Law & Society Review 33.; L. Robertson, Robert F. Rich, and H. Laurence Ross "Jail Sentences for Driving while Intoxicated in Chicago: A Judicial Action that Failed," (1973) 8 Law & Society Review 55.; Ross, H. Laurence, Settled Out of Court: The Social Process of Insurance Claims Adjustment. Chicago: Aldine Publishing (1970).; _____ "Law, Science and Accidents: The British Road Safety Act of 1967," (1973) 2 Journal Studies 1.; _____ "The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway." (1975) 4 Journal of Legal Studies 285.; _____and Murray Blumenthal "Sanctions for the Drinking Driver: An Experimental Study," (1974) 3 Journal of Legal Studies 53.; _____ and _____ "Some Problems in Experimentation in a Legal Setting," (1975) 10 American Sociologist 150.

212. Ross (1976), supra note 210 p. 579.