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REPRESENTATION OF THE ACCUSED

Legal Representation at Trial and Corrections

The Committee considers that equal justice under the law requires that no person charged with a serious offence should be precluded by poverty from having the assistance of counsel.

In a democratic society, as the Committee has previously observed, the effective enforcement of the criminal law requires public support. The administration of criminal justice cannot hope to command public respect if it is at variance with fundamental concepts of fairness and if it operates in such a way that an accused person is disadvantaged because he lacks the financial means to procure the assistance of a lawyer. The wider interests of society as a whole, no less than those of the individual, are thus involved.

From the standpoint of corrections, the criminal law must, so far as possible, avoid dealing with the individual, who is subject to its process, in a way that provides just cause for bitterness and leaves him with a sense of injustice.

During its visits to Canadian penal institutions, the Committee was informed by senior staff officials that lack of adequate legal representation, or none, was a frequent cause of bitterness on the part of many inmates. It was also a contributing factor in creating or aggravating hostilities and anti-social attitudes. The likelihood that the accused will be embittered if he has not been properly represented has also been emphasized in written and oral representations made to the Committee.

At the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Stockholm in August, 1965, the following statement of principle was enunciated:

... that adequate and timely legal assistance must be available as of right to all arrested and accused persons at a sufficiently early stage in the criminal process adequately to protect their human rights and to ensure the fair and

non-discriminatory application of the criminal law to all citizens. This aim is justified not only in terms of human rights and social decency, but also because the failure to provide adequate legal aid may well leave the convicted person with a sense of injustice. . . .¹

The view was also expressed at the Congress that the sense of injustice that may be created in the accused by discriminatory application of the criminal law tends to increase recidivism.

A study of 184 persistent offenders in Canadian penitentiaries, conducted as part of a research program by the Department of Psychiatry of McGill University, showed that the majority were without counsel at their first appearance in court. Most pleaded guilty. The authors state:

The number of men who appeared at court without counsel among our 184 subjects is alarming, but more disturbing is that even when they knew their legal rights, which most did not at their first appearance in an adult court, they were unable to secure them or to use their right to defend themselves through ignorance, youth, emotional immaturity or lack of money. They faced the law undefended.²

The Committee is of the view that a person experiencing a deep-seated sense of injustice is unlikely to engage in honest self-criticism or to identify with the values of those he considers part of an unjust system. Thus, so long as he considers himself the victim of injustice he is unlikely to be receptive to treatment and training programs based on a recognition of a need to change.

On the other hand, the offender receiving proper legal representation may well feel that his case is being dealt with according to a process which is fair and rational, and which does not abridge his dignity as a human being. Feeling that he has experienced fairness in his encounter with the representatives of the administration of justice during a time of personal crisis, he is more likely to identify with the values of society.

The correlative proposition that adequate legal representation of those charged with offences will minimize or reduce the sense of injustice with which many convicted persons are left at the present time derives strong support from surveys conducted in Ontario.

After the Ontario Legal Aid Plan had been in operation for three months, a survey was conducted with respect to the operation of the plan. Among those interviewed who had received legal aid were persons who had been convicted and sentenced to imprisonment. Ninety-eight per cent of all persons interviewed stated that they felt they had been well represented, and that everything had been said or done on their behalf that could have been.

¹ United Nations. *Third United Nations Congress On The Prevention of Crime And The Treatment of Offenders*. New York: U.N. Publications, 1967, p. 23.

² Cormier, B. M., M.D., and J. M. Sangowicz, M.D., M. Kennedy, P.S.W., A. Bert, P.S.W., R. A. Washbrook, M.D., A. T. Galardo, M.D., R. Boyer, Ph.D., A. L. Thiffault, L.Ps. "The Persistent Offender and His Sentences". *9 Can. Psychiatric Assoc. J.* 462-474 (1964).

In subsequent surveys, the vast majority of those who received legal aid have continued to express similar sentiments. Not surprisingly, a few voiced expressions of dissatisfaction, even where they had been represented by lawyers of superior experience and ability.

The Committee emphasizes the need for *adequate* representation. There is a vast difference between legal representation characterized by careful preparation and personal encounter between lawyer and client and representation which is essentially casual, hurried and fleeting, and which may leave the accused bewildered and confused.

The need for the assistance of counsel at his trial by one charged with a crime, a conviction for which may entail the most serious consequences, scarcely requires elaboration. Writing in the last half of the nineteenth century, Sir James Stephen in this connection said:

... if the facts are at all numerous, if the witnesses either lie or conceal the truth, an ordinary man, deeply ignorant of law, and intensely interested in the result of the trial, and excited by it, is in practice utterly helpless if he has no one to advise him.³

In more recent times Mr. Justice Sutherland in *Powell v Alabama*⁴ has eloquently and forcefully stated the defendant's need for a lawyer:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

A Committee was appointed in September, 1961, by the Board of Directors of the John Howard Society of British Columbia to report on legal aid in British Columbia.⁵ In its report the Committee asked⁶:

Our Criminal Code in Canada provides that a person is entitled in a criminal case: "to make full answer and defence personally, or by counsel." Can a person who is untrained in the law ever make a *full* answer and defence personally without trained counsel? Our Bill of Rights says that an individual in Canada has the right to "equality before the law." Can an accused person be "equal before the law" if required to defend himself without counsel

³ Stephen, Sir J. A. *A History of the Criminal Law of England*. 3 vols. London: Macmillan & Co., 1883, vol. 1, p. 382. Sir James Stephen was the author of the English draft Code from which the Canadian Criminal Code of 1892 was largely derived.

⁴ 287 U.S. 45, pp. 68-69.

⁵ The Committee consisted of Mr. Clare Skatfield, Chairman; Professor Graham Parker, Mr. Vaughan Lyon and Professor John Fornataro.

⁶ "Report on Legal Aid in British Columbia." 7 *Crim. Law Q.* 72 p. 74 (1964-65).

when arrayed against him on the other side are the well organized and trained police with their scientific laboratories and experienced investigators and legally trained prosecutors?

The Dominion Bureau of Statistics shows that convictions are registered against approximately 90 per cent of all those charged with indictable offences in Canada. During the years 1955 to 1966 inclusive, the conviction rate ranged from a low of 87.3 per cent in 1955 to a high of 90.2 per cent in 1964. The conviction rate in 1966 was 89.5 per cent. As professor Friedland has pointed out, the Dominion Bureau of Statistics ignores withdrawals in arriving at the conviction rate. If withdrawals were counted as acquittals, the conviction rate would be substantially lower and the acquittal rate correspondingly higher.⁷

It is perhaps open to question whether withdrawals which occur because the police at the present time consider it necessary to bring a person who has been arrested without a warrant before a justice of the peace in order to release him, where subsequent investigation has cleared him, or has failed to produce sufficient evidence upon which to proceed, should be included as acquittals.

It must also be remembered that a very large percentage of the convictions are registered as a result of pleas of guilty. Although statistics are not collected by the Dominion Bureau of Statistics to show the percentage of convictions which result from pleas of guilty, 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. These figures are supported by limited studies which have been made. If 50 per cent of all convictions result from pleas of guilty the conviction rate in respect of charges which are tried on a plea of not guilty would be approximately 81 per cent, and the acquittal rate in respect of such charges would be approximately 19 per cent.

An analysis of the results of 963 cases conducted by 187 lawyers in different parts of the province under legal aid certificates under the Ontario Legal Aid Plan over a three-month period, shows an acquittal rate of approximately 35 per cent with respect to charges of indictable offences.⁸ This percentage of acquittals would seem to be startlingly high compared to the national average or even to the acquittal rate with respect to clients who are able to pay for their legal services.

It must be borne in mind, however, that a high percentage of those who plead guilty do so at the time of their first court appearance. Consequently, a considerable proportion of the total number of those pleading guilty in

⁷ 41 *Can. Bar Rev.* 475 (1963). Based on a study of 5,539 cases in the Magistrates' Courts in Toronto of which 2,645 cases were in respect of indictable offences, Professor Friedland arrived at a conviction rate of 72 per cent for indictable offences, counting withdrawals as acquittals. The withdrawals exceeded the acquittals, namely, 16 per cent withdrawals as against 11 per cent acquittals. See also Friedland, M. L. *Detention Before Trial*. Toronto: U. of T. Press, 1965, p. 77.

⁸ Statistics supplied by D. J. McCourt, Controller under the Ontario Legal Aid Plan.

Ontario would have pleaded guilty, assisted by duty counsel under the Ontario Legal Aid Plan, prior to the issuing of a certificate, which would inflate the acquittal rate of those to whom certificates were issued. Moreover, the 35 per cent acquittal rate includes withdrawals, which would also tend to inflate the acquittal rate. Most withdrawals, however, occur at the time of the first court appearance if the withdrawal is being used to clear a case where arrest has been made without warrant; these withdrawals would therefore have occurred when the accused was being assisted by duty counsel. Hence, the withdrawals at the stage where a certificate has been issued would not be as numerous and would consequently be of less significance.

On the other hand, the 963 cases would also include cases where pleas of guilty have been entered on the advice of defence counsel, acting under a certificate. This would, of course, reduce the acquittal rate.

In the Province of Alberta, which has a government-supported legal aid plan, the statistics are seemingly even more dramatic.⁹ Legal aid in criminal cases was granted in 1967 to 1,563 persons in the Province of Alberta. Legal aid in Alberta is primarily confined to indictable offences. The results were as follows:

Number of cases in which legal aid provided	1,558
Convictions	740
Acquittals, dismissals and withdrawals	519
New trial ordered	5
Pending	294

The acquittal rate was, accordingly, approximately 41 per cent. The fact that the Alberta and Ontario figures are roughly comparable is in itself significant. The somewhat higher acquittal rate in legally aided cases in Alberta may be accounted for by the fact that legal aid in Alberta, with one exception, is not extended to those indictable offences of a less serious nature which the magistrate is empowered to try without the consent of the accused. The conviction rate tends to be higher with respect to this class of offence than that with respect to the more serious indictable offences.

In contrast to the above figures, the *conviction* rate in respect of indictable offences in 1963 in a province which has no organized legal aid was 97.6 per cent.¹⁰

These figures must be interpreted with caution because of the limited nature of the statistics presently available. They do, however, after making allowance for the above factors, strongly support the natural assumption that an accused person who is denied the services of a lawyer because of poverty has not received equal justice, and they indicate that the right to equality before the law has not been achieved in practice. The percentage of acquittals in cases where legal aid has been granted cannot be taken as the only measure of the value of counsel. Even where a conviction has been registered, the accused

⁹ Statistics supplied by the Department of the Attorney-General of the Province of Alberta.

¹⁰ *Canada Year Book 1966*, p. 424.

may have derived a considerable benefit from the assistance of counsel in bringing out facts in mitigation.

It is axiomatic that no innocent person should be subject to correction.

In any system of criminal law, whatever precautions are taken, some miscarriage of justice will inevitably occur. The damage done to the individual in such cases is obvious and irreparable. What is frequently overlooked is the grave damage to society, in terms of loss of confidence in the administration of justice, when a miscarriage of justice occurs.

Providing an accused person with competent counsel at a sufficiently early stage for legal assistance to be effective is a powerful and additional safeguard against an innocent person being convicted. It is an additional assurance that a person, although not entirely free from criminality, will not be convicted of a more serious crime than that warranted by the facts.

A high percentage of those charged with criminal offences cannot afford to employ a lawyer.

The Joint Committee on Legal Aid was appointed by the Attorney-General of Ontario in 1963. In its report the Joint Committee indicated that probably 60 per cent of all persons accused of serious offences in Ontario could not afford to retain a lawyer.¹¹ The report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice in the United States, which was submitted on February 25, 1963, states:

It has been estimated that in the country as a whole, in state as well as in federal courts, about sixty per cent of the accused are financially unable to obtain counsel. In some courts, particularly the small-crimes courts in our large cities, the number of unrepresented defendants may often far exceed even that fraction.¹²

The Committee of the John Howard Society of British Columbia, whose report is dated June 25, 1963, was of the opinion that probably over one-half of all accused persons in Canada charged with indictable offences were undefended at trial.

Professor Friedland, prior to the enactment of the Ontario Legal Aid Act 1966, found as a result of a study of some 5,539 cases in the magistrates' courts in Toronto that over one-half of those defendants who pleaded not guilty to a charge in respect of an indictable offence, and who were in custody at their trial, were not represented by counsel. Ninety-five per cent of those persons in custody who pleaded guilty on their first appearance in court were not represented by counsel.

The Committee has not attempted to arrive at exact figures for the whole of Canada with respect to the percentage of persons charged with serious

¹¹ Ontario. *Report of the Joint Committee on Legal Aid*. Toronto: Queen's Printer, 1965, p. 19.

¹² United States. *Report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice*. Washington: U.S. Gov't Printing Office, 1967, p. 18.

offences who lack the financial means to employ counsel. However, discussions with officials in the corrections field and members of the Bar across Canada, as well as our own observations and experience, lead us to believe that the figure is not substantially different from that estimated in the reports to which reference has been made.

The number of persons requiring legal representation in criminal matters who are either unable to pay any part of the costs or are unable to pay the whole cost involved in retaining counsel for themselves, is further demonstrated by the number of persons who have received legal aid in criminal cases during the first twelve months of the operation of the Ontario Legal Aid Plan. During that period, commencing on March 29, 1967, and ending March 31, 1968, some 18,502 certificates were issued in criminal matters and 52,668 persons were assisted by duty counsel in magistrates' courts. In addition, 9,550 provisional certificates were issued, approximately half of which were issued in respect of criminal matters.¹³

Legal Representation as a Human Right

It was not until 1836¹⁴ that an accused in England charged with a felony (the name given to the more heinous class of offences other than treason) was entitled to the assistance of counsel with respect to all aspects of his trial. Similar provisions were enacted in Canada in 1841,¹⁵ from which s. 557(3) of the present Criminal Code is derived.

Section 557(3) of the Criminal Code, which deals with indictable offences, provides:

- (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

Section 709 of the Criminal Code, which deals with summary conviction offences, provides:

- (1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.
- (2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

The right to counsel originally meant no more than that an accused who had retained counsel was entitled to his assistance. From the standpoint of the jurisdiction of a court to try an indigent defendant who lacks counsel, the right to counsel under Canadian law still has this limited meaning. The right to counsel in this legal sense loses much of its meaning if the accused is too poor to hire a lawyer. The concept of the right to counsel as a social

¹³ Statistics supplied by D. J. McCourt, Controller under the Ontario Legal Aid Plan.

¹⁴ 6 & 7 WILL. 11, c. 114.

¹⁵ 4 & 5 VICT., c. 24.

or human right implying an obligation on the part of the state to provide counsel for an accused who lacks the means to obtain the services of counsel for himself has largely developed in contemporary society.

In the landmark decision in *Gideon v Wainwright, Corrections Director*,¹⁶ decided in 1963, the Supreme Court of the United States held that the right of a defendant to have the assistance of counsel is a fundamental right, and that the trial of an indigent defendant charged with felony in a state court, whose request to have counsel assigned to him has been denied, is invalid as being in violation of the due process secured by the Fourteenth Amendment.

It is not without interest that Gideon, who was convicted of breaking and entering and sentenced to five years imprisonment at his first trial when he was unrepresented, was acquitted at his second trial after the Supreme Court—because he had not been represented by counsel—ordered a new trial.

The same rule had been enunciated twenty-five years earlier with respect to trials in the federal courts of the United States in which the right to counsel is secured by the Sixth Amendment.

The English and Canadian courts, unlike the Supreme Court of the United States, have never held that the assistance of counsel, unless the defendant has waived his right to counsel, is a requirement of a valid trial. In *Reg. v Piper*¹⁷ the accused pleaded guilty to a charge under s. 125 (a) of the Criminal Code of unlawfully escaping from prison. The accused when apprehended was still on the penitentiary grounds. He was not represented by counsel; made no request for counsel and was not informed that counsel was available to him. The Manitoba Court of Appeal in sustaining the conviction said:

It would have been preferable if [the magistrate] had informed the accused that he might request the services of the Legal Aid Committee but, under the circumstances of the case, there was no infringement of any rights guaranteed under the *Bill of Rights* since he was not deprived of the privilege to retain and instruct counsel.

The court rejected the argument of counsel that the right to counsel in a criminal trial is a fundamental right without which a fair trial is impossible and expressed the view that the right contended for was a matter for legislation.

The English Court of Criminal Appeal has, however, not hesitated to quash the conviction of a defendant who, in the opinion of the court, has been improperly denied legal aid, where the court was of the opinion that

¹⁶ 372 U.S. 335 (1963).

¹⁷ (1964), 51 D. L. R. (2d) 534. See also Grosman, Brian A. "The Right to Counsel in Canada". 10 *Can. Bar J.* 189 (1967); Tarnopolsky, Walter S. "The Lacuna in North American Civil Liberties—The Right to Counsel in Canada". 17 *Buffalo Law Rev.* 145 (1967).

the result of the trial might have been different if he had had a lawyer, or where the refusal of legal aid has rendered the trial unsatisfactory.¹⁸

The Committee is of the opinion that legal representation is a matter of right and not an act of grace or an extension of charity; that it is a responsibility of government. Moreover, we feel that the administration of criminal justice cannot be regarded as satisfactory if adequate provision is not made for legal representation for every defendant in a criminal case where conviction may involve a serious penalty if the defendant is unable, by reason of poverty, to obtain the services of counsel himself.

The Committee has given careful consideration to the desirability of legislation requiring the assistance of counsel as a requisite of a valid trial, unless the defendant states that he does not wish the assistance of counsel. A *mere* requirement that counsel be assigned to an indigent defendant, without providing the necessary machinery to ensure the availability of competent counsel, will not assure effective representation. Moreover, such an assignment may be made too late to enable counsel effectively to defend the accused.

Effective legal aid also requires that provision be made for supplying the defence with necessary transcripts of evidence and with funds to employ expert witnesses in appropriate circumstances. It must also be borne in mind that due regard for the expenditure of public funds, if counsel is to be compensated, requires the existence of machinery to determine whether a defendant who requests legal aid lacks the means to employ counsel himself.

The Committee also recognizes that *legislation enacted at the present time*, making the assistance of counsel, unless the defendant waives the right to counsel, a requirement of a valid legal trial, must necessarily be limited in its scope to the more serious offences. Wider legislative provisions can not be implemented *immediately* because of lack of sufficient courts, judges, magistrates, and defence counsel in some parts of Canada to cope with the extra demands that will be made upon the machinery of justice.

The Committee is concerned lest such legislation may have a tendency to freeze at the *present* level of practicability the right of financially disadvantaged defendants to be provided with counsel. The Committee considers that this would not be desirable.

The Committee has, however, come to the conclusion that legislation requiring that an indigent defendant, charged with one of the more serious offences, be provided with counsel, unless the defendant waives the right to counsel, should be enacted as an interim step until the right to counsel can be fully implemented in accordance with the recommendations made later in this chapter. The Committee is of the view that such legislation would be

¹⁸ *Reg. v Sowden* [1964], 1 W.L.R. 1454. In *Reg. v O'Brien*, [1967] *Crim. Law Rev.* 367, the English Court of Criminal Appeal quashed the conviction of the accused who had been refused legal aid and who alleged that he had no opportunity to prepare his defence or arrange for the attendance of witnesses, on the ground that the trial was not satisfactory.

supportive of the longer term objectives sought to be achieved by such recommendations.

The Committee therefore recommends:

- 1. That the Criminal Code be amended to provide that a defendant charged with an indictable offence, other than an indictable offence within the absolute jurisdiction of a magistrate, who lacks the means to employ counsel shall, unless he states that he does not wish to be represented by counsel, be provided with counsel and that in such circumstances representation by counsel is a requirement of a valid trial.**
- 2. That a person against whom an application is made for preventive detention who lacks the means to employ counsel shall be provided with counsel or, in the event that the Committee's recommendations with respect to dangerous offender legislation is implemented, that a person who is alleged to be a dangerous offender shall be provided with counsel.**

Later in this chapter, the Committee will discuss more specifically what it considers should be the objectives in providing legal representation for those who lack the means to secure it for themselves, and the best means of ensuring adequate representation in accordance with those objectives. The Committee, moreover, considers that the right to counsel at the trial is merely one aspect of a larger problem and can not be viewed in isolation from the role of the lawyer in the total criminal process.

Legal Representation before Trial

Legal assistance must be provided at an early stage of the criminal process to be effective. Effective legal representation of an accused person frequently involves intensive investigation to gather and sift evidence. If the investigation is not commenced soon after the alleged occurrence, which is the subject matter of the charge, potential witnesses may not be able to be traced. Physical evidence which may throw light on the matter may disappear or be destroyed. Experienced defence counsel are well aware of the impediment to the successful conduct of a defence at trial by an inadequately conducted preliminary hearing.

A high percentage of accused persons plead guilty on their first appearance before the magistrate. Not infrequently, an accused pleads guilty on his first appearance before the magistrate because he does not understand the elements of the offence with which he is charged and mistakenly assumes that he is guilty when his behaviour has not brought him within the legal definition of the offence, or where he lacked the necessary state of mind to constitute the offence. Sometimes he is advised to plead guilty by fellow prisoners or by the police—sometimes from worthy motives—on the supposition that a plea of guilty will lead to a more lenient sentence.

It is, therefore, imperative that an accused receive legal assistance before his first appearance in a court having jurisdiction to accept a plea of guilty from the accused in respect of the criminal offence with which he is charged. Sometimes magistrates or crown counsel become aware that the accused is under a misapprehension after a plea of guilty has been entered and the magistrate will order that the plea of guilty be struck out and a plea of not guilty be entered followed by a dismissal of the charge.

Sometimes probation officers in the course of preparing a pre-sentence report discover that an accused has pleaded guilty in ignorance of what is involved in the commission of the offence with which he was charged. Steps are then taken to remedy the error. We are not satisfied that all such errors are discovered.

The judiciary and crown counsel are concerned to protect the rights of the accused, especially when they become alerted to the fact that an error may have occurred. But the crown counsel is appointed to prosecute and however fair he may be in the discharge of his duties, his function is not to search for possible defences in respect to the cases that he brings before the court. Magistrates, especially in the larger centres, are required to deal with a very heavy work load. However competent and careful they may be, they cannot be expected to perform the functions of a defence counsel as well as those of a magistrate.

A high percentage of the people who appear in the criminal courts for the first time are poor, frightened and bewildered. Legal assistance at the time of the first appearance may assist the accused to obtain release from custody on his own recognizance or solemn undertaking pending his trial, by the presentation of facts with respect to his family status, employment record and other relevant considerations and thereby preserve his job and prevent serious social dislocation.

Even where the proper advice to be given is to enter a plea of guilty, there is frequently much that can be done by way of bringing out mitigating circumstances, by arranging for psychiatric examination where it is appropriate, and by assisting in formulating a helpful plan for the rehabilitation of the offender which may enable him to remain out of prison. Services such as these, when performed in accordance with high standards, assist the offender, the court and society.

Right to Counsel while in Police Custody

The existence, nature and extent of the right of a suspect to counsel, while in the custody of the police, and the consequences which should attach to the wrongful denial of counsel at this stage have given rise to some of the most controversial legal issues of our time.

It is the view of the Committee that in this country the right of an accused in police custody to communicate with a lawyer, or the right of a lawyer retained by the accused to consult with him at the police station, does not

admit of doubt. The right of a person in police custody to retain and instruct counsel without delay imposes a corresponding obligation on the police to afford a prisoner in their custody a reasonable opportunity to communicate with a lawyer and to permit the lawyer to consult privately with his client.*

The Canadian Bill of Rights¹⁹ reads in part as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding *The Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement, of any of the rights or freedoms herein recognized and declared, and in particular no law of Canada shall be construed or applied so as to...
 - (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay... (the emphasis is ours)

The Supreme Court of Canada has held²⁰ that the rights and freedoms recognized by the Bill of Rights are the rights and freedoms which existed in Canada immediately before the statute was enacted. The right of a person under arrest to communicate with his family or to consult with a lawyer had been recognized in Canada prior to the enactment of the Bill of Rights²¹.

Section 2 (c) (ii) of the Bill of Rights is, in the opinion of the Committee, a clear direction by Parliament that the law of arrest is not to be construed or applied so as to abrogate, abridge or infringe this fundamental right.

In *Regina v O'Connor*²² Roach J.A., said:

Haines J., in his reasons seems to indicate that the police in this case were following a rule that a prisoner in custody shall be given only one opportunity to get in touch with a lawyer. If that is an iron-clad inflexible rule within the

**Reg. v Ballegeer* (1969) 1 D.L.P. (3rd) 74.

¹⁹ Stats. Can. 1960, c. 44.

²⁰ *Robertson and Rosetanni v The Queen*, [1963] s. C.R. 651.

²¹ *Koehlin v Waugh and Hamilton* (1957), 118 C.C.C. 24. The Report of the Honourable Mr. Justice Roach sitting as a Commissioner appointed by the Attorney-General under s. 46 of the Police Act R.S.O. 1950, c. 279 (now R.S.O. 1960 c. 298, s. 48) to investigate a complaint made against the conduct of the police contains the following statement:

"The suggestion that any detective or other police officer is justified in preventing or attempting to prevent a prisoner from conferring with his counsel is a most shocking one. The suggestion that counsel, if he is permitted to confer with his client who is in custody, might thereby obstruct the police in the discharge of their duties is even more shocking. The prisoner is not obliged to say anything and the lawyer is entitled to advise him of that right. The lawyer is an officer of the Court and it is the function of the courts to administer justice according to the law. To prevent an officer of the Court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is a fundamental to our system for the administration of justice."

Law Society of Upper Canada. "Arrest and Interrogation". *Special Lectures, 1963*. Toronto, Richard de Boo, 1963, at p. 57.

²² [1966] 2 C.C.C. 28 at p. 34, aff'd on appeal to the Supreme Court of Canada in [1966] S.C.R. 619, without reference to the passage quoted from the judgment of the Court of Appeal.

*department then in my opinion it is wrong and not compatible with the right given a prisoner by the Canadian Bill of Rights.** Circumstances will differ from case to case and in determining whether or not in any given case the prisoner's right has been violated the circumstances must be taken into consideration and it is for the court to say whether every reasonable opportunity was given to the prisoner to retain and instruct counsel without delay. There may be cases in which one telephone message would suffice—a message by or on behalf of a prisoner to a member of his family or to a friend who, not labouring under disability, could retain counsel on the prisoner's behalf. In the instant case I think a further opportunity should have been given to the accused to reach counsel direct or through a member of his family or a friend.

The Committee is in agreement with the views expressed by Mr. Justice Roach. Later in this chapter we make specific recommendations with respect to the enactment of legislation to ensure that a person in police custody is afforded a reasonable opportunity to communicate with counsel.

No sanctions are, however, contained in the Bill of Rights for a violation of the right recognized therein of a person who has been arrested or detained, to retain and instruct counsel without delay, although it has been suggested that such a violation attracts both civil and criminal liability.²³ As the Committee has pointed out, civil actions for damages have proved reasonably effective to deter trespassory interferences with person or property arising out of assaults, false arrests and illegal searches. Neither civil remedies nor criminal sanctions are, however, likely to be effective to restrain violations of a civil liberty, such as the right to counsel, because of the lack of supporting physical evidence and corroborative circumstances.

Contrary to popular belief such a violation does not invalidate the subsequent trial. Nor does it render inadmissible real or physical evidence discovered subsequent to, or as a consequence of, a violation of accused's rights to retain counsel.²⁴

Prior to the enactment of the Canadian Bill of Rights, it had been held that an improper refusal of a prisoner's request to consult counsel was a factor—but only a factor—to be considered by the trial judge in determining whether a subsequent confession or incriminating statement was made

* The emphasis is ours.

²³ In *Reg. v Steves*, [1964] 1 C.C.C. 266 Coffin J. was of the view that a violation of the rights which are recognized by the Bill of Rights might give rise to a civil action for damages in tort, and perhaps to criminal liability under s. 107 of the Code, which provides that every one who without lawful excuse contravenes an Act of the Parliament of Canada for which no express penalty is provided by law, is guilty of an offence. It is, to say the least, doubtful whether federal legislation can create a civil cause of action and s. 107 is of doubtful application because s. 2 (c) (ii) of the Bill of Rights does not command a police officer to do anything. It is a direction to a court not to construe the law of arrest in such a way as to infringe the right of a person who has been arrested to retain a lawyer. Cf. however Tarnopolsky, Walter S. *The Canadian Bill of Rights*. Toronto: Carswell Co., 1966, at p. 180.

²⁴ *Reg. v O'Connor*, [1966] S. C. R. 619; *Reg. v Steeves*, [1964] 1 C. C. C. 266; *Attorney-General for Quebec v Begin*, [1955] S. C. R. 593.

voluntarily. In *R v Emele*²⁵ the trial judge rejected incriminating statements made by the accused, who was charged with the murder of her husband, following a request to see her solicitor, Mr. Diefenbaker, which was ignored by the police. In setting aside the acquittal and ordering a new trial the Saskatchewan Court of Appeal said:

Without wishing to sanction the conduct of the police touching such request in any way, we would say that we cannot sustain the views of the learned trial Judge in this respect. After all the question he had to determine was not what would have happened if the respondent had been permitted to see her solicitor but whether the statements alleged to have been made by her were voluntary. The fact that her request was ignored was, in our opinion, but one of a number of circumstances requiring consideration in determining that question.

Even though an incriminating statement made to the police in such circumstances may be "voluntary" in the strict sense, it might well be, however, that even in the present state of the law the judge presiding at the trial would be justified in exercising his discretion to reject an incriminating statement so obtained.

Police Attitudes

The right of a person in police custody to consult with counsel, while recognized by many police officers, is not universally recognized by the police. However, we wish to point out that the Royal Canadian Mounted Police instructions to their members require its members to inform a prisoner upon arrest that he has a right to counsel. The Committee considers that these instructions constitute a model and they are reproduced as Annex A to this chapter. Some police officers feel that this right has never been authoritatively stated in the law. The Committee has already indicated that, in its view, the law is clear that immediately upon arrest a person has the right to be afforded a reasonable opportunity to communicate with counsel.

Undoubtedly back of the objection on the part of some police officers is the fear that if a suspect is permitted to consult a lawyer, the lawyer will advise him of his legal right not to make a statement, or will advise him not to make a statement and that this would have a detrimental effect on law enforcement. It would seem that the short answer to this objection is that under our law an accused is not under any legal obligation to answer questions put to him by the police. An objection to a lawyer advising an accused as to his legal rights implies that the system of police questioning is based on keeping an accused in ignorance of his legal rights. A system of law enforcement based on keeping people in ignorance of their rights could not hope to command public respect.

The unacceptability of a system of law enforcement based upon keeping people in ignorance of their rights was forcefully stated by Mr. Justice Gold-

²⁵ (1940), 74 C. C. C. 76 at p. 81.

berg, speaking for the majority of the Supreme Court of the United States in *Escobedo v Illinois* when he said:

If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.²⁶

The Committee believes that the professional criminals, who are likely to know their rights in any event, represent the most serious danger to society. Consequently, the only people likely to be affected by the denial of counsel to persons in custody of the police are the ignorant and unsophisticated. Nor does it necessarily follow that counsel will in all cases advise silence, although counsel will in all probability advise his client not to make a statement until counsel has become familiar with the facts of the case. After becoming acquainted with the facts, he will advise his client to remain silent or make a statement accordingly, as he thinks it best serves his interest.

We think the police views previously referred to do not represent the views of all police officers; indeed, a major police brief received by the Committee states:

Possibly the only general principle which should govern the right to counsel is that *every person is entitled to counsel at any time and should not be prevented from obtaining this service.** To do so would be to abrogate a right to which all persons are entitled. In all cases where an indigent accused requires counsel it should be provided at public expense upon verification of his inability to pay.

Right in other Jurisdictions

Right to Counsel in Scotland. The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police.

Under the law of Scotland, a person who has been arrested on any criminal charge is entitled *immediately* upon such arrest to have intimation sent at once to a solicitor informing him that his professional assistance is required and to have a private interview with him.²⁷

The relevant sections of the Scottish statutes are set out in Annex B to this chapter. The right of a person who has been arrested to consult a solicitor and to have a private interview with him is regarded as an important constitutional right in Scotland.

As has been pointed out, the Scottish law is much more restrictive than the Canadian law with respect to police questioning. Once a person is arrested, statements elicited as a result of police questioning in relation to the charge upon which he has been arrested are not admissible in evidence. However,

²⁶ 378 U.S. 478 (1964).

*The emphasis is ours.

²⁷ Watt, F. C. (ed.). *Renton and Brown's Criminal Procedure*. 3rd ed. Edinburgh: W. Green & Sons, 1956, at p. 36; Criminal Procedure (Scotland) Act (1887), 50 & 51 VICT., c. 35, s. 17; Summary Jurisdiction (Scotland) Act (1954), 2 & 3 ELIZ. 11, c. 48, s. 12.

a statement which is "volunteered" by a person in custody is admissible providing that there has been no element of unfairness to the accused.

The Scottish courts have laid down the principle that a person who is accused has the right from the moment of apprehension to have the advice of a skilled law-agent as to whether or not he should make a statement, or in order that immediate steps may be taken to preserve evidence or in other directions which would lead ultimately to his exculpation.²⁸ The High Court of Justiciary has not hesitated to reject even statements which have been volunteered by a person in custody, where the court was of the opinion that a violation of the accused's right to counsel has resulted in unfairness to the accused.

Indeed, the court has expressed the view that under some circumstances a denial of the accused's right to consult a solicitor, which has resulted in prejudicing an accused with respect to his defence, might have the effect not only of rendering inadmissible an incriminating statement made by him, but of completely terminating the entire proceedings in his favour.²⁹

Judges' Rules in England. The preface of the latest edition of the Judges' Rules in England³⁰ states:

These rules do not affect the principles

- (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his so doing.

If the limitation contained in the Judges' Rules means that there is any *general* discretion vested in the police to deny a person under arrest a *reasonable* opportunity to confer with a lawyer until their investigation is complete, such a limitation on the right of a person under arrest to communicate with a lawyer is inconsistent with the Canadian Bill of Rights, which recognizes the right to retain and instruct counsel *without delay*.

On the other hand, the processes of investigation ought not to be held up indefinitely if the accused, having been afforded a reasonable opportunity to consult a lawyer, is unable to procure one.

It is also possible to imagine cases where the failure to afford an accused the right to consult counsel immediately might be excused where it was necessary to save life or avert some great evil. For example, if the police arrested a person who was reasonably believed to have planted a bomb in an airplane, immediate police questioning in order to discover the plane

²⁸ *H. M. Advocate v Aitken*, 1926 J. C. 83.

²⁹ *Cheyne v McGregor*, 1941 J. C. 17.

³⁰ [1964] 1 W.L.R. 152 at p. 153.

in which the bomb had been planted would clearly be their duty. Furthermore, failure to first afford the accused an opportunity to consult counsel should be excused in accordance with the general principle of the criminal law that, subject to certain exceptions, conduct which would otherwise constitute a breach of the law may be excused on the grounds of necessity—where the act is done to avert some greater evil.

A rather striking example of a case of this kind may be found in the California case of *People v Modesto*.³¹ A child had been murdered and her sister was missing. It was suggested to the defendant by an officer that the missing girl might still be alive and her life could be saved. The defendant then gave incriminating information which led to the discovery of the body of the missing child. The court held that the paramount interest in saving the child's life, if possible, justified the officers in not impeding their rescue efforts by informing the defendant of his constitutional rights. The court held that the investigatory and rescue operations were inextricably interwoven and admitted the incriminating statement in evidence.

In the view of the Committee, the right to counsel as recognized in the Bill of Rights is similarly subject to the above principle. No change in the law in that respect is desirable. The fact that the police procedure is justified by the circumstances of the case ought not to be a ground, however, for admitting an incriminating statement if the statement is otherwise inadmissible.

The United States. In addition to the constitutional guarantees contained in the United States Constitution, more than half of the states have enacted legislation specifically providing for the right of a person upon arrest, or within a short time after arrest, to communicate with counsel and for counsel to consult with his client privately.³² The legislation varies considerably in detail. The statutes commonly provide a penalty by way of fine or imprisonment for a violation of their provisions. The Kansas statute, which provides for the right of a lawyer to consult with his client in private, prohibits the presence of any recording or "listening in" devices.

Most of the statutes, however, contain no provision for clearly insuring that the prisoner will learn of his rights. The statutes in Vermont and Illinois require that copies of the provisions of the statute be posted in police stations and other places where arrested persons are held. An excellent example of legislation of this kind is contained in the Illinois Code of Criminal Procedure of 1963, the relevant parts of which are set out in Annex C to this chapter.

The model Code of Pre-Arrest Procedure of the American Law Institute similarly sets out—although in somewhat greater detail—provisions designed to secure effective implementation of the right of a person who

³¹ 398 p. 2d. 753 (1965).

³² "Right to Communicate With Retained Counsel Upon Detention or Arrest: State Statutory Guarantees", 1962 *University of Illinois Law Forum* 641.

has been arrested to communicate with counsel. The case for legislation along similar lines in Canada is well put by Professor Grosman when he says:

It may be that the general principles propounded in the Bill will gain in legislative effectiveness from their detailed implementation in a Code of Criminal Procedure. If the Legislature has, in the Bill of Rights, enunciated valid social standards then their implementation so that they become part of the living fabric of the administration of criminal justice can only promote the means to those valid ends. Principles become illusory if not implemented by Judges, legislators and lawyers. They become ineffective if sanctions for their non-observance are unavailable.³³

Right to Counsel in Continental European Systems. The Committee has studied the right to counsel in various European countries, but has found it difficult to draw parallels due to fundamental differences in investigative procedures.

Notification of Right to Counsel

Under Canadian law there is no affirmative obligation on a police officer to advise a prisoner that he has a right to communicate with counsel if he wishes to do so.³⁴ The obligation of a police officer is limited to not depriving a person under arrest of the right to communicate with counsel if he wishes to do so.

The Attorney-General's Joint Committee on Legal Aid in Ontario considered the question as to whether the police should have the responsibility for informing persons upon arrest of the availability of legal aid. That committee took the view that it is undesirable to place the police in the position where they are giving advice which, in a given case, could be misleading.³⁵

With this view the Committee is in general agreement. We believe, however, that it is possible to set up machinery to provide reasonable means for informing a suspect with respect to his rights with a minimum involvement of the police in this process. This could be achieved by the posting of appropriate notices in police stations or handing the prisoner a leaflet or a card clearly stating his right to counsel and the facilities for legal aid, or by the use of both such devices. The Report of the Departmental Committee on Legal Aid in Criminal Proceedings in England under the chairmanship of the Honourable Mr. Justice Widgery states:

It has been represented to us that the need for legal advice is particularly urgent in the case of an accused person who is held by the police prior to appearing in court and it has been suggested that an emergency service

³³ Grosman, Brian A. "The Right to Counsel in Canada". 10 *Can. Bar J.* 189, p. 207 (1967).

³⁴ *Reg. v DeClercq* [1966] 2 C. C. C. 190, p. 192.

³⁵ Ontario. *Report of the Joint Committee on Legal Aid*. Toronto: Queen's Printer, 1965, pp. 70-73.

of solicitors should be established in large towns so that any person arrested could be given immediate advice at the police station by the solicitor on duty.⁸⁶

The Widgery Committee recommended that every person taken into custody should at an early stage be handed a leaflet explaining the facilities for legal aid, and that a list of solicitors on the legal advice panel should be kept at every police station.

In both written and oral submissions made to the Committee, it has been suggested that notices informing the accused of his right to counsel and the facilities for legal aid should be posted in police stations and lock-ups.

The Report of the Committee of the John Howard Society on Legal Aid in British Columbia expressed the opinion that every accused person should receive notice of the right to request a lawyer forthwith. The report states:

Such notice should in our opinion appear in clear and simple language in every gaol cell, in every police "interrogation" and "interviewing" room, and should be notified to every accused by every arresting police officer.⁸⁷

Under the Scottish law, the statutes which confer the right to the advice of a solicitor from the moment of arrest do not impose a duty upon anyone to inform the accused of his right to summon professional assistance. The High Court of Justiciary has, however, held that failure on the part of the police to notify a person under arrest of his right to communicate with counsel *may* result in the rejection of an incriminating statement volunteered by the accused, if such failure has resulted in unfairness to the accused, although the failure to notify the accused of his right to communicate with a solicitor will not necessarily result in the rejection of a statement volunteered by him. As has been pointed out, statements elicited *as a result of interrogation* in relation to the charge following an arrest are inadmissible under Scottish law notwithstanding that accused has been warned and notified with respect to his right to counsel.

The extreme fairness of the Scottish legal system is illustrated by the case of *H.M. Advocate v Cunningham*.⁸⁸ The accused was under arrest, charged with assault and robbery. He received the usual caution required by the Scottish law that anything he might say in answer to the charge might be used in evidence. The officer conducting him to the cells drew the accused's attention to a notice hanging in the corridor, which stated that a prisoner was entitled to communicate with a law agent, and that he would be assisted to do so. The constable also explained the notice and informed the accused that if he could not pay for a lawyer he would be entitled to free legal aid. At a later hour that night the accused expressed a desire to make a statement and after being again cautioned, made an incriminatory statement. Lord

⁸⁶ United Kingdom. *Report of the Departmental Committee on Legal Aid in Criminal Proceedings*. London: Her Majesty's Printing Office, 1966, p. 57.

⁸⁷ "Report on Legal Aid in British Columbia". 7 *Crim. Law Q.* 72, pp. 97-98 (1964-65).

⁸⁸ 1939 J. C. 61, p. 66.

Moncrief, in dealing with the question whether adequate notice of his right to legal assistance had been given to the accused, said:

I think, accordingly, that the requirement tabled by Lord Anderson in the case of *Aitken*, of intimation to this effect may be regarded as having been adequately observed. While I am of opinion that in future cases it would be desirable, and would be in the spirit of the requirements of section 17 of the Criminal Procedure (Scotland) Act, 1887, that this intimation should in practice be given at an earlier stage, I am prepared to hold in this case that the intimation was adequately given.

The Committee has been informed by the administrative secretary of the Legal Aid Central Committee of the Law Society of Scotland that the charge rooms of police stations are "well placarded" with notices advising accused persons of their right to see a solicitor and to apply for legal aid.

In England, Home Office circular No. 31/1964 under the heading of "*Facilities for defence*" states:

Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.

Recommendations with Respect to the Right of an Arrested Person to Consult Counsel

The Committee is of the opinion that the right of a person in police custody to communicate with a lawyer upon request is a fundamental right. In our view, the abrogation or any infringement thereof is incompatible with the dictates of a free society.

We are also of the view that reasonable means should be adopted to inform a person who has been taken into custody by the police of his right to communicate with counsel and the facilities for legal aid.

The Committee considers that the obligation to give reasonable notice would normally be met by: the posting of appropriate notices in police stations and lock-ups, and, in particular, in any room where a suspect is interviewed or questioned, and by handing the suspect a document setting out his right to communicate with counsel and the facilities for legal aid. Such documents should be printed in appropriate languages, in addition to the two official languages. There is an expectation that the police will communicate such information verbally to persons who are illiterate. These suggestions are not intended to be exhaustive or to exclude other measures to inform the accused of his right to communicate with counsel.

The Committee is of the opinion that the right of a person under arrest to consult counsel without delay, recognized by the Bill of Rights as a fundamental right, should be spelled out more fully in a section of the Criminal Code dealing with the rights of an accused upon arrest.

The Committee therefore recommends:

- (a) That the Criminal Code provide that a person who is under arrest has the right to be afforded a reasonable opportunity to communicate with a lawyer upon request and to consult in private with a lawyer who is retained by him or on his behalf.**
- (b) That the proposed legislation should also contain a provision requiring that reasonable means be taken to inform an arrested person of his right to counsel by the posting of notices in police stations and by handing the accused a document setting out his rights or by any other reasonable means.**

The Committee has expressed the view in Chapter 3 that, subject to the exclusionary rules which would be suggested in this chapter, the test of admissibility with respect to incriminating statements made to persons in authority should continue to be whether they were voluntarily made and that the broad question should continue to be left to the court.

In *Boudreau v The King*, Rand J. said:

What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case.

The Committee is of the opinion that the denial of a reasonable opportunity to communicate with counsel, after a request for permission to do so has been made, or a refusal to permit counsel retained by or on behalf of the prisoner a reasonable opportunity to consult with him, casts so much doubt on the voluntary nature of any incriminating statement thereafter made to a person in authority, prior to being afforded such reasonable opportunity, that the necessary assurance that it was made voluntarily is lacking and that such a statement should not be admitted in evidence.

The Committee recommends that legislation be enacted to provide:

- (a) That failure to afford a person under arrest a reasonable opportunity to consult with counsel, after a request for permission to do so has been made, or failure to afford counsel retained by or on behalf of the accused a reasonable opportunity to consult with him privately shall render inadmissible in evidence any incriminating statement subsequently made to a person in authority prior to such reasonable opportunity being afforded.**
- (b) That an incriminating statement made by a person in custody in any police station or lock-up as a result of police questioning, should be inadmissible unless reasonable means have been taken to inform the accused of his right to communicate with counsel.**

It should be a question of fact to be determined by the trial judge in each case whether reasonable means have been taken to notify the accused with

respect to his rights. The Committee recommends that legislation should be enacted to so provide.

The Committee has confined this latter recommendation to incriminating statements made in answer to questioning in a police station or other place under the control of the police used to question suspected persons where the accused, alone and in the presence of officers, may feel that he is surrounded by a compulsive atmosphere. Where the accused is interviewed in his home or at his place of business different considerations prevail. The Committee is also aware that incriminating remarks are sometimes blurted out upon arrest before there has been any opportunity to take measures to inform the suspect of his rights. Such statements would not be within the scope of the rule proposed.

Function of Counsel when Consulted by a Person in Police Custody

The Committee considers that it is appropriate to discuss briefly what the Committee conceives to be the *principal* functions of counsel when consulted at the investigation stage of the criminal process. The Committee considers that it is the function of counsel under such circumstances to:

- (a) Ascertain the charge, if any, with which the client is charged.
- (b) Advise the client with respect to his legal rights and express his opinion as to what he considers is the best course for the client to follow and to take such legal proceedings as he considers are appropriate to protect his client's rights.
- (c) Advise the client with respect to the legal rights of the police.
- (d) Assist the client to obtain his release on bail where the nature of the charge is such as to make release on bail at that stage possible.
- (e) Commence any investigation appropriate to the defence of his client, or take appropriate steps to preserve evidence which may be relevant to his defence.

The Committee does not consider that it is the function of counsel to oversee police conduct. The assignment of such a role to defence counsel would destroy his independence as an advocate and convert him into a witness. As Professors Elsen and Rosett have written:

It also raises sharp ethical problems for counsel, who may have to testify against his client's interest.⁸⁰

In the view of the Committee, concepts which are basic to the adversary system, and hence appropriate to a court, are not applicable to the conduct of police investigations. We consider that the right of a person in custody to *consult* with counsel if he wishes to do so is fundamental, but we point out that under Canadian law it is not a condition of the admissibility of a statement made by a person in custody to a police officer that counsel be present

⁸⁰Elsen, Sheldon H. and Arthur Rosett. "Protections for the Suspect Under *Miranda v Arizona*". 67 *Columbia Law Rev.* 645 p. 666 (1967).

when such a statement is made. We recommend no change in the law in that respect.

Effect on Law Enforcement

Proposals for securing for individuals their fundamental rights with respect to counsel frequently excite apprehension that effective law enforcement will be jeopardized. The Committee is of the view that the provisions which we have recommended will not impair effective and *proper* enforcement of the criminal law.

Moreover, we consider that they constitute imperatives—if the fundamental right of a person who has been arrested or detained to consult counsel without delay, recognized by the Canadian Bill of Rights, is not to be wholly illusory and chimerical. We are of the opinion that it would be preferable to repeal s. 27(c) (ii) of the Bill of Rights if its provisions are not to be made meaningful. This Committee is not prepared to recommend the repeal of this section of the Bill of Rights or any other section thereof.

As we have indicated in an earlier part of our report, *undue* reliance upon the eliciting of incriminating statements by police questioning may in the long term actually be detrimental to law enforcement by removing the incentive to develop more imaginative and effective investigation techniques, and to expend the effort that other forms of investigation may require.

Recent studies in the United States, following the decision of the Supreme Court of the United States in *Miranda v Arizona*, would seem to indicate that in spite of the restrictions imposed by that decision on the police with respect to the interrogation of suspects, which restrictions greatly exceed those which flow from the recommendations of this Committee, the police still obtain incriminating statements in a substantial number of cases notwithstanding compliance with the requirements laid down by the Supreme Court of the United States. What is even more significant, available evidence would seem to indicate that a decline in the *confession* rate does not necessarily result in a decline in the *conviction* rate.⁴⁰

It should be noted that the conviction rate in Scotland does not appear to differ significantly from the present Canadian conviction rate. Taking the conviction rate as an indication of the effectiveness of law enforcement, it appears that the extreme fairness shown by the Scottish legal system towards the accused does not impair the effective enforcement of the law.⁴¹

⁴⁰ Elsen, Sheldon H. and Arthur Rosett. "Protections for the Suspect Under *Miranda v Arizona*". 67 *Columbia Law Rev.* 645 p. 654 (1967); Seeburger, R. H., and R. Stanton Wettick Jr. "Miranda in Pittsburgh; a Statistical Study". 29 *University of Pittsburgh Law Rev.* 1 ff. (1968); Special Project. "Interrogation in New Haven: The Impact of *Miranda*". 76 *Yale Law J.* 1519 ff. (1966-67).

⁴¹ The D. B. S. Statistics for indictable offences give the 1963 conviction rate for indictable offences in Canada as 90.1 per cent. The comparable Scottish conviction rate with respect to cases tried in solemn procedure for the same year calculated from the Scottish Home Office criminal statistics, notwithstanding the existence of an advanced system of legal aid in Scotland, was 91.1 per cent. The Scottish conviction rate for all offences in 1966 (i.e. offences tried in solemn procedure as well as those tried on summary jurisdiction) was approximately 92 per cent and for offences tried in solemn procedure was approximately 88 per cent calculated on the same basis as D. B. S. ignoring withdrawals.

Even where the rights of the accused are fully protected, there are strong psychological pressures upon a person under suspicion to speak to avoid the appearance of guilt.⁴² Many persons speak freely at this time and frequently incriminate themselves in the belief that they are exonerating themselves. We do not consider that it is or should be the policy of the criminal law to prevent or discourage the making of *voluntary* statements to the police, but sound criminal policy requires that basic rights recognized by law should receive adequate protection.

It would appear that from a purely *quantitative* or statistical standpoint, emphasis on the protection of the basic right of a person under arrest to consult counsel has very little effect on law enforcement. The effects likely to be achieved are rather in the direction of increased respect for the entire system of criminal justice on the part of the public and the individual by upgrading the *quality* of that system.

Legal Aid at the Police Station

Providing legal advice to persons in police custody who require legal aid presents difficult problems. It has been suggested in representations made to the Committee that in every large police station there should be a legal aid officer available to advise those who request his services.

The Committee considers that legal aid lawyers should not be attached to police stations any more than private lawyers should be entitled to post themselves in police stations. Obviously, the person who lacks means should be placed in the same situation as a person who is able to pay for the legal services he requires. He should not be placed in any higher position.

The Widgery Committee, although it recommended that provision should be made for providing legal advice to persons in police custody who required legal aid, was of the view that provision under legal aid for visits by solicitors to police stations should be confined to offences of some seriousness. The report states:

We have not attempted to define such offences as it would be undesirable to lay down a hard and fast rule, and we recommend that it should be left to the discretion of the solicitor consulted to decide whether the case is of such a nature that a visit to the police station would be justified.⁴³

With this viewpoint this Committee is in agreement. In some cases advice given over the telephone might be sufficient.

We think, however, that the view of the Widgery Committee that it would not be desirable to make special arrangements for after-hour visits is open to question. We think that in the larger centres, where the problem is likely to be most acute, there should be no difficulty in providing a panel of solicitors on a rotating basis or a duty counsel who would provide legal aid

⁴² Glasbeck, H. J. and D. D. Prentice. "The Criminal Suspect's Illusory Right of Silence in the British Commonwealth". 53 *Cornell Law Rev.* 473 (1967-68).

⁴³ United Kingdom. *Report of the Departmental Committee on Legal Aid in Criminal Proceedings*. London: Her Majesty's Stationery Office, 1966, p. 58.

after hours in serious cases on request. The comprehensive Ontario Legal Aid Plan makes no provision for legal advice at the police station, although duty counsel are available to assist indigent defendants immediately prior to and during their first appearance in court.

Legal Representation on Appeal

In the view of the Committee, all the safeguards of the criminal law should be available to every accused without regard to his financial means.

The Report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice in the United States contains the following statement:

The Committee is of the view that the basic objective of a system of criminal appeals is no different from that of other areas of criminal-law administration: namely, the establishment of procedures adequate to protect the legitimate interests of the accused irrespective of his financial status.

Any government-financed system of legal aid in respect of appeals must, of course, contain adequate safeguards to prevent the expenditure of public funds on frivolous appeals.

Section 590 of the Criminal Code provides:

A Court of Appeal or a Judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or Judge, it appears desirable in the interests of justice that the accused should have legal aid and where it appears that the accused has not sufficient means to obtain that aid.

Where legal aid is provided under the provisions of s. 590 of the Criminal Code, it is provided on a purely voluntary basis by the lawyer whom the court has requested to act.

In those provinces which have legal aid plans, whereby legal aid is extended to appeals, there may be two different systems of legal aid in relation to appeals operating at the same time: one voluntary where counsel is assigned by the court under s. 590 of the Code, and one under a legal aid plan in which compensation is paid to the lawyer providing legal services.⁴⁴ One system may impose restrictions on the granting of legal aid which are not imposed in the other.

⁴⁴In New Brunswick there is no organized legal aid but the *Poor Prisoner's Defence Act*, R.S.N.B. 1952, c. 171 (as amended by Stats. N.B. 1957, c. 49) provides that the Chief Justice of New Brunswick or a Judge of the Court of Appeal designated by him shall issue an appeal certificate to a person sentenced to death whose means are insufficient to enable him to obtain aid in the conduct and preparation of his appeal. The statute provides that where an appeal certificate has been granted the costs of the appeal shall be paid out of the consolidated revenue fund. Under the Act the costs are limited to the cost of a copy of the evidence and the judge's charge, a fee not exceeding one hundred dollars (\$100.00) for the preparation of the appeal and a fee not exceeding fifty dollars (\$50.00) per day while engaged at the hearing of the appeal.

If a uniform and adequate system of legal aid with respect to criminal appeals were to be established in all the provinces, the anomaly at present existing could be removed by repealing s. 590. In the event that the court of appeal or a judge thereof was of the opinion that legal aid had been improperly refused by the authority responsible, under a provincial plan, for granting legal aid in respect of appeals, the court could refer the matter back to such authority together with its views as to the propriety of granting legal aid. The Ontario Legal Aid Plan requires the approval of an area committee as a condition of the issuance of a certificate for legal aid on appeal, but provides that where the court of appeal is of the opinion that it is desirable in the interests of justice that the appellant or respondent be represented by counsel, a certificate may be issued by the director of legal aid where he is satisfied that the appellant or respondent lacks sufficient means to procure counsel for himself.

Legal Aid in Canada at the Present Time

Most of the provinces of Canada have some form of legal aid under which legal aid is provided to defendants in criminal cases on an organized basis.

In those provinces which have legal aid plans there is, however, a considerable variation in the extent to which legal aid is provided. For example, some legal aid plans exclude a person with prior conviction—except in special circumstances or in respect of certain kinds of proceedings.

Under some legal aid plans, summary conviction offences and indictable offences within the absolute jurisdiction of the magistrate are excluded. Under some legal aid plans, legal aid with respect to appeals is more restricted than in others.

In some of the provinces which have legal aid plans, the plans are organized on a purely voluntary basis and the lawyers are not paid for their services. In other provinces lawyers providing legal aid are paid an honorarium which is not intended to compensate for the services supplied, but is more in the nature of a contribution towards the office expense of the lawyer who is providing the service. Legal aid provided on this basis is provided as a charitable undertaking and not as a social right. Alberta, Ontario and Saskatchewan have government-supported legal aid plans which provide for payment to lawyers rendering legal aid on a modest but reasonable basis for the services rendered.

In some provinces there is no organized legal aid at all and legal aid, when provided, is on a charitable basis by individual members of the Bar. Provision is made in virtually all provinces for assigning counsel in capital cases and very serious cases with compensation on a modest basis being paid by the provincial government.⁴⁵

⁴⁵Parker, G. E. "Legal Aid—The Canadian Need". 6 *Can. Bar J.* 179 (1963); Tarnopolsky, Walter S. "The Lacuna in North American Civil Liberties—The Right to Council in Canada". 17 *Buffalo Law Rev.* 145, p. 159 (1967).

The Ontario Legal Aid Plan, which came into operation in March of 1967, has been described as one of the most comprehensive legal aid plans in the world.

Under the Ontario plan, legal aid is supplied on a contributory basis to those who can pay some part, but not all, of the cost of the legal aid provided. It is supplied without contribution to those persons who are unable to bear any of the cost of the legal aid applied for. Under the Ontario plan, the province is divided into a number of areas for the purposes of the plan. An area director is appointed for each of such areas who is responsible for the operation of the plan in his area.

In each area there is an area committee which, in addition to performing the duties required of it under the statute, is required to advise the area director in respect of any matter upon which he requests its advice. The majority of the members of each area committee are lawyers, since the committee frequently has to deal with purely legal questions, but *provision is also made for community representation on area committees*. The chief executive officer of the plan is the provincial Director, who is responsible to The Law Society of Upper Canada for the working of the plan. While the plan is administered by the Law Society, it is subject to certain governmental controls since public funds are being expended.

Lawyers who provide legal aid are paid three-fourths of their fees as determined by a legal aid tariff. The cost of operating the plan is borne by the province.

A person who qualifies for legal aid receives a certificate which entitles him to select the lawyer of his choice to represent him, provided only that such lawyer has agreed to serve on a legal aid panel. Lawyers acting under a legal aid certificate are prohibited from disclosing that fact, except where such disclosure is necessary for the operation of the plan. The person who qualifies for legal aid is, therefore, placed as far as it is possible to do so in the same position as a person who can pay for the legal services which he requires.

Under the Ontario plan a person who is financially eligible and who is charged with an indictable offence, or against whom an application for preventive detention is brought, is entitled to legal aid as of right.

In the discretion of the area director, a person who is financially eligible and who is charged with an offence punishable on summary conviction, is entitled to legal aid if upon conviction there is likelihood of imprisonment or loss of means of earning a livelihood.

In the discretion of the area director, legal aid may be granted in hearings before administrative or quasi-judicial tribunals. Legal aid may also be granted in respect of appeals with the consent of the area committee.

Under the Ontario plan, duty counsel are appointed to interview persons in custody or who are summoned to appear on a criminal charge, prior to their appearance before a magistrate and who wish legal aid. The primary function of duty counsel is to advise the defendant with respect to his legal

rights, to advise him as to the elements of the offence with which he is charged, and to represent him on an application for bail or an adjournment. Duty counsel may also speak in mitigation of sentence where the accused, after having been advised as to the elements of the offence with which he is charged, and of his right to plead guilty or not guilty, wishes to plead guilty. In certain restricted situations, if the accused requests it, duty counsel may also conduct a defence. Under the comprehensive Ontario plan no provision is made for providing legal aid at the police station.

In addition to the provincial legal aid plans, the federal government provides legal aid in each of the ten provinces for indigent Indians charged with either capital or non-capital murder. In addition, the federal government administers a legal aid programme in criminal cases in the Northwest Territories and the Yukon Territory.

Public Defender System

The public defender system which has been established in some parts of the United States has not taken root in Canada, and legal aid has developed along different lines. The public defender, like his counterpart, the public prosecutor, is a public official. Generally speaking the public defender is a salaried lawyer in public employment who represents accused persons who cannot afford to retain counsel for themselves.

In the larger centres the public defender's office is composed of a number of lawyers who devote themselves full-time to duties of their office and are paid a salary. Some of the public defender organizations have, in addition, a staff for investigation purposes. Many public defender offices, however, operate with part-time lawyers especially in the smaller centres. Undoubtedly a public defender service is more economical to operate than a comprehensive legal aid plan. The proponents of the public defender system assert that public defenders devoting their full time to the defence of criminal cases become experts in this field and are, therefore, able to provide a better service than a lawyer in private practice who devotes only a part—perhaps a small part—of his time to the defence of criminal cases.

The principal defects in the system are that the defendant exercises no choice as to who will represent him. He gets the lawyer who is assigned to him. The defendant is, therefore, not placed in the same position with respect to legal representation as the person with means. Representation by the public defender informs the court and the public that the defendant is in receipt of charity. There is in addition the danger that because of the volume of cases that may be handled by an individual public defender, the service rendered may tend to become perfunctory and impersonal.

One of the arguments that is most frequently made against the public defender system is that being in the employ of the same governmental authority which is conducting the prosecution, the independence of the public defender may be jeopardized or at least the person being defended may think so.

While recognizing that many public defender offices are staffed by highly competent defence counsel, the Joint Committee appointed by the Attorney-General of Ontario, whose terms of reference included investigating and reporting upon legal aid and public defender schemes in other jurisdictions, considered that the advantages of the public defender system were outweighed by its disadvantages. The same view was taken by the Widgery Committee in England. On the other hand the Report of the John Howard Society Committee on Legal Aid in British Columbia found features in the public defender concept which commended themselves to that Committee.⁴⁶

Recommendations with Respect to Legal Aid

The Committee is of the opinion that it is within the legislative competence of Parliament, because of its exclusive jurisdiction over criminal law and procedure, to enact legislation to provide legal aid in respect of criminal matters. The Committee, however, considers that the establishment of a separate system of legal aid in criminal cases would not be desirable for the following reasons.

Legal aid in its wider aspect is primarily within the jurisdiction of the provincial legislatures.

It is preferable for each province to develop the legal aid plan or public defender concept, as the case may be, that is best suited to its needs, having regard to its population, the number of lawyers available and geographical considerations.

As has been pointed out, most of the provinces already make some provision for legal aid, although there is a considerable variation with respect to the comprehensiveness of the legal aid provided in the different provinces. In the provincial plans, legal aid in civil and criminal matters forms part of an integrated plan. In some provinces legal aid and its sufficiency is undergoing re-assessment. For example, Manitoba has long had a legal aid plan whereby legal aid is provided in respect of indictable offences. Compensation is paid on a modest basis, except with respect to indictable offences tried in the magistrates' courts, where legal aid is provided on a voluntary basis unless the defending lawyer is required to travel outside his resident office area. A recent amendment to the Attorney-General's Act (Statutes of Manitoba, 1968, Ch. 3) authorizes the Attorney-General to establish and administer a scheme for assisting persons charged with indictable offences under the Criminal Code, including indictable offences that are tried summarily, who are unable to afford a lawyer.

The Committee considers it would be wasteful and not in the interest of efficiency to have a federal system of legal aid in criminal matters which would involve unnecessary duplication of costs and administrative personnel.

⁴⁶ "Report on Legal Aid in British Columbia", 7 *Crim. Law Q.* 72 pp. 80-86 (1964-65). See also Parker, G. E. "Legal Aid—The Canadian Need", 6 *Can. Bar J.* 179 (1963).

The Committee is, however, of the view that in Canada, where a single system of criminal law and procedure is applicable to the entire country, the right of the defendant charged with a criminal offence to legal representation should be substantially the same in all the provinces.

The report of the President's Commission on Law Enforcement and Administration of Justice in the United States, states:

The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself.⁴⁷

The Committee is of the opinion that the following goals with respect to the representation of the accused should be achieved as soon as it is possible to do so, namely:

1. That every defendant in a criminal proceeding in respect of which imprisonment may be imposed or which involves a likelihood of loss of means of livelihood (for example, loss of a driver's license when it is necessary for employment) should be provided with adequate legal assistance before his first appearance in court and until the termination of the trial proceedings if he lacks the means to procure such assistance for himself.
2. That every person convicted of any offence involving imprisonment or loss of means of livelihood, should be provided with adequate legal assistance for the purpose of an appeal if he is financially unable to provide such assistance himself, subject to reasonable safeguards to prevent the expenditure of public funds on appeals which are without merit.
3. That provision should be made under all legal aid plans to provide lawyers to advise persons in police custody charged with a serious offence who request legal assistance.

The Committee recommends that steps be taken by way of consultation between the Canadian government and the provincial governments to provide legal aid for defendants in criminal cases in accordance with the above principles and that federal assistance be provided, to the extent that it is necessary in order to achieve adequate basic standards of legal aid in Canada in conformity with the above principles.

⁴⁷ United States. *The Challenge of Crime in a Free Society*. The President's Commission on Law Enforcement and Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. 150.

Annex A

Instructions to members of the Royal Canadian Mounted Police Force with respect to advising prisoners of their right to counsel:

1576. (1) The following rules shall be observed concerning prisoners and counsel.

(2) Prisoners shall be advised of their right to engage counsel but must neither be encouraged to seek nor hindered from obtaining the service of counsel to ensure their adequate defence.

(3) An alphabetical list of all barristers, practising at the point where a prisoner is held in custody, shall be made available to him on request and he is to be permitted to make free choice therefrom. The names of the various barristers are to be set forth with equal prominence in the list. In large centres it will be sufficient if the telephone book is given the prisoner to enable him to make a free choice.

(4) Members shall not engage counsel for prisoners, nor suggest any particular barrister or influence a prisoner's choice of legal assistance in any way.

(5) In unusual circumstances where the prisoner is unable, because of language difficulties, physical injury or lack of communication facilities to contact personally the barrister of his choice, a member of the Force may do so on his behalf. Whenever this is done the member concerned should obtain either a written request from the prisoner naming the barrister of his choice or arrange to have a witness present when a verbal request is made.

Annex B

Criminal Procedure (Scotland) Act, 1887. 50 & 51 Victoria, Chapter 35.

17. Where any person has been arrested on any criminal charge, such person shall be entitled immediately upon such arrest to have intimation sent to any properly qualified law agent that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination; and such law agent shall be entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination, which shall be conducted according to the existing practice, provided always that it shall be in the power of the sheriff or magistrate to delay such examination for a period not exceeding forty-eight hours from and after the time of such person's arrest, in order to allow time for the attendance of such law agent.

Summary Jurisdiction (Scotland) Act 1954, Chapter 48.

12. In any proceedings under this Act the accused, if apprehended, shall immediately on apprehension be entitled, if he so desires, to have intimation sent to a solicitor, and to have a private interview with such solicitor prior to being brought before the court.

Annex C

ILLINOIS CRIMINAL LAW AND PROCEDURE

Illinois Revised Statutes 1967

Chapter 38

Article 103. Rights of Accused.

103-1. *Rights on Arrest.*

- (a) After an arrest on a warrant the person making the arrest shall inform the person arrested that a warrant has been issued for his arrest and the nature of the offense specified in the warrant.
- (b) After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based.

103-2. *Treatment While in Custody.*

- (a) On being taken into custody every person shall have the right to remain silent.
- (b) No unlawful means of any kind shall be used to obtain a statement, admission or confession from any person in custody.
- (c) Persons in custody shall be treated humanely and provided with proper food, shelter and, if required, medical treatment.

103-3. *Right to Communicate with Attorney and Family; Transfers.*

- (a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody.
- (b) In the event the accused is transferred to a new place of custody his right to communicate with an attorney and a member of his family is renewed.

103-4. *Right to Consult with Attorney.* Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this State under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty.

103-7. Posting Notice of Rights. Every sheriff, chief of police or other person who is in charge of any jail, police station or other building where persons under arrest are held in custody pending investigation, bail or other criminal proceedings, shall post in every room, other than cells, of such buildings where persons are held in custody, in conspicuous places where it may be seen and read by persons in custody and others, a poster, printed in large type, containing a verbatim copy in the English language of the provisions of Sections 103-2, 103-3, 103-4 . . .

9

THE CRIMINAL COURT

The criminal court is the central, crucial institution in the criminal justice system.¹

Under the British North America Act 1867, the Parliament of Canada is given exclusive legislative authority with respect to "the Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" (91:27). The creation, operation and maintenance of criminal courts in Canada is therefore a matter of provincial legislative authority subject to the limitation in s. 96 whereby the appointment of judges of the superior, district and county courts is reserved to the Governor-General. Magistrates and justices of the peace and, in the Province of Quebec, judges of the sessions of the peace and provincial judges are appointed by the lieutenant-governors-in-council.

With the exception of the appointment of judges to the higher courts, the operation of criminal courts in Canada is a provincial responsibility. The Committee, therefore, in this chapter, confines itself to setting out criteria by which the adequacy of criminal courts can be assessed, in the expectation that reasonable and uniform standards can be accepted and implemented in all jurisdictions in which Canadian criminal law is applied. The criteria have been formulated on the assumption that criminal courts may in the future be created and maintained for the disposition of crimes to the exclusion of such petty quasi-criminal matters as traffic offences. The Committee expects important changes in substantive criminal law so that the criminal process would be reserved for seriously disruptive social conduct not susceptible to control by any other means. In particular, it is assumed that common drunks and vagrants will for little longer clog the machinery of criminal justice.

A criminal court must be assessed with respect to three attributes, the judge, the court in its physical sense, and the ancillary services and per-

¹United States. President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington: United States Government Printing Office, 1967, p. 125

sonnel. Attention was concentrated on the so-called lower courts in view of the fact that approximately 95 per cent of the indictable offences and all summary conviction offences are disposed of at this level of the judicial hierarchy.² Observations derived from an examination of these courts has provided a basis for establishing the following criteria applicable to the entire system of criminal courts.

The Judge

A judge in a criminal case should be legally qualified.

Law has as one of its principal objects the securing to the individual of those rights which he is accorded by the political system in effect. No person should be allowed to adjudicate in a criminal matter who has not received a training adequate to alert him to situations where the basic constitutional rights of a citizen are in issue.

While all supreme, superior and county court judges are recruited from the ranks of the legal profession, it is noted that not all lower courts are presided over by legally qualified persons.

The Committee acknowledges that there are many instances where persons without formal legal qualifications have made very substantial contributions to the administration of justice in the performance of judicial duties. It appears, nonetheless, that in view of the serious nature of charges within the jurisdiction of the lower courts and the gravity of sentences that may be imposed, that future appointments to the Bench should require not only formal legal qualification but substantial practical experience.

A judge in criminal cases should be secure from the risk of pressure from those appointing him or others.

As Lord Hewart (then Lord Chief Justice of England) pointed out:

It is not merely of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.³

The present position in Canada is unsatisfactory in at least two respects: judges provincially appointed have less security of tenure than have judges in the superior courts; judges of the so-called lower courts generally enjoy a lower standard of remuneration than do their brothers in the superior courts. These discrepancies tend to lay the magistracy open to the criticism that they are susceptible to pressure either from the provincial government who appointed them or from those who appear before them.

² Ontario, Royal Commission Inquiry into Civil Rights. *Report No. 1* (McRuer Report). Toronto: Queen's Printer, 1968, p. 526

³ *R. v. Sussex Justices* [1924] 1 K.B. 256, p. 259.

A judge should not be liable to be regarded as part of the police apparatus.

The term "Police Magistrate" still appears in the Criminal Code. While such a description has a sound, historical justification, it is felt that a close identification between any level of the judiciary and the police can only strike at the respect in which the public ought to hold the impartiality of the administration of justice and the police. This matter will be returned to in our analysis and discussion of the physical facilities presently enjoyed by criminal courts.

A judge, in a criminal case, should be adequately informed not only as to the philosophy of sentencing subscribed to by the legal system but also as to the real consequences of any sentence he imposes.

These propositions appear to be self-evident. The layman would expect that a philosophy of sentencing would have been articulated with sufficient clarity that those charged with the responsibility of administering it could comprehend and apply it. A layman might also reasonably expect that a judge imposing a particular sentence would have tailored it not only to the offender but to the climate and facilities available for his punishment or rehabilitation.

Neither of these presumptions would appear to be founded in fact. Neither the appropriate philosophy of sentencing nor the reality of the correctional institutions available, would appear to have been made clear to those charged with the responsibility of imposing sentence in 95 per cent of Canadian criminal cases. It may well be that this lack of information extends throughout the judicial hierarchy. Recommendations are made in the chapter on sentencing to ensure a more adequate flow of relevant information to the courts.

The Court: Its Location and Construction

The court should not be confused with the police station.

The relationship between the police and the courts—in particular the proximity of the magistrates' courts to the police station—has caused great concern in many jurisdictions throughout Canada. Practice varies from province to province, from municipality to municipality within the province, and from court to court within the municipality. For example, in most of the principal cities of Canada, the police and the magistrates' courts occupy the same building, sometimes euphemistically described as a "public safety building". In other jurisdictions, on the other hand, an attempt has been made to keep the police station and the court building separate.

Most will agree that this separation is desirable; the key question is, how separate should they be? The general principle should be sufficient separation of the courts and the police to ensure that the public does not confuse their roles and will be aware of their mutual independence.

A great number of factors will effect the creation of such an impression: the physical proximity of the police station and the court building; whether the court is referred to as a "police court" (and until recently some courts were officially so designated); control of the administration of the courts by the same municipal body which controls the police; whether the court clerk and the other court officials are police officers; whether there is a common entrance to the police station and the court (and whether there is a sign or other indication on the outside of the building that there is a court inside); the existence of other public buildings in the same area; and many other factors, some subtle and some obvious.

No single factor by itself will be decisive; their cumulative effect is the important consideration. Physical separation is probably essential. Without it, it is almost impossible to prevent at least some members of the public from confusing the law enforcement and adjudicative aspects of the administration of justice. The main argument in favour of having the police and the courts together is that it is more efficient for the police and thus decreases public expenditure of funds. But with a well-regulated system of court-liaison officers and a properly organized method of scheduling cases, the amount of time lost can be cut to a minimum. And if steps are taken to remove the offence of drunkenness from the courts, the saving in cost will be further increased. Of course, it is not necessary for the courts to be widely separated from the police; provided that the effect of separation is maintained, they can be adjacent buildings, particularly if there are other public buildings in the same area.

It is not just physical proximity which must be examined, but the total relationship between the courts and the police. To insist on physical separation and yet, for example, to permit the police to control the functioning of the court may accomplish very little.

Having all the criminal courts in one structure would enable the magistrates to have contact with other members of the judiciary, would give them access to a better library than is usually available in the magistrates' courts, and would be more convenient for the other participants, such as lawyers and police, who now appear in both the higher and lower courts. Moreover, a central lockup would be much more workable if all criminal courts were in one building.

The physical facilities should be such as to provide that degree of dignity which is necessary to maintain respect for the law and the administration of justice.

Most of the magistrates' courts in Canada are badly designed and, in the larger centres at least, are overcrowded. The McRuer Report states that the accommodation provided "in many cases is very unsatisfactory⁴"; and one practitioner has observed that "many of our magistrate's courts resemble factory lunch rooms⁵".

⁴ Ibid p. 538.

⁵ Virtue. *Survey of Metropolitan Courts: Final Report* (1962).

Perhaps the first obvious deficiency in design is the too common difficulty of finding the specific courtroom one is looking for—assuming that one has found the proper court building. In many cases there are no visible directions when one enters the building. When there is more than one courtroom in which a case might be tried, it is usually difficult to decipher the posted court list, particularly when there are a great many other persons crowded around the area where the list is posted.

Little need be said about the necessity for adequate lighting, ventilation and acoustics. The latter two are interrelated because in many courts the only way of providing any ventilation (a need usually extreme because of the large number of persons in the courtroom) is to open the windows, bringing in outside noise and making it difficult to hear what is going on inside the courtroom. This is a choice faced by many courts: whether to hear or to breathe. All courts, should, of course, have effective air-conditioning; and outside noise and visual distractions should be eliminated either by constructing the courts in the centre of the building, or at least by placing the courts in that part of the building which is away from a busy street. In a few courts in Canada it is possible for someone in the public section to hear what is taking place in court. Amplification is one solution; better design would be a better one.

The physical relationship between the various participants in the courtroom requires rethinking. The day may well be past in which it was necessary to place the accused as a "prisoner" in a guarded dock. An accused person might well be permitted to sit near his lawyer.

Courtrooms should be adaptable to the various functions performed.

Courtrooms tend to be designed solely for the trial of cases whereas, in fact, magistrates' courts are used to a substantial degree for adjournments and guilty pleas rather than for trials. No account is taken of the fact that a great number of persons not in custody appear in court to plead guilty or to have the case put over to another day. Usually no attempt is made to place these persons in the prisoners' dock. In some courts the accused simply walks up to the front of the court without being particularly sure where he should stand. In other courts the court officials have devised techniques such as placing a chair with its back towards the spectators to serve as the place behind which the accused stands. A proper design would take this function of the court into account and would provide an easily recognized place for an accused on remand to stand. A further indication that the adjournment function of the court has normally been totally forgotten is that no arrangement has been made for a proper calendar to be placed on the wall. All courts require such a calendar which is used by the participants to decide on the date to which a case will be adjourned. Normally an ordinary commercial calendar is used; this is often too small to be properly seen and has inelegant advertising on it. No doubt these are minor points but they do illustrate that little thought has been given to the various functions of a magistrates' court.

Confusion should be avoided.

Good planning can help reduce the appearance of confusion often found in the courts. Because the courts process a large number of cases, a great number of people are constantly coming and going, with witnesses, accused, lawyers, and police officers congregating in the halls. The result is that the halls are necessarily noisy and people are constantly attempting to enter and leave the courtroom. One of the most common sights in courtrooms throughout Canada is a police officer blocking the door and preventing people from coming in or out, often causing confusion. Two techniques are also effective in reducing confusion. When a case or the name of a witness is called, it should be transmitted to the hall by means of a loudspeaker. This simple device would eliminate the necessity of first calling a name in court and, if there is no reply, having a police officer open the court door and repeat the name in the hall. There should also be a system which could instantly convey court documents from the clerk to the administrative office, enabling those convicted or required to enter into a recognizance to comply with the court order without waiting for an official to bring the required papers from the court. In most courts the accused has to wait around for a period of time and a clerk periodically disrupts the court proceedings in order to obtain the necessary documents.

Adequate holding facilities should be provided.

The holding facilities of the courts for accused persons in custody are uniformly bad throughout Canada. In many there is no drinking water or toilet facilities—yet accused persons often remain in such places for several hours before their case is reached. The facilities (usually in a police station) for holding persons overnight and in some cases for short remands are often equally as bad. In many cases there are no mattresses for the steel beds. In general, the atmosphere is oppressive and punitive. Conditions for those who have appeared in court and are then remanded in custody to a local jail are equally depressing.

The Ancillary Services

Delay should be avoided.

Consistent (and in some instances shocking) delay exists in almost all courts in Canada. Even in cases in which both the crown and the defence wish the case to proceed there may be periods of delay ranging up to several months. The introduction of effective legal aid is to produce fewer guilty pleas, with a consequent increase in the problem of delay.

Delay produces a number of harmful effects on the administration of justice. Not only is it unfair and costly to the accused and witnesses, but it wastes the time of the prosecutor and the court. Delay is particularly harmful if the accused is in custody, and steps should be taken to ensure

that these cases are tried first. In many courts the remand date is set before the question of bail is discussed. It would be more sensible if this procedure were reversed. Delay leads to further delay, for each adjournment no matter how quickly it can be processed, requires a certain amount of time and this cuts down on the time available for trying cases. Moreover, congestion and delay mean that the individual case is likely to be given more cursory attention. Because of pressure the magistrate may tend to rely unduly on the crown for bail decisions; may not advise the accused of his rights; may show annoyance at a lengthy presentation of evidence or argument; may pass sentence without a pre-sentence report; may tend to be somewhat inconsiderate.

Delay is particularly unfortunate when both sides are ready to proceed with the case but cannot do so because court personnel or facilities are not available. There are many possible reasons why a case cannot be proceeded with and these vary from time to time and from place to place. In some cases, for example, it is because there are not enough magistrates; in others because there are not enough courtrooms; and in still others—although this is often overlooked—because of a shortage of crown prosecutors. Obviously, there must be sufficient personnel and facilities available to cover the cases as they arise.

Although the crown attorney in many municipalities has control of the scheduling of cases, it would be preferable to have a magistrate perform the function of reducing delay. He should be able to co-ordinate the work in the various courtrooms and should have clear authority to shift cases from one magistrate to another in order to equalize the case load and to ensure that cases are processed at the first reasonable opportunity. Not only should there be someone in charge of the court in a particular municipality but there should be a chief magistrate for the province who is given legal authority to move magistrates from one area to another depending upon need. All magistrates should have territorial jurisdiction throughout the province.

In most magistrate's courts throughout Canada proceedings start at 10 o'clock in the morning and all the cases are called for at that time in order to avoid a gap in the proceedings. The sensible procedure would be to stagger the cases throughout the day; if there is a gap in the proceedings the magistrate and other participants can retire to their respective chambers. As one efficiency expert has pointed out, "After all, a dentist does not start work with all his patients for that day mustered in the waiting room, so why the magistrate?" Certainly there should be at least a morning and afternoon court (which many cities now have) and, in the larger centres, a night court to which certain cases could be adjourned for trial and which would also handle the first appearance of persons arrested during the day. There is no reason why cases cannot be further staggered, perhaps by hourly periods. A simple step such as this would cut down on the usual waiting around and confusion which now tends to be a hallmark of magistrates' courts.

In many courts in Canada no one appears to be in charge of administration. It is not uncommon to find extremely crowded dockets and complaints about the length of time before a case could be tried and yet to find that courts are not operating in the afternoon. With better co-ordination of personnel and facilities such an unfortunate situation could probably be avoided. Confusion might also be lessened if a simple document outlining how the court handles such matters as remands and guilty pleas were available (in appropriate languages) to accused persons and witnesses. The introduction of legal aid duty counsel should mean that the court procedure will run more smoothly.

A further technique applicable in the large centres is to have all new cases appear first in one court—the court of first appearance—and to fix a trial date at that time where there is no plea of guilty. This technique is now used in a number of the larger centres and is certainly more effective than an initial division of the new cases among the various courts. A further advantage of a court of first appearance is that magistrates can devote more time and consideration to setting bail and remand dates. Moreover, since they will not necessarily conduct the trial, the risk of prejudice (because of knowledge of the accused's prior conduct) will be reduced.

We have been dealing with cases in which both sides were prepared to proceed. But of course it often happens that either the crown or the accused or both do not wish to proceed. If neither wish to proceed, very little can be done by the magistrate. If the defence wishes to proceed but the crown is not ready and the magistrate feels that the crown has had adequate time to prepare its case and that there is no justifiable reason for not proceeding at this time, he can and should proceed with the case; if the evidence does not justify a conviction, he should dismiss the charge.

Probably a greater cause for delay is the unwillingness of defence counsel to proceed. The magistrate is placed in a difficult position if he forces the accused to proceed without his lawyer, for this might appear to be a denial of the accused's right to counsel. On the other hand, if the magistrate accedes to the accused's counsel's request he will only encourage delay. Many magistrates in Canada readily grant adjournments in these cases; to force an accused person on with his case, when there has been ample opportunity for preparing it, would be desirable. In jurisdictions in which there are duty counsel, the magistrate should be able to assign duty counsel to assist the accused in such instances in the trial of the case.

The treatment of witnesses in magistrates' court has already been touched on; techniques should be developed to ensure that they are treated with consideration, are adequately compensated, and do not have to spend too much time waiting for the case to be heard. Certainly they should be notified in advance if the case is not to be proceeded with. Moreover, techniques should be explored which would enable witnesses to stay at their jobs and yet be ready to be called on very short notice.

Finally, something should be said about the use of computers in the scheduling of cases. In the larger centres this is now done for traffic cases. Examination should be made of its use in assigning and adjourning criminal cases. The computer can more effectively take into account such factors as existing case loads, time requirements, and availability of personnel than can a magistrate and crown counsel who have to make this decision on the spur of the moment.

A serious weakness in the administration of many magistrates' courts in Canada is the inefficient manner of preparing, presenting and integrating the various documents used in the criminal and correctional processes. There are few courts which would not benefit greatly from serious examination by an efficiency expert.

One of the most hopeful developments in correcting the deficiencies has come through the Dominion Bureau of Statistics which has started to work closely with a number of provinces in developing new forms to serve provincial administrative, research, and statistical needs as well as the Bureau's requirements for data and for statistical research.

Adequate diagnostic services should be available to a court sentencing an offender convicted of a criminal offence.⁶

Pre-sentence reports are neither required nor obtained in many cases presently disposed of by a sentence of imprisonment. Pre-sentence reports should be required by law as a preliminary to the imposition of any sentence involving serious loss of liberty or loss of means of livelihood and adequate facilities should be made available for their preparation.

Adequate post-disposition report should be available to all criminal courts.

At present there appears to be no formal process by way of which a judge or magistrate is informed as to what actually happens to an offender as a result of a particular disposition arrived at. An informal although negative information service exists in that a judge or magistrate may well recognize an offender as one previously sentenced in his court or may have an offender brought before him in breach of a probation order. It would seem desirable that a flow of positive statistical information be established so that the judge or magistrate would be aware of the subsequent career of those sentenced by him. Such a system would of necessity be confined to indictable offences.

Conclusion

The Committee is firmly of the view that criteria should be established with reference to which the performance of the Canadian criminal courts could be assessed.

⁶ This matter is fully dealt with in Chapter 11

At stake is the success of the criminal process. As the American *Task Force Report on the Administration of Justice* states:

No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality, and rehabilitation professed in theory, yet frequently denied in practice. The result may be a hardening of anti-social attitudes in many defendants and the creation of obstacles to the successful adjustment of others.⁷

Only with a sufficient number of qualified personnel, adequate physical resources, effective supervision, and a constant examination of the system can the courts in Canada properly meet the demands placed upon them by society.

⁷President's Commission on Law Enforcement and Administration of Justice. *Task Force Report on the Courts*. op. cit., p. 29.

10

USE AND PROTECTION OF INFORMATION ACQUIRED THROUGH A CONFIDENTIAL RELATIONSHIP

Very great concern has been evidenced to the Committee on this matter and from briefs and interviews it is obvious that those engaged in diagnostic, counselling, treatment, or related functions, including doctors, clergymen, social workers, psychologists and psychiatrists, find what appears to be a serious conflict of interest between what they conceive to be their duty to their patients or clients and their duty to the public authorities.

For example, clients come to an agency expecting to receive help. Effective service is based upon the development of a close and individual relationship with the caseworker as representative of the agency or service. To receive help involves a great degree of trust to ensure the production by the applicant not only of identifying information but of highly emotional and intimate material or secrets of great depth. This information may affect not only the client himself and his feelings but his attitudes and actions concerning others in inter-personal and family relationships.

The public also has an attitude to this helping relationship. There is good reason to believe that the public expects a priest, minister, doctor or lawyer, in the exercise of his professional function, to maintain confidence. The work of the social worker falls within the same general type of relationship. It is hard to distinguish between the responsibility of the psychiatrist and the social worker since they are both dealing with emotional matters.¹

We think the main concern is the possibility of compelling disclosure in court of a variety of social or personal behaviour which no-one would normally want to become public knowledge. The point to emphasize is that the emergence of organized, well established social agencies and mental health clinics is a comparatively recent phenomenon, and has brought about the widespread practice of recording highly personal material which did not previously exist anywhere in comparable recorded form, and which often affects others besides the client or patient himself. The recording of this

¹The above two paragraphs are taken from a brief submitted to the Committee by the John Howard Society of Ontario.

material, both for reference during a lengthy treatment process, and for sharing within the agency or clinic with certain other persons involved in the treatment process to whom disclosure was not made directly, is a legitimate and necessary practice if used solely for the purpose for which it was obtained and recorded. If used for other purposes however, it could constitute a gross invasion of privacy.

We suggest, in view of this *recent* emergence of the existence of such recorded material, that a particular responsibility rests upon the courts to establish, first, the *relevance* of any such material which is sought to be introduced, and secondly, to establish the presence of sufficiently compelling *reasons* that, in the public interest, it should be introduced, which will override what are in our view, serious reasons of public interest requiring the protection of such material. It must be emphasized that this material has usually been shared with a psychiatrist or social worker in the pursuit of goals which were in the personal interest of the patient or client but which may in another context be used against him.

The Committee accepts the proposition that the effectiveness of the correctional services and treatment agencies is related to the degree that confidentiality may be maintained between the offender and those involved in his treatment. We agree that the confidentiality of such relationships should be protected to the extent that is consistent with other public interests also to be protected. New therapeutic techniques have not as yet become sufficiently stable to allow easy legal recognition; however, there is no reason why the trend to recognize them should not continue to develop.

It appears, however, that much of the concern evidenced to the Committee arises not so much from the inadequacy of the existing law but from a regrettable failure to clarify the existing law and from a failure to appreciate that a number of different situations arise in which those working with offenders assume entirely different roles. For example, a probation officer will typically serve to collect information for the court before sentence and assume a blended role of supervisor and counsellor in the post-disposition stage. A probation officer is bound to supervise a probationer and report any breaches of the probation order. In his capacity as counsellor, he is under no obligation to report information. Similarly, a psychiatrist to whom a person is sent for assessment may inevitably engage in some form of treatment thereby confusing his role. The significance of the relationship in terms of confidentiality obviously presupposes that the relationship has been identified.

Rights and Duties of Citizens Generally

There appears to be a widespread misunderstanding as to the duties of any citizen with respect to communication of information to the authorities. These duties must be considered with respect to both the law enforcement agencies and the courts. A citizen is under a strong social and moral duty to assist both the law enforcement agencies and the courts in the prevention of crime and the apprehension and conviction of criminals.

This obligation however is *not* enforceable by law with respect to law enforcement agencies and no citizen is under any obligation under existing law to report to the law enforcement authorities, information which indicates that a crime (other than treason)² is about to be committed or under any legal duty to report information that a crime has been committed. The police are, of course, entitled to ask questions but, as indicated, no one, subject to specific statutory exceptions,³ is under any legal obligation to disclose any information which he has in reply. It is, of course, an offence to assist in the preparation or commission of a crime or to positively assist a criminal to escape but to refrain from disclosing information either before or after a crime is not considered in law a form of prohibited resistance to authority.

Different considerations apply where the criminal process has reached the point of court proceedings against a particular accused. At such stage, everyone, save the accused and in most instances, his spouse and members of certain very limited classes such as ambassadors, is bound to appear in court and give evidence when called upon to do so by either party to the proceeding. When such a person has entered the witness box, he is bound, again generally speaking, to answer any question put to him and refusal to answer such questions will put him in contempt of court.

Privilege Arising from Particular Relationships

There are a small number of instances where a witness may be excused or indeed prevented from answering certain questions. This power to refuse or prevent answers has traditionally been referred to as "privilege".

The most widely publicized and frequently misunderstood privilege is that which arises from the relationship of lawyer and client. A lawyer may not disclose, without his client's permission, matters which have been communicated to him in his capacity as lawyer, except where the information was communicated to him for the purpose of enabling a crime or fraud to be committed. To dissipate the misunderstandings which do exist, it must be emphasized that this privilege does not extend to matters of which a lawyer becomes aware otherwise than in his capacity as lawyer. Were a lawyer to see a man assault another, he would be liable to be called as a witness and to tell the court what he saw despite the fact that the accused whom he saw was already a client at the time of the assault. Similarly, except for information collected by the lawyer for the purpose of conducting litigation on behalf of the client or giving him legal advice, he would be bound to disclose in court anything he learned. The privilege does not extend to matters related to projected crimes and frauds. The justification for this privilege is obvious; if a man is to be fully advised as to his legal rights he must obviously be protected

² Criminal Code, Statutes of Canada 1953-54, 2-3 Eliz. II as amended to 1967:

50 (1) Everyone commits an offence who

(b) Knowing that a person is about to commit treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing treason.

³ For example, Ontario Highway Traffic Act, R.S.O. 1960 C. 172, S. 143, 144, 143A S.O. 1960-61 C. 34, S. 15.

from subsequent disclosure. In some jurisdictions in Canada, a similar privilege is extended to the relationship of spiritual advisor and parishioner. Such provincial privilege has been held to apply only to civil cases⁴ but it is thought unlikely that any Canadian court even in a criminal matter, would hold in contempt a clergyman of a recognised religion who claimed to be bound to silence in his capacity as spiritual advisor. Generally speaking, save for provincial legislation, no privilege attaches to the relationship of doctor and patient, although, in one unreported decision, the Ontario High Court refused to compel a psychiatrist to give evidence in divorce proceedings.⁵ This discretionary power to refuse to compel a witness to answer must not be confused with an established privilege of a witness to refuse to answer.

State Privilege

Apart from a privilege arising out of a particular relationship, a privilege may be claimed by the state itself to refuse to disclose certain facts or to prevent others from disclosing such facts. A typical example of a claim for such privilege is found in an English case concerning plans for an experimental submarine which sank while on trials. Dependents of those lost in the disaster brought action against the ship builders, claiming negligence, and sought production of the plans of the submarine. The action arose in 1939 and the British Admiralty intervened to prevent disclosure of the plans by way of an objection by the First Sea Lord that such production would "not be in the public interest." The court accepted the binding effect of such restriction when expressed in proper form.⁶ In a more recent Canadian case involving the liability of the Department of National Revenue to produce income tax returns made by an accused person, the Minister objected to production on the ground of prejudice to the public interest. The accused were charged with bookmaking offences and the prosecution had information that income tax returns had been filed showing the amount and source of this illegal income. Counsel for the Department of National Revenue argued that the Minister's objection was final and that the public was to be protected from the danger that the revenues of the Crown would suffer if criminals feared to make a true return of their unlawful profits. It was argued for the Minister that his objection was conclusive. The Supreme Court of Canada held that the Minister's objection was *not conclusive* unless the facts involved were such as it *could* be against the public interest to disclose. The court would not permit an objection on untenable grounds to prevail.⁷

Statements without Prejudice

Closely linked to the matter of privilege is the existence of so-called 'statements without prejudice.' As Dr. Rupert Cross points out:

⁴ *Marshal v. R.* [1961] S.C.R. 123, p. 128-9 (1961) 26 D.L.R. (2d) 459, p. 464-465.

⁵ per Stewart, J. *Dembie v. Dembie* (unreported) April 6th, 1963, Ontario High Court of Justice.

⁶ *Duncan v. Cammell, Laird and Co. Ltd.* [1942], A.C. 624.

⁷ *R. v. Snider* [1954] 4 D.L.R. 483; 109 C. C. C. 193; (the Department of National Revenue has since been protected from compulsory disclosure by sec. 133 Income Tax Act).

As part of an attempt to settle a dispute, the parties frequently make statements "without prejudice". When this is done, the contents of the statement cannot be put in evidence without the consent of both parties, the case being one of joint privilege. The statements often relate to the offer of a compromise, and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. Obviously it is in the public interest that disputes should be settled and litigation reduced to a minimum, so the policy of the law is in favour of enlarging the cloak under which negotiations may be conducted without prejudice. . . . Some recent cases have been concerned with statements made to a mediator and the question arises as to whether he can decline to give evidence concerning them without the consent of the parties. The answer is in the affirmative, and although this would probably be the case with all negotiations carried on through a mediator, the promotion of marital harmony is an additional reason in favour of the promotion of the fullest possible privilege when the dispute is between husband and wife. . . .⁸

Confidentiality with Respect to Corrections

The general legal position as to privilege has been set out in the above brief summary. In the light of this general statement, the legal position of the psychologist, psychiatrist or social worker involved in the correctional process, may be ascertained.

It appears to the Committee that problems of confidentiality arise at two stages of the criminal process, pre-disposition and post-disposition. In the pre-disposition stage, a person called upon to prepare a pre-sentence report may feel that there are certain matters which he would like to divulge to the court but which he would prefer to withhold from the offender. Again, a social or treatment agency is likely to have been in confidential contact with many persons not charged with offences at that time but who subsequently are alleged to have committed offences.

In the post-disposition stage, a similar concern exists and it appears that some persons involved in the treatment and correction of offenders acquire information from or about the offender which they would prefer to withhold from law enforcement authorities and to be privileged from disclosure as evidence in court.

The two chronological stages indicated will be dealt with separately.

Pre-Disposition

One problem at this stage concerns the confidentiality of information acquired to assist the court in arriving at a proper sentence. Information may be obtained by the court from a variety of sources but is typically contained in a pre-sentence report. A probation officer or other person gathering information is clearly acting at this stage as agent for the court and is bound to disclose to the court all relevant information acquired in his pre-sentence investigation. As noted earlier, the services concerned have shown substan-

⁸ *Evidence* by Rupert Cross, 3rd ed., London, 1966, pp. 247-248.

tial concern on the issue whether this information should, in suitable circumstances, be withheld from an accused person. The services fear that information contained in some pre-sentence reports which is presently unknown to some accused persons, if conveyed to an accused may cause serious psychological or social damage to him. A typical example is information that the accused is illegitimate. Except in so far as this fact, if known to others, may have a bearing on their attitude towards him, it is hard to see the relevancy of such information if the accused was up to now unaware of his illegitimacy. Nothing should be put before the court which is not logically relevant to one of the issues before the court. If those furnishing information applied more stringent tests to the use of information collected, then it is believed that many of the problems would disappear

There is also a fear that the informant may make himself liable in an action for defamation based upon the allegations contained in a pre-sentence report. Also, there appears to be a fear that sources of information will dry up if the source learns that the information is being communicated to the offender.

Nevertheless, it is axiomatic in terms of Canadian concepts of fair trial and due process that an accused or his counsel be made aware of any allegations which may affect his sentence so that they may be explained, denied or rebutted. Any damage inflicted by this communication must be balanced against the need for a system which is not only fair but is seen to be fair. The same is true as to the security of the sources of information. Fairness demands that the accused be entitled to not merely the allegations but their source. The risk of liability to a defamation action by an informant is illusory in that an informant acting without malice and bona fide would be protected by qualified privilege; an officer of the court would, it is submitted, be protected absolutely.

Where information is being collected for use in relation to the sentencing of the offender, the offender should be notified and all information collected should be placed before him or his counsel. Informants should be warned that the offender will be made aware of the reports. The relationship which governs is that between the informant and the court and no question of confidentiality arises as between the informant and the offender⁹.

⁹ See the Criminal Justice Act 1954 of New Zealand which provides:

5. Report of probation officer to be shown or given to offender—
 - (1) Where, under any provision of this Act or of any other enactment, a written report is made to the Court by a probation officer, a copy of the report shall be shown, or if the Court so directs shall be given, to the solicitor or counsel appearing for the offender, or, if the offender is not represented by a solicitor or counsel, to the offender.
 - (2) The offender or his solicitor or counsel may tender evidence on any matter referred to in any report, whether written or oral, that is made to the Court by a probation officer.
 - (3) Failure to show or give a copy of any report in accordance with this section shall not affect the validity of the proceedings in any Court or of any order made or sentence passed by the Court.

It is difficult to justify §(3) where the failure may have prejudiced the offender.

See also the Canadian case *R. v. Benson and Stevenson* (1951), 100 C. C. C. 249 in which the British Columbia Court of Appeal held that the probation officer's pre-sentence report, excepting those items concerning the prisoner's mental condition, must be revealed to the prisoner. This case was followed by the same court in *R. v. Dolbec* [1963] 2 C. C. C. 87.

Post-Disposition

At this stage entirely different considerations may apply.

Supervision of Probation or Parole Conditions. Where an offender is released subject to conditions, which include to be of good order and to keep the peace, a probation or parole officer serves the double function of supervision and treatment. In his supervisory function, his duty is clearly to the court to see that the conditions of probation or parole are observed and no question of confidentiality arises as between himself and his probationer or parolee in this respect.

Treatment under Probation, Parole or After-care. Probation and parole involve both supervision and treatment while after-care has no supervisory ingredient. However, the legal position of an agency supplying treatment within the correctional process would seem to be no different from that of a similar agency outside the correctional process. The incidents which attach to the relationship are determined by reference to the general law as set out in the summary above. A treatment agency is under no higher duty to report actual or contemplated crimes to the law enforcement authorities than is any other person. The decision to report such crimes or to remain silent is left to the conscience and professional ethics of the individual concerned. As was pointed out above, if a member of such an agency is summoned as a witness to court he must attend. Having entered the witness box, he must in general answer any question put to him. The possibility of extending a formal and fixed professional privilege like that which attaches to the lawyer-client relationship, appears to be remote because of the difficulty of defining the professional roles involved and the social value of protecting certain kinds of information. No true analogy to "without prejudice" negotiations can be drawn as they are based on the traditional policy of the courts that settlement is better than litigation. In the situations here discussed, the social agency is *not acting as mediator* between two parties. The matrimonial cases are, therefore, without relevance. The correct analogy is with the relationship between those standing in a spiritual or medical relationship which a judge may, not must, recognise as privileged in a particular case.

There are, however, two ways of *claiming privilege* for information obtained through such relationship; one is by way of intervention by a minister of state who would claim that the information should not be disclosed as it would be against the public interest so to do. Should he make such objection, the courts would sustain it unless his grounds were patently lacking or untenable. In England, ministers of state have successfully objected to such things as the production of reports made by doctors and police officers concerning the mental condition of a prisoner awaiting trial who had assaulted the plaintiff, a fellow prisoner, and to the production of a soldier's medical sheets at the hearing of a divorce case. It is clearly established that a minister may interfere even where the witness is not a member of a state agency,

provided that the state has a general interest in the matter involved¹⁰. Admittedly, the English courts are asserting themselves and no longer feel themselves bound to accept the minister's decision as final—nonetheless it is felt that in each of the above cases there was an element of public interest which the courts could not have regarded as illusory. It is felt that a Canadian court might well have arrived at similar decisions, under the current Canadian rule. The minister's objection in such case would be based upon the propositions that the effectiveness of service of the type involved depended on the trust of the persons served and that the value to society of the services generally was so important as to override the interest of discovering the facts in any particular case.

The other way of claiming privilege is for the particular witness to object to answering a particular question with respect to information acquired in a confidential way. An individual trial judge might or might not protect the witness depending not only on the nature of the proceeding but on the importance of the evidence sought to be compelled. This appears to be a matter of judicial discretion and there appears to be no reason why any witness should not claim the privilege. With increasing clarification of the nature of the relationship it is to be expected that judicial recognition will correspondingly increase.

Particular Problems

1. *The use of a pre-sentence report in subsequent criminal or civil proceedings.*

It would appear that on the basis of the general law of evidence, an actual pre-sentence report would not be admissible as such in subsequent civil or criminal proceedings in that to do so would offend many of the exclusionary rules (e.g. the rules relating to hearsay, opinion and character evidence). Those supplying the information could of course be called as witnesses in any subsequent proceeding.

It has been suggested that the appellate courts are sometimes supplied with copies of a pre-sentence report used by the sentencing judge at trial. This practice is, of course, sound where the appeal relates to the sentence imposed. Different considerations apply where the appeal is against conviction and it is suggested that there are good reasons why in such a situation the pre-sentence report should not be placed before the appellate court.

2. *The use of agency or hospital records as evidence in subsequent civil or criminal proceedings.*

As previously noted, this type of documentary material may not, save in a limited number of exceptional cases, be admissible as evidence

¹⁰ *Broome v. Broome* [1955] P. 190; [1955] 1 all. E.R. 201. In this case crown privilege was successfully invoked with respect to records compiled by an agency which had no connection with the crown. It was further held that though the minister could not prevent the compiler of the records generally from testifying that if the minister had appeared at the hearing he could have objected to specific questions put to the witness and the court would be likely to uphold the claim of crown privilege in respect of such questions.

by reason of the operation of the exclusionary rules. Once again, persons designated as informants, might be called as witnesses.

3. *The use of law enforcement agencies or hospital records as sources of information.*

Voluntary disclosure of information to law enforcement agencies is, as has been noted earlier, a matter of ethics rather than law although in at least one province it may be a provincial offence to disclose such information without lawful justification.

Where the agency or hospital does not wish to disclose its records to the police, is it bound to do so? Once again the general rule applies that no one is legally bound to disclose information to, or answer questions put to them by police officers. Nonetheless, there appears to be very real concern in agencies and hospitals that their records may be made available to law enforcement officers greatly to the detriment of a particular confidential relationship and generally to the agency or hospital's reputation for trustworthiness. Coupled with this concern is much confusion stemming from a failure to realise that a duty to disclose to the police must be distinguished from a duty to disclose to the courts.

There appears to be grave doubts as to whether documents, which are not evidence themselves, may be seized in order to inspect them for the purpose of obtaining information.¹¹

4. *The liability of individuals to appear as witnesses or produce documents in court under sub-poena.*

As has been made clear, individuals are liable to be called as witnesses and questioned in the witness-box as to information acquired in a confidential relationship. It appears that the most common situation is in matters involving family or matrimonial disputes where a person involved with one of the parties in a correctional or welfare relationship is asked to disclose matters acquired through that relationship. At the moment, it has been

¹¹ The possibility of employing search warrant procedures to examine records in the possession of a person not suspected of or charged with a crime was considered in the recent Ontario case of *R. v. Mowat* [1968] 1 O.R. 179. The issue in that case was whether a search warrant authorising search and seizure of records maintained by a bank, should be quashed. It was held that the bank was protected by the Canada Evidence Act which in section 29(5) creates a special privilege with respect to bankers' books. A more general authority on this matter may be an earlier Ontario case, re *The Bell Telephone Co.* [1947] OWN 651. This was also an application to quash a search warrant which purported to authorise police officers to enter certain premises and observe the operation of certain devices which indicated the origin and destination of telephone calls. In quashing the warrant, McRuer C. J. H. C. appeared to draw a distinction between the use of a search warrant to procure things for use as evidence and the use of a search warrant to procure things in connection with an offence. This second extended use was not lawful. It may be that the interest of the police in agency and hospital records is analogous to their interest in telephone equipment—the interest being in observing the records in order to discover facts and the identity of potential witnesses, not in seizing the records in order to preserve them for use in evidence.

suggested that a person faced with such question has two courses open to him if he wishes to be excused from answering.

- (a) He may ask the presiding judge to exercise his discretion and grant him privilege which the trial judge may, subject to appeal, grant or refuse; and/or
- (b) He may rely upon an objection to his answering the question made by the appropriate minister on the ground that to pry open relationships of this class would be contrary to a specified public interest. In such case, the presiding judge would be bound to uphold the objection unless he found it completely without merit. This course depends on prior agreement by the minister to intervene, and actual intervention by or on behalf of the minister at trial. The witness cannot raise this ground of privilege himself as the privilege is entirely that of the state.

Summary of Views and Conclusions

The discretion hitherto exercised by the courts in refusing to compel a clergyman or a psychiatrist to disclose information received as a spiritual adviser or by way of communication from a patient is capable of expanding to meet the needs of the newer professional groups involved in corrections. Declaratory legislation confirming the right of a judge to exercise his discretion in refusing to compel a witness to answer a question would, no doubt, provide a firm basis for such expansion in that witnesses would be encouraged to seek protection in suitable cases.

The Committee accordingly recommends that the Canada Evidence Act be amended by adding a new section 5A expressed as follows:

Objection By Witness

- s. 5A (1) A witness may object to answering any question on the ground that it would be contrary to the public interest to compel him to answer.**
- (2) Where a witness has objected to answering a question on the ground that it would be contrary to the public interest to compel him to answer, the presiding judge or magistrate may, where in his opinion it would be contrary to the public interest to compel the witness to answer, excuse the witness from answering the question.**

11

SENTENCING

Introduction

A unity of purpose and philosophy is essential to any system of criminal justice which purports to deal in a meaningful way with an offender against the criminal law. Legislative policy in the creation of offences, the extent of police powers in prevention and investigation of crime, the operation of the courts and lawyers, judicial policy in the disposition of offenders, the construction and operation of correctional services, must rest upon a common principle.

The Committee has stated in Chapter 2 its view of the proper function of the criminal and correctional process: to protect society from the effects of crime in a manner commanding public respect and support, at the same time avoiding needless injury to the offender.

The greatest obstacles to the development of a unified system of criminal law and corrections have been the absence, to date, of any clearly articulated sentencing policy and the inadequacy of the services and facilities available to a judge responsible for the key operation in the entire process. The Committee makes far reaching recommendations which respect both to sentencing policy and to the necessity for increasing the range of dispositions available to a sentencing judge.

The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.

An examination, however cursory, of the history of judicial sentencing in the Western world, indicates both the magnitude and complexity of the task

which faced the Committee. No clear patterns or cycles can be detected and perhaps the only conclusion that can safely be drawn is that conditions are not adverse to further changes in the directions proposed by us.

Historical Positions on Sentencing

A study of the changes that have occurred in our ideas of how to deal with offenders against the criminal law brings us into contact with one of the most fascinating and challenging aspects of social history, the history of punishment. It is by and large, a sordid history; a record of our slow progress in finding effective means of reducing criminality by punishment; a record of much violence, brutality, torture and indifference to human suffering, but also of charity, compassion and honest search for methods of correctional treatment that will salvage rather than destroy those who are its objects.¹

Punishment

There can be little doubt that the emphasis on correction, rather than punishment, is of comparatively recent origin. Any attempt to assess early positions on sentencing policy can only result in the conclusion that early sentencing policy was vindictive, retributive or, at the best, negative. Both quality and quantity of the sentence were supposed to reflect the seriousness of the offence. There was a wide variety of serious punishments.

The Bible mentions "being put to the sword, stoned, decapitated, rendered asunder, crucified, strangled, and burned to death". Drowning was also an ancient form of punishment. The Romans executed parricides by putting the murderer into a bag with a dog, a cock, a viper, an ape and throwing the menagerie into the Tiber. In Mediaeval Europe male felons were often broken on the wheel.

That the seriousness of the offence was relative rather than absolute is indicated by the widely divergent conduct to which very serious penalties were applied. For example, the Mosaic Code listed no fewer than 33 capital crimes including witchcraft and failure to keep the Passover. During certain periods of the Roman republic one could suffer death for publishing a libel and singing insulting songs.

In Mediaeval England, consorting with gypsies, as well as clipping coins carried the penalty of death. In 1722, the Waltham (so-called *Black*) Act was passed by parliament. It brought to about 350 the number of existing capital crimes including such offences as stealing rabbits or fish, or maiming or wounding cattle. Some sections of the Act remained in existence for over 110 years, that is, until 1833.

In Massachusetts Bay Colony, idolatry, witchcraft and a child's cursing or hitting his parents; in Newhaven Colony profaning the Lord's Day by work or sport and doing it "proudly, presumptuously and with a high head," were capital offences.

¹ Thorsten Sellin. "Correction in Historical Perspective." *Law and Contemporary Problems* (1958) Vol. 23, p. 585.

In Virginia any Englishman found North of the York River and any Indian found South of the James River were guilty of capital offences.

Punishment was self-justifying: crime demanded punishment. Such protection as was achieved, was by elimination of the offender and the possible deterrent effects of his elimination upon others tempted to commit similar crimes. Prisons, so far as they existed, were used to hold persons awaiting trial rather than as punishment devices.

Penitence

With the construction of prisons, a penitential theory appeared. For example, in the New World, two philosophies based on this common purpose were translated into action by the construction of two penitentiaries; one, the "Cherry Hill" Institution (Eastern Pennsylvania Penitentiary), in Philadelphia, and the other, the Auburn Prison in the State of New York.

These two prisons were built between 1820 and 1830. They appear to have influenced, until about a decade ago, the design and program for carceral institutions in the Western world.

In the Eastern Pennsylvania Penitentiary, a man was put into a cell alone with his Bible and his thoughts (the theory being, that he would repent and reform); whereas in the Auburn Prison inmates were let out of their cells by day to work together in shops while being forbidden to speak and required to march in lockstep with a downcast gaze. The latter system rested on the theory that hard work, not solitary penance, would both punish and reform. However, the efficacy of such methods has not been demonstrated.

The penitential theory has a fundamental defect in that it rests on the proposition that an offender must be imprisoned in order to provide an opportunity for his reform.

There is mounting evidence that treatment in the community may frequently be much more effective.

Correction

Correction refers to the contemporary theory and potential practice in the treatment of offenders against the criminal law. Correction, in the view of the Committee, involves an averment of the value, or potential value, of an offender and seeks to find more subtle means than mere punishment or penitence to accomplish his return to and acceptance by society. Contemporary correctional philosophy treats the offender as a continuing member of society and while condemning his behaviour, seeks to correct him.

The claims of different correctional approaches should be made the subject of long-term empirical research. The Committee feels, however, that the success of measures involving treatment in the community is sufficiently impressive to justify the Committee's position. If society can be as well, if not better, protected by measures involving a reduction in imprisonment and the abolition of corporal punishment, we believe that such steps should be taken at once.

Contemporary Positions on Sentencing

The aim of sentencing should be the protection of the community. Contemporary positions on sentencing take into account three possible approaches to this desired result:

- (i) punishment for general or particular deterrence,
- (ii) segregation, and
- (iii) rehabilitation.

There is occasional and generally derogatory reference in sentencing literature to what may appear to be a vestigial remainder of punishment as punishment, generally referred to as retribution. Retribution may be understood as either vengeance or repudiation. The satisfaction of a desire for vengeance is a very expensive, and in our view fruitless, luxury. The cost to the community of incarceration and the damage to and the subsequent danger from, an individual punished for vengeance make the execution of vengeance totally unacceptable to any rationally motivated community. Repudiation is, however, a different matter. Repudiation relates to the solemn denunciation of certain behaviour. It is the view of the Committee that any sentence based on the principle of deterrence inevitably involves repudiation. Society says to the offender, "We repudiate this behaviour" and indicates the degree of repudiation by the degree of sentence imposed. Repudiation is thus inextricably interwoven with deterrence, whether general or particular.

Contemporary approaches to sentencing might well be described as of a compromise nature. A judge is said to be required to take the three measures of deterrence, rehabilitation and segregation into account when deciding how best to ensure the protection of the community. These approaches require him not to select one technique to the exclusion of others, but rather to blend all three into an appropriate disposition.

In order to determine the degree and extent of control which is appropriate in a particular case, the judge must first decide which is the *pre-dominant* consideration.

In one case reform and rehabilitation may be the predominant consideration. In another case the deterrence of others may be paramount to reform of the individual and in another case prevention of the particular offender from continuing his activities may be paramount.²

The Committee agrees with the proposition that one approach must be predominant or paramount. It appears to us that when all approaches are given equal measure in the so-called blending process then the result may serve none rather than all the aims of sentencing. No paramount approach aimed at the protection of society will obliterate all secondary effects of the subordinate approaches.

² Per McLennan J. A. in *Reg v. Wilmott* (1966), 58 D.L.R. (2nd) p. 33 at p. 39.

Any blending process involves an acceptance of the propositions that control protects society from the particular offender for the period of control; that whatever control is imposed is unwelcome and operates as a deterrent; that some degree of control is involved in any known technique of rehabilitation.

Contemporary Canadian Law

The Canadian Criminal Code does not contain a general definition of the words "sentence" and "sentencing". In general it affords the sentencing authority a choice which is limited to fines, fines in addition to imprisonment, imprisonment, sometimes with corporal punishment, and probation dependent upon a suspended sentence, accompanied by a "bond to keep the peace and be of good behaviour". No guidelines are provided, except in some few cases where a statutory minimum sentence does away partly with the discretionary power of the courts, and in all cases where a maximum penalty draws the line. However, minimum sentences have been infrequently prescribed in the latest revision of the Criminal Code. The maximum sentence provided for an offence appears to mark the seriousness with which Parliament viewed that category of offence. The degree of "punishment" (an omnibus expression applying to sentences in the Code) is otherwise left to the discretion of the court, subject to limitations prescribed in the applicable enactment.

Under our federal system of divided responsibility a reasonably consistent and pervasive sentencing policy is difficult to attain. In addition to the noticeable inequalities existing among the provinces in the standard of custodial care and correction, judges and magistrates are limited in the sentencing process by the available custodial and correctional institutions.

The Committee's Approach

The Committee sees the criminal justice system as existing to protect society and recognizes that the infliction of punishment is justified where necessary for that purpose. We accept that at the present time protection is secured by way of deterrence, segregation and rehabilitation. It is worth reiterating that the Committee believes that the ultimate rehabilitation of the individual offers the best long-term protection for society, since that ends the risk of a continuing criminal career.

Relatively little is known as to the effectiveness of the deterrent techniques and at present protection by way of segregation is, in general, both erratic and irrational in that it is imposed by way of fixed sentences at the end of which the offender, however dangerous, must be set free. Existing legislative provision for indefinite segregation does not appear to us either in theory or in practice to have protected Canadian society from the dangerous offender.

Dangerous Offenders

This lack of adequate protection from the chronically dangerous offender is perhaps the most serious defect in the present legislation governing habitual offenders and dangerous sexual offenders and the Committee recommends the creation of a new category of offender, the *Dangerous Offender*, who would be liable to indefinite segregation, not for punitive or exemplary purposes, but purely to protect the community by physically preventing the repetition of the dangerous conduct for which he has been convicted and by affording him such treatment as may be available in an appropriate setting. Detailed proposals for the repeal of the present preventive detention legislation and its replacement by dangerous offender provisions are set out in a separate chapter. Generally, it is recommended that where a conviction has been registered for certain specified crimes involving serious danger to the person, the sentencing judge may remand the offender for a period of observation and assessment after which he would be returned to the court for a determination as to his chronic dangerousness. If so classified, he would be sentenced to indefinite detention, provision being made for regular review.

Necessity for Imprisonment

Were this dangerous group to be identified and segregated, many of the long sentences presently imposed, and at least in part justified by the need to protect society by removing an offender suspected to be dangerous from the community, would be unnecessary and the protection of the public from the chronically dangerous might be achieved by segregation from which all deliberate elements of example and retribution had been eliminated.

It is the Committee's view that in all cases where there has been no finding of dangerousness, sentences of imprisonment should be imposed only where protection of society clearly requires such penalty, for example, where there is grave risk from a few, where there is grave temptation for many, or where the failure to impose a sentence of imprisonment would inadequately reflect society's view of the gravity of the crime.

The Committee wishes to emphasize the danger of overestimating the necessity for and the value of long terms of imprisonment except in special circumstances. The serving of a long term imposes an enormous financial burden upon society and at the same time greatly reduces the chance of the inmate on release assuming a normal, tolerable, role in society and may indeed result in the creation of a social cripple.

The members of the Fauteux Committee did not hesitate to express a strong opinion about the severity of sentences of imprisonment in Canada:

We are particularly struck by the fact that the length of sentences imposed in Canada, when compared with those imposed in England for comparable offences, are (sic) generally much greater.⁹

⁹ Canada. Department of Justice, Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada. *Report* (Fauteux Report). Ottawa: Queen's Printer, 1956, p. 18.

In some cases of crime of a casual nature, short exemplary sentences may be appropriate. It is suggested that for casual offences, society might better be served by the creation of such part-time, night or weekend sentences as will be discussed later.

Change of Approach

It appears to the Committee that the way in which sentencing provisions are set out in the Criminal Code has inclined the courts to take a particular attitude as to their duty to impose sentences of imprisonment. For example, a fine may *not* be substituted for imprisonment where the offence may be punished with more than five years imprisonment; sentence may *not* be suspended where more than one previous conviction is proved. The existence of such restrictions upon the power of a court to sentence otherwise than to imprisonment all too frequently leads to a practice of imposing a sentence of imprisonment in the absence of mitigating factors.

A different approach is predicated by the provisions of the Model Penal Code of the American Law Institute, which in section 7 provides that:

- (1) The Court shall deal with a person who has been convicted of a crime *without imposing sentence of imprisonment unless*, having regard to the nature and circumstance of the crime and history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:
 - (a) there is undue 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 sentence will depreciate the seriousness of the defendant's crime.⁴

The Committee endorses this approach.

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.

Disparity of Sentences

The Committee is aware that to adopt this recommended approach might result in an even greater impression of disparity than is created by the present uneven application of the so-called tariff system of sentencing to imprisonment.

⁴ A.L.I. Model Penal Code, proposed official draft, May 4, 1962.

However, we share the opinion of Professor J. LL. J. Edwards concerning disparities in sentencing:

Much is heard nowadays of the disparities in sentencing with the underlying assumption that justice would be better served if divergencies in judicial assessments of the appropriate penalty were to be eliminated altogether. To a certain extent this approach is very understandable but '*it would be folly to suppose that sentencing can ever be reduced to a scientific equation*'. In some respects, however, Canada displays a marked absence of uniformity in the *principles* of sentencing and this is to be regretted.⁸ (emphasis added)

Unfortunately, offenders who are sentenced by different judges or magistrates to different terms of imprisonment for what they may consider similar offences, are likely to meet eventually at a common place of detention. They will inevitably compare the kind of penalties imposed by judges in different parts of the country, or even parts of a province, for what they, within the prison subculture, consider to be identical crimes. A deep sense of injustice may then arise in their minds, because they may not be capable of appreciating the very real differences between the circumstances surrounding the commission of one offence which is comparable to another. Therefore, they will normally feel aggrieved by such apparent inequalities or inequities and their rehabilitation may present additional difficulties.

Necessity for Reasons

The Committee feels that this risk of creating a sense of injustice by reason of the individualization of sentences, could be minimized were all judges to give adequate reasons in fact as well as in law for all sentences.

The Committee recommends that any court when imposing or any court of appeal when varying a sentence of imprisonment express publicly as fully as possible, the reasons for such adjudication, disposition or sentence and that the Criminal Code be amended to require such reasons.

Other considerations supporting the desirability of requiring reasons for sentence are set out in the later section of this chapter entitled "Mechanics of Sentencing".

Proposed Sentencing Scheme

The Scheme in Principle

Il faut savoir et savoir faire, mais il ne faut pas attendre de tout savoir pour commencer à faire . . .⁹

⁸ Paper delivered at the Ninth Alumni Conference on Crime and Punishment, University of Manitoba, March 19, 1966 (p. 9).

⁹ Professor Lyon-Caen in a lecture before the Université Libre de Bruxelles, quoted by L. de Bray, *Travail Social et Délinquance*, Université Libre de Bruxelles, édition de l'Institut de Sociologie, p. 376 (1967).

The range of dispositions necessary to permit the implementation of a rational, and at the same time humane, sentencing policy must be widened. A wide range is necessary if there is to be proper opportunity for just individualization of sentences.

It is time, therefore, that reformers of the criminal law faced the fact that the feasibility of a reliable technique of individualization is crucial to the entire program of scientific and humane criminal justice. If, in fact, a reasonably sound individualization cannot be accomplished by *the means at hand*, then, despite the lofty aims of modern correctional philosophy, and regardless of the most elaborate investigations and case histories, the system will not work.⁷ (emphasis added)

The Committee is of the view that such means must be made available now. What the Committee considers as a desirable range of alternative dispositions is set out below:

- (1) Absolute discharge, with or without conditions.
- (2) Probation.
- (3) Fines.
- (4) Suspended sentence.
- (5) Restitution, reparation or compensation to the victims.
- (6) Confinement
 - (a) weekend detention;
 - (b) night detention with programmes of compulsory or voluntary work in the community;
 - (c) in reform institutions, penitentiaries, or other places of segregation.

It is the view of the Committee that indeterminate sentences should properly be reserved for the offender who has been carefully assessed as chronically dangerous. We do not feel that corporal punishment is appropriate to be continued either as a judicial or institutional punishment.

While we stress the desirability of individualization of disposition, it is proper to note that certain generalizations can be made with respect to certain classes of persons. The Committee, accordingly, states its view with respect to certain very broad classes, such as:

- (a) young adult offenders;
- (b) dangerous offenders;
- (c) mentally disordered persons.

Because of the wide range of sentences proposed, with "absolute discharge" at one pole and "indefinite segregation" at the other, the Committee considers that the words "sentence" and "sentencing" (which, in some jurisdictions, such as those of France and Belgium are not, as yet, considered

⁷ Sheldon Glueck, "Prediction devices and the individualization of justice". *Law and Contemporary Problems*, Vol. 23 (1958), p. 462.

apart from the *conviction* itself) should be replaced wherever appropriate in legislation and in criminological and correctional writing by the expressions "adjudication" and "disposition".

General Principle

In keeping with the basic principles and purposes formulated in Chapter 2, the Committee, therefore, affirms that:

The primary purpose of sentencing is the *protection* of society. *Deterrence*, both general and particular, through knowledge of penalties consequent upon prohibited acts; *rehabilitation* of the individual offender into a law abiding citizen; *confinement* of the dangerous offender as long as he is dangerous, are major means of accomplishing this purpose. Use of these means should, however, be devoid of any connotation of vengeance or retribution.

We begin this examination of sentencing alternatives with an examination of those sentences which do not involve total loss of liberty.

Sentences Not Involving Confinement

Absolute Discharge with or without Conditions

The handicaps that accompany a criminal record are dealt with in another section of this report, and recommendations are made to introduce a system intended to reduce the effects of such a record after an appropriate period of time. However, there should be provisions that permit the court to deal with first offenders charged with a minor offence in such a way that would avoid the damaging consequences of the existence of a criminal record.

A conviction against a first offender establishes a record that can carry with it life-long consequences that continue long after rehabilitation is complete and risk to the community is no greater from this individual than from the average citizen. In fact, the record may be the result of what the individual considered a prank and the individual may at no time have been a danger to society. In other cases the exposure to public trial has a deterrent effect in itself so that the imposition of additional punishment is superfluous, costly and damaging to both the individual and the community.

An alternative should be open to the court, at this preconviction stage, so that action appropriate to the individual case may be planned, including a period on probation to test the court's assessment of the offender. This should take the form of *absolute discharge*, either with or without conditions. This form of disposition has been adopted in a number of jurisdictions. The Committee proposes the following definitions:

In this report, the term ABSOLUTE DISCHARGE means "a disposition of the court whereby, although a charge has been proved, it is, having regard to the circumstances including the nature of the charge and the character of the accused, inappropriate to record a conviction, and punishment or a probation order is not appropriate." Absolute discharge has the same effect as *acquittal*.

The term ABSOLUTE DISCHARGE WITH CONDITIONS means "a disposition of the court whereby, although a charge has been proved, it is, having regard to the circumstances including the nature of the charge and the character of the accused, inappropriate to record a conviction at that time, but appropriate to discharge the accused subject to the conditions that the accused keep the peace and be of good behaviour, that he accept probation supervision if that condition is ordered by the court, and that he will report to the court if and when called upon to do so.

The juvenile or welfare courts in this country have been using *sine die* adjournments to accomplish this end, and the Discussion Draft of the Children and Young Persons Act (which incidentally uses the terms "adjudication and disposition") contains a provision that would give formal recognition to such a procedure. Some adult courts in Canada have been experimenting with the use of long adjournment before a conviction is registered, discharging the case if the offender responds. There is no legal basis for this procedure and magistrates in all parts of Canada have recommended to the Committee that the aims sought by this procedure be given legislative approval by permitting the court to grant an absolute discharge with or without conditions when such a disposition is suitable.

The Committee recommends that where a person, not having previously been given an absolute discharge, is charged, the trial court or the court that hears the appeal, although finding that the charge has been proved, after considering the evidence and having regard to the circumstances including the nature of the charge and the character of the accused may, without conviction, make an order of absolute discharge with or without conditions; that when a person named in an order of absolute discharge with conditions has violated any of the conditions therein, the court may convict the person and, on the basis of evidence heard at the original trial, make whatever disposition it could have made when the matter was originally heard; that either the offender or probation officer be empowered to request and have heard an application to reconsider and/or vary the conditions of the order; that an order of absolute discharge with conditions be in effect for a period of up to one year.

There are difficulties related to such procedures. There is the danger that the same person might be charged with a number of offences over a period of years, each time being dealt with as a first offender. This could be overcome if it were possible to maintain a registry of those who have been dealt with in this manner.

The Committee is of the opinion that provision for an appeal should be made because an individual might feel himself aggrieved in that he considered himself entitled to an absolute acquittal.

The Committee is aware that these measures would not be fully successful in protecting the offender against the effects of a record. If the charge is in connection with an indictable offence the offender normally would have been finger-printed and the fingerprints recorded by the National Registry of

Fingerprints and the local police. Information could be obtained from court records. The record would also exist in people's memories, and in private agency files and in newspaper morgues. Further, the offender would have to answer "yes" to a question on a job or visa application form: "Have you ever been charged with a criminal offence?" These difficulties are similar to those set out in Chapter 23.

Although they will not supply a complete solution, these measures should be introduced and their effectiveness assessed after some years' experience.

Probation

As appears from Chapter 16, probation is now firmly established as a correctional measure in many countries. The United Nations, in one of their publications, had this to say:

Deux institutions juridiques ont marqué d'une empreinte profonde et durable l'administration de la justice pénale pendant la première moitié du XXI^e siècle: les tribunaux pour enfants et la probation. Leur origine et leur évolution ultérieure ont été étroitement liées et elles se sont développées dans de nombreux pays.⁸

In Canada the most important legislative change in the power to suspend sentence came with the 1961 Criminal Code amendment authorizing the imposition of probation.⁹

Two of the main conditions precedent to the expansion of the use of probation in our country depend on the extensive increase of discretion on the part of the courts or judges as well as on the organization of services in different provinces. Our Committee has been informed by a number of judges and magistrates that they would have ordered probation much more often, had they felt that there were adequate provisions to render it operative in their different jurisdictions. Many times, sections 637, 638 and 639 of the Criminal Code have appeared so unnecessarily restrictive that judges who believed a case was a proper one for probation have rendered sentences which technically were illegal in order to prevent persons from going to jail. For example, the prosecution, sometimes with the court's tacit approval, has refrained from establishing the offender's previous criminal record, in order that the prohibition contained in paragraph 1 of section 638 be inoperative.

The Committee's attention has been drawn to section 637 (1) (a) of the Criminal Code providing for the "binding over" of a person convicted of an indictable offence, "in addition to any sentence that is imposed upon him." There is no doubt in our mind that this cannot be considered as *probation* but an entirely different form of control, now substantially obsolete in view of the development of parole.

Probation, as defined in this report, is considered so important in the correctional pattern that a whole chapter has been devoted to it. The Committee's recommendations are to be found in Chapter 16.

⁸ Nations Unies. Département des affaires économiques et sociales. *La sélection des délinquants à mettre en probation*. New York: 1939, p. 1.

⁹ Statutes of Canada 1921, Chapter 25, section 19.

Fines

An offender who pays a fine thereby acknowledges that he is an offender. Not much attention has been directed to the significance of this acknowledgement but from time to time there are cases in which a convicted offender will refuse to pay a nominal fine and will almost insist on being sent to prison because he is not prepared to admit that he has done anything wrong. In other words, the nominal fine may perform a useful social function. The most appropriate area for the use of fines of this sort is probably with respect to breach of regulatory laws. If the proposed system of absolute discharge with or without conditions is introduced, there would be no need to use a fine as a last resort where no sentence at all seems appropriate.

There is no doubt that a substantial rather than a nominal fine, however, may operate as a deterrent to the offender and other potential offenders in appropriate cases. The Committee considers that deterrent fines may be appropriately imposed with respect to casual offences committed by people with general law abiding tendencies, for example, with respect to such offences as dangerous driving.

The imposition of a substantial fine appears to be particularly appropriate where the offender has benefited financially from the commission of the offence. In such cases fines may be imposed either in lieu of or in addition to any other punishment depending on the circumstances of the case.

The Committee believes that serious consideration should be given to the enactment of legislation to specifically authorize a court, where there is reason to believe that the defendant benefited financially from the commission of the offence¹⁰, to hold a hearing to determine the extent to which the offender benefited financially from the offence and his present financial ability to pay a fine. At any such hearing the defendant should have the right to be present and to give evidence with respect to the extent to which he benefited financially from the commission of the offence and his present economic condition.

Consideration should also be given to the possibility of introducing legislation whereby a deterrent fine could be made recoverable directly by civil process without further litigation. Prior to 1955, the Criminal Code contained such a provision. In the 1955 revision, the procedure, for no apparent reason, disappeared. It would not seem that any constitutional difficulty was involved, as a provision in section 623 of the Criminal Code provides for recovery of fines on corporations or legal "persons" by filing a conviction as a civil judgment. There is no reason why section 623 should not be extended to cover fines on real persons. If this were done, the obsolescent notion of imprisonment in default of payment might well become less significant. Such legislation would have the effect of making immediately available civil remedies such as proceedings to set aside fraudulent conveyances and the examination of the defendant as a judgment debtor.

¹⁰ Comments by Prof. Graham Parker of Osgoode Hall Law School of York University, Toronto, on *Regina v. Hinch and Salanski*, 62 W.W.R. 205 (B.C.C.A.). *The Canadian Bar Review*, Volume XLVII, March 1969, No. 1, p. 115, at p. 124.

In connection with the use of financial sanctions, the memoranda of the Council of the Law Society regarding criminal bankruptcy to the British Royal Commission on the Penal System have been carefully considered. In its memorandum dated July 1965, the Council proposed that "the fact of conviction for any indictable offence occasioning loss or damage to property which has not been the subject of restitution by the defendant would constitute an act of bankruptcy." In a second memorandum dated February 1966, the Council further developed the notion of the institution of criminal bankruptcy proceedings whereby would be achieved "the best possible means of depriving the criminal of the fruits of his crime."

While it is apparent that a great many nominal gains would flow to the criminal process from the institution of the proposed criminal bankruptcy proceedings, it appears that all real gains would be equally available through the re-introduction of a scheme whereby an appropriate fine could be recovered as if it were a judgment in a civil case.

The Committee is very strongly of the opinion, however, that no one should be imprisoned for mere *inability* to pay.

The observations of the Committee across Canada indicate that a very large percentage of persons incarcerated in provincial institutions are serving terms simply because of their inability to pay fines imposed routinely or according to what has been described as the "revolving door" and the "tariff" process.

The fact that a fine—however substantial—has been imposed rather than a sentence of imprisonment cannot be considered as anything but an implicit acknowledgment that the offender presents no problem of dangerousness. But if he has not enough money—as happens mostly in the case of smaller fines—he is quasi-automatically imprisoned for a number of days roughly corresponding to the number of dollars stipulated in the sentence. Moreover, the equation between "thirty dollars" and "thirty days" is totally unrealistic in times of inflation, and so is the provision allowing for a proportionate reduction of imprisonment on part payment of the fine.

In all cases, a court should be reasonably satisfied that the offender is in a position to pay a fine, or to pay a fine in the amount contemplated, before the fine is imposed. A pre-sentence report would, in many cases, constitute a suitable means test. In cases where the court contemplates the imposition of a substantial fine where there is reason to believe that the offender has benefited financially from the commission of the offence, the Committee considers that a hearing of the kind previously described may be desirable. The amount of the fine in the view of the Committee should not, however, be such as to incapacitate the offender with respect to making restitution to the victim, if any, where that appears possible. Moreover, the Committee considers that where a fine has been imposed and remains unpaid, and the defendant claims inability to pay, procedures should be established to:

- (a) permit the court to review its decision to impose a fine and impose a different sentence if it appears desirable to do so;

- (b) consider whether the failure to pay the fine is due to the defendant's inability to pay or his wilful refusal to do so;
- (c) grant the defendant an extension of time within which to pay the fine or alter the terms upon which it is to be paid or alter the amount of the fine.

In the view of the Committee, imprisonment should only be imposed for failure to pay a fine where the offender, although able to do so, has refused to pay the fine or fraudulently divested himself of his assets.

The Committee is of the opinion that the restrictions contained in section 622 of the Criminal Code which preclude the imposition of a fine in lieu of imprisonment where the offender is convicted of an offence punishable with imprisonment for more than five years should be repealed, since there are a great many offences with respect to which a fine only may be an appropriate sentence, which are punishable by imprisonment for more than five years, e.g. *theft where the value of what is stolen exceeds \$50.00 is punishable by ten years imprisonment.*

The Committee, therefore, recommends that:

- (a) greater use be made of fines, in suitable cases, where the offender has benefited financially from the commission of the offence either in lieu of or in addition to a sentence of imprisonment;**
- (b) legislation be enacted to establish procedures to determine, prior to the imposition of a fine, the ability of the offender to pay a fine or to pay a fine in a particular amount and to determine the amount by which the offender has benefited financially from the commission of the offence where there is reason to believe that the offender has so benefited;**
- (c) time be allowed for the payment of fines, at the discretion of the sentencing authority but within a reasonable period to be defined by law;**
- (d) legislation be enacted to establish procedures to review the ability of the offender to pay the fine imposed where the fine imposed remains unpaid and to review the sentence;**
- (e) imprisonment in default of payment only be ordered where the offender, although able to pay, has refused to pay the fine or has fraudulently divested himself of his assets;**
- (f) legislation be enacted to provide that a sentence imposing a fine take effect as a civil judgment and that all civil remedies be immediately available without first resorting to civil litigation;**
- (g) the restrictions of section 622 of the Criminal Code precluding the imposition of a fine in lieu of imprisonment where the offender is convicted of an indictable offence punishable by more than five years be repealed.**

Suspended Sentence

The distinction between probation and suspended sentences lies essentially in the fact that under an ordinary suspended sentence the offender would not be placed under supervision of a probation officer. Provision for suspended sentence is made in s. 638(1) of the Criminal Code.

In French-speaking countries of continental Europe, the expression "sursis simple" is used for suspended sentence, and "sursis avec mise à l'épreuve" for *probation*, although the latter word has now acquired a respected niche of its own in legal and correctional parlance. A choice is afforded to the sentencing authority, viz: suspending the *execution* of a definite sentence or suspending the *imposition* of a sentence.

The Committee has been informed that in Canada some courts suspend sentences for a given period while informing the convicted person of the length of the sentence to be later imposed in case there is evidence of lack of good behaviour within the allotted period of suspension. Our view is that such a procedure is not authorized by law and does not conform with the principles of modern corrections.

The Committee feels that a disposition normally could be suspended without probation as regards an offender whom the court does not consider eligible for absolute discharge but who does not require probation. It has been said that the high success rate of probation may be due to the fact that the courts often use probation for people who are really not in need of it. There are instances when conviction followed by unconditional suspension of a sentence will have the desired salutary effect.

A definite period should be specified in relation to such suspension. The mere knowledge that a punitive disposition could be meted out should the offender be brought back before the court on another charge within the period of suspension would prevent a large number of first offenders from becoming recidivists, as long as the disposition itself is properly recorded in a central registry and knowledge of it be made available to the court before whom the offender is brought on a second charge.

The Committee recommends that having regard to all the circumstances of the case the court be empowered to suspend a sentence for a definite period of time without any other condition than if the convicted person is found guilty of an offence during the period of suspension, it then be the court's duty to review the original case and decide whether or not to impose the suspended sentence with or without consideration for any other sentence in respect of the second offence.

Restitution or Reparation to the Victims of Crime

Contemporary writings on restitution, compensation or reparation to the victims of crime tend to concentrate on the injustice of leaving the victim without redress. The making of restitution, compensation or reparation may, however, have profound correctional significance. The awareness of the

amount of damage or injury caused by the crime and the imposition of responsibility to make such damage good may have the most beneficial correctional effects in that these possibilities relate correction to natural rather than artificial results.

Existing provisions in the Criminal Code offer limited opportunities to order restitution or compensation. Section 373 relates to wilful destruction or damage to property not exceeding fifty dollars. Section 628 makes much broader provision for the payment of satisfaction or compensation for loss or damage to property suffered by a victim of crime. Section 629 provides for compensation to a bona fide purchaser to whom property had been sold and who had been forced to return the property to its true owner. Section 630 provides for the restitution to the person entitled to it of property obtained through the commission of an offence. Restitution may also be ordered under section 638 as a condition for suspension of sentence.

These provisions have been on the statute books for quite some time but have rarely been invoked, with the exception of the provisions directing return of property to the true owner and restitution as a condition for suspension of sentence. It appears to the Committee that this failure to invoke let alone expand those provisions can be attributed to the difficulty likely to be experienced by a criminal court in assessing damages which arise from personal injury or complicated interference with property rights. Criminal procedures are not readily adaptable to the trial of civil issues. Furthermore, difficult constitutional questions would arise in Canada were the general award of civil damages to be vested in a criminal court.

The Committee makes these observations but no recommendation other than that the correctional possibilities of such disposition be kept under review with a view to their development.

Representations have been made to the Committee regarding the establishment of state compensation to the victims of crime. However, this is outside the terms of reference of the Committee and also essentially of a provincial nature. This does not preclude the Committee from expressing the wish that provinces study without delay the opportunity of establishing a system of public or state compensation to victims of crimes.

Conviction and Confinement

A sentence of detention can, in the view of the Committee, be justified only where it is shown to be necessary for the protection of society. Imprisonment may serve this purpose by segregating the chronically dangerous offender; by offering a deterrent to the offender and others with similar inclinations; by affording an opportunity for the application of correctional conditions within a strictly controlled environment.

The indeterminate segregation of the chronically dangerous will be dealt with in Chapter 13. Confinement for fixed periods certainly protects society

for the period of the sentence and might offer longer term protection if the length of sentence were based upon an accurate prediction. However, prediction techniques have not yet reached that point of development which would allow reliable assessment to be made.

Detention for deterrent purposes, whether particularly addressed to the offender or more generally to the community, is based on tradition and its success is difficult to evaluate. Obviously those subsequently in conflict with the criminal law were not sufficiently affected. Nonetheless, the Committee feels that there is a clear case for deterrent sentences where there is grave public risk from rational but illegal activity, such as professional crime, or where there is grave public temptation as in the case of impaired driving, thus warranting imprisonment in some circumstances such as upon conviction for a second offence. It has, however, already been pointed out that an adequate legislative framework for the imposition and collection of substantial fines would afford an additional and effective deterrent against the commission of crimes for profit. In cases where there is general public temptation, the risk of detection, apprehension and trial may in some cases achieve the maximum deterrent effect of labelling as criminal the behaviour involved.

Detention for correctional purposes remains to be considered. Dr. Denis Szabo, Director of the Department of Criminology of the University of Montreal, has had this to say:

Comme on le sait, les prisons n'ont pas toujours existé et, par conséquent, elles n'existeront peut-être pas toujours... Historiquement parlant, la première fonction de la prison est celle de protéger la société de certains de ses membres qui représentent un danger pour son intégrité corporelle, matérielle et morale. . .

Il n'est donc pas dit, ou pas encore, qu'une peine privative de liberté peut ou ne peut pas réhabiliter un criminel. Ce qui paraît évident à la lumière de l'expérience unanime des pays occidentaux, c'est que la punition ne protège pas, à elle seule, la société contre les criminels. Des expériences en vue de «réformer», de réhabiliter les criminels ont à peine commencé et aucune conclusion définitive ne peut encore être tiré à cet égard.¹¹

While the Committee agrees with Dr. Szabo that no definite conclusions can yet be drawn with respect to the possibility of true rehabilitation under detention, we are of opinion that there are certain obvious possibilities deserving further serious exploration. Furthermore, it is evident that sentences of imprisonment will continue to be imposed for purposes other than rehabilitation but which offer an opportunity for study and treatment in the future interest both of society generally and of the offender in particular.

¹¹ Szabo, Denis. *Criminologie*. Montréal: Presses de l'Université de Montréal, 1965, pp. 444 and 446.

There are two types of control exercised partly within the community which appeal to the Committee's consideration under the caption:

Intermittent Sentences:

- (a) night detention with compulsory work programmes within the community;
- (b) weekend detention.

There appear to be two separate correctional techniques and two separate social functions involved in the general context of part-time detention. The Committee is of the opinion that careful distinction must be made.

Firstly, the sentence imposed by the judge might be expressed in part-time or intermittent terms, *e.g.*, a sentence of thirty days imprisonment to be served on consecutive weekends. Such a sentence would serve as both general and particular deterrence without unnecessary social disruption of the life of the offender. Such technique may be described as the imposition of an intermittent sentence.

Secondly, a sentence imposed by the judge in terms of a period of consecutive units of time might be served in what the correctional authority decided was the manner most likely to assist in rehabilitation, *e.g.*, a sentence of six months is imposed and the correctional authorities decide that the offender may be released at an appropriate time on a part-time basis to work or study in the community. Such technique may be described as correctional work-release.

Semi-detention (or semi-liberty, as it is known in Europe) is applied differently in practically every country. It has been looked upon as a transitional period between a stay in prison and the return to freedom. Results have proven to be so satisfactory that in more than one country it was considered as the true alternative to imprisonment, especially short-term imprisonment. Indeed, it allows the offender the opportunity to continue working in his trade or profession. In the morning he goes to work from the institution to which he returns every night. He is in residence (being classified as a "resident" and not an inmate) during weekends and on holidays. In this fashion the "resident" does not cut off all links with society, and his family is protected against want. Finally, such a system allows for the recovery of fines (wherever fines are added to a sentence) and of any indemnification or compensation to the victim of an offence.

"Weekend detention" refers to a disposition whereby an offender is sentenced to a certain number of days instead of months. These are served inside the institution, during weekends. A weekend is equivalent to two days. Thus one month in "residence" represents fifteen weekends spent in gaol.

It goes without saying that if such legislative provisions are to be made effective and used for a significant number of offenders, there will be need to locate detention quarters and adjust staffing accordingly, because no conceptual correctional measure can be successfully implemented in the absence of the necessary physical and staff facilities.

The Committee recommends that the court be empowered to impose a sentence of imprisonment to be served intermittently, the total period of imprisonment not to exceed six months.

Full Confinement

The Committee is not recommending a change at this time in the general division of responsibilities between the provinces and the federal government, although we are recommending that certain present anomalies be eliminated.

Moreover, it is the Committee's earnest hope that all provinces will endeavour to develop a uniformly effective system of reform institutions.

It has come to our attention that many judges would wish to have authority to sentence a convicted person to a particular institution. But their position, at that stage, does not appear to be very different from that of psychiatrists admitting or committing a patient to a mental hospital. Even though they may have some opinion as to the probable nature and length of treatment they do not possess sufficient information at that juncture to be able to set a discharge date with precision or to set dates on which the patient will be moved from one section of the hospital dealing with certain kinds of patients or patients at different stages of their illness.

On the other hand, it often happens that the sentencing authority is cognizant of certain facts which constitute important factors toward the rehabilitation of an offender but which, because of lack of adequate recording systems, do not always reach the institutional files concerning the offender. Whenever a judge makes specific recommendations or expresses an opinion about the manner in which the convicted person ought to be dealt with, it should be possible to transmit this material to the authorities of all institutions in which the offender is to be confined. Otherwise, whenever the sentencing authority learns that recommendations which were hopefully preferred have miscarried, have been mislaid or simply were ignored without any explanation, there is, understandably, a sense of frustration.

In other jurisdictions (notably in France, since the establishment of the "juges de l'application des peines") it has been found that interrelation between the sentencing and correctional authorities has improved to a marked extent due to the flow of information exchanged between the two. On the other hand, it is a well known fact that before such time as an adequate and comprehensive range of facilities and dispositions is put at the disposal of the sentencing authority, it will be well nigh impossible to make a value judgment about the appropriateness of one institution as against another.

In conclusion the Committee maintains that imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed, but subject to its other recommendations concerning different types of offenders and different categories of dispositions.

Indefinite or Indeterminate Sentences

It will be remembered that the words "indefinite" or "indeterminate" carry no special legal significance except under the existing provisions of the Prisons and Reformatories Act where they imply the right of release on parole by provincial authorities.

In our chapter on the Purposes and Organization of the Adult Correctional Services (Chapter 14), we recommend the abolition of the system of indeterminate sentences as it exists in Ontario and British Columbia, and in Chapter 13 we recommend indeterminate sentences for Dangerous Offenders.

Some arguments against abolition have been advanced which are summarized as follows:

An indeterminate sentence of two years less a day for all young adult offenders considered to be in need of training provides a uniform sentence of indeterminate length regardless of the offence committed—the emphasis is thus strictly on the offender's need for training, not the offence. Being a sentence of indeterminate length it more readily conveys the idea, both to the offender and those associated with him and his training, that his time in custody will depend entirely on the progress he makes and that he can be paroled at any time once he is considered ready for it.

The Committee feels that similar objectives of control and correction as regards all offenders can be better achieved by resorting to a *definite* sentence, provided the parole authority is sufficiently close to the situation and considers all cases for parole. This, in the Committee's opinion, would be the direct result of the Committee's recommendations in the chapter on parole. This is in keeping with a recommendation of the Archambault Commission.¹²

Moreover, many experts from the United States, where indefinite or indeterminate sentences are recognized by statute, appear to believe that definite sentences combined with parole have the same force and effect as indeterminate sentences with less danger of uncertainty and with a character of finality.

The Committee recommends that indeterminate sentences as they now exist be abolished, subject to our recommendations concerning the dangerous offender.

The Committee has also considered the possibility of recommending that the sentencing authority be empowered and directed by statute to take into account, when determining the length of time to be served in an institution, the calculation of earned remission, statutory remission or statutory conditional release, and the possibility of parole.

¹²Canada. Royal Commission to Investigate the Penal System of Canada. *Report* (Archambault Report). Ottawa: Queen's Printer, 1938, p. 248.

It is true that a number of judges presently do, subconsciously or not, take such factors into account. But they very seldom indicate to the interested parties (and to the public at large) the reasons for such a choice, perhaps because there is presently a conflict of judicial authority as to the propriety of taking such matters into account.

However, it is well nigh impossible to predict the institutional conduct of a particular offender in the vast majority of cases. The anticipated conduct of an individual parolee while on parole, including the time element, is equally difficult to predict.

Moreover, the Committee is concerned that a recommendation that the sentencing authority be directed to take earned remission, statutory remission (or statutory conditional release) and the possibility of parole into account in determining the length of sentence might be construed as a justification for the imposition of inappropriately long sentences.

For these reasons the Committee has not seen fit to make a relevant recommendation on this point.

Disposition of Outstanding Charges

The liability of an offender, sentenced to imprisonment or who has been placed on probation, to be prosecuted in respect of a further existing charge is a source of frequent difficulty to correctional administrators in planning a course of correctional treatment. The existence of other charges, which have not been disposed of, may affect an offender's parole and may make him less responsive to treatment.

Section 421(3) of the Criminal Code contains provisions which were enacted for the purpose of alleviating this problem and which permit a person in custody in one province to plead guilty in that province to charges in respect of offences committed in another province. These provisions, however, do not extend to the offences listed in s. 413(2) of the Code which are triable only in a superior court of criminal jurisdiction and which, speaking generally, constitute the most serious offences, such as murder and rape. These charges are accordingly not transferable.

The existing provisions of the Criminal Code permit the transfer of an outstanding charge from one province to another only where the accused is in custody and where he signifies his intention in writing to plead guilty and does plead guilty. Legislation has been proposed which will extend the present provisions of the Code to cases where an accused is not in custody but wishes to plead guilty to a charge with respect to an offence alleged to have been committed in another province.

Similar provisions in the Code permit a person who is charged with an offence alleged to have been committed in another territorial division in the same province to have the charge disposed of in the territorial jurisdiction where he then is, provided that he signifies his intention to plead guilty and pleads guilty.

The transfer of a charge from one province to another requires the consent of the attorney-general of the province where the offence is alleged to have been committed. The Committee is informed that a considerable variation exists among provincial attorneys-general in their readiness to facilitate the transfer of charges.

We consider that the present provisions of the Code are too restricted in scope.

The Committee therefore recommends that provisions be made to:

- (a) require the transfer of charges from one province to another where the accused wishes to plead guilty, provided that the offence is a transferable offence;**
- (b) require all other outstanding charges, including non-transferable charges and those to which the accused does not want to plead guilty, to be disposed of within a reasonable and stated time after an offender has been convicted and to provide that failure to so dispose of outstanding charges within the time prescribed is a bar to a subsequent prosecution.**

The Committee is also of the opinion that consideration should be given to requiring all other offences with respect to which there is sufficient evidence to warrant a prosecution, whether or not a charge has been laid, to be dealt with and disposed of within a reasonable time after a person has been convicted of an offence.

Corporal Punishment

The Committee deems it necessary to record and deplore the fact that corporal punishment may lawfully be included as part of a sentence imposed by a Canadian court. Despite the fact that sentences of whipping are rarely imposed by present-day courts, the emphasis on liability to be whipped in the Criminal Code presents an astonishing anachronism.

There are a substantial number of serious offences under the Criminal Code with respect to which a sentence of whipping may be imposed, *e.g.*, rape, indecent assault, robbery and breaking and entering when armed. Females and juvenile offenders are not subject to whipping under the Criminal Code.

A court may sentence an offender to be whipped on one, two or three occasions, and the precise time of execution of the sentence is left to the discretion of the prison warden, subject to the provision that no sentence of whipping may be implemented until after the time of appeal has expired, and that whenever practicable not less than ten days before the expiration of the term of imprisonment of the convicted person.

The instrument used for whipping is the cat-o'-nine-tails (the lash), unless otherwise specified by the court. However, some courts order whipping by way of the paddle which is administered by a leather strap across the buttocks. The Code provides for the supervision of the prison doctor or a duly qualified medical practitioner named by the attorney general.

The Committee considers that the imposition of such punishment is brutal and degrading both to the recipient and the person imposing it.

Moreover, the number and percentage of sentences of corporal punishment has been steadily decreasing in Canada since 1931 as shown from the report of the Joint Committee of the Senate and House of Commons on Corporal Punishment.¹³

In England, the Cadogan Report on Corporal Punishment (1938) concluded that it should be abolished.¹⁴

The report of the Advisory Council on the Treatment of Offenders presented a further study to the British Parliament in 1960 after strong pressure had been applied on the government to reintroduce the use of corporal punishment. The Council reached the conclusion that to reintroduce the use of corporal punishment would be a retrograde step and would turn the clock back not twelve years, but a hundred years. It stated that:

The reintroduction of judicial corporal punishment could be justified only if there was a reasonable assurance that it would substantially reduce crime and afford real protection to potential victims. We think that there cannot be any such assurance. There is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others.¹⁵

The written and oral evidence received by the Committee has confirmed that judicial corporal punishment offers no definite assurance that offenders who suffer it are deterred by it or that it deters others. We are satisfied that it has no long-term reformatory or rehabilitative value and, on the whole, believe that it has the contrary effect.

The Committee recommends that corporal punishment, as a sentence of the court, be abolished.

The Mechanics of Sentencing

The Committee has found from its observation the disquieting impression that the "rule of thumb" is all too frequently applied in the determination of sentences.

In order that a rational and consistent sentencing policy be created and developed, the following deficiencies in the present system must be remedied. There is:

- (i) a lack of easily available information as to the range of sentencing alternatives available and as to the facilities and services presently existing to implement any disposition which is made;

¹³ Joint Committee of the Senate and House of Commons on Corporal Punishment. *Report*. Ottawa: Queen's Printer, 1956, p. 43.

¹⁴ Great Britain. Home Department. Committee on Corporal Punishment. *Report*. (Cadogan Report). London: HMSO, 1938.

¹⁵ Advisory Council on the Treatment of Offenders. *Report on Corporal Punishment*. London: 1960.

- (ii) a lack of comprehensive information as to the personal characteristics and environmental background of the offender;
- (iii) a lack of information as to the reasons why judges impose certain sentences and their expectations in particular cases.

Guides to Sentencing

The Committee believes that the deficiency arising from the lack of information about the correctional institutions and services could and should be immediately remedied. There appears to be no possible justification for the present policy of "sentencing in the dark". In England, the Home Office has produced a booklet purportedly directed to supplying this information. It is doubtful whether a booklet will satisfy the deficiency and we are of the opinion that a comprehensive and frequently up-dated document containing the fullest information as to the range of alternative dispositions and the existing facilities for implementing them should be produced as soon as possible. Institutions and services should not merely be listed but should be particularly described with reference to their actual operation and to the purpose of the services or institutions as seen by the correctional personnel directing them.

The Committee recommends that a Guide to Dispositions in Criminal Cases be prepared and issued by the federal government in cooperation with provincial governments, covering the whole field of correctional institutions and services but excluding, unless it is specifically requested by the provinces, any reference to offences under provincial statutes.

Pre-Disposition Reports

If the above recommendation is accepted and implemented, judges will, for the first time, be given clear and official information as to what will be the possible results of the imposition of a given sentence or disposition in terms of what typically is done with reference to those sentenced in such a way. Such information is, however, not enough and information is needed not only about offenders generally but about this offender in particular.

Some knowledge, if a trial has taken place, will stem from the facts thus elicited. But in any case potentially involving loss of liberty or loss of means of livelihood further information should be required in the form of a pre-sentence or pre-disposition report.

In all the countries visited by the Committee, especially since the inception of probation, the development of pre-sentence reports or social inquiries has been remarkable. Needless to say, there are not enough probation officers, psychologists, psychiatrists or social workers to investigate *every* offender who comes before the courts. In order to make the best use of available manpower, pre-disposition reports should be requested where it is anticipated they will be most useful, in line with the recommendations in this chapter.

Where no official machinery exists to provide such report to the judge or magistrate, he should be required to inform himself to the extent which is

reasonable having regard to the severity of the sentence likely to be imposed and to the availability of information.

Dr. Nigel Walker, Reader in Criminology at Oxford, has suggested the following rule which might be considered:

One possible rule would be that there should be a social inquiry report in every case in which the offender had been recently convicted of similar offences. Such a record would demonstrate the existence of some state of affairs—whether psychological or environmental—which made it unlikely that he would respond to ordinary measures. The number of occasions and the period could be adjusted in the light of the volume of work involved and the experience gained by those carrying out the investigation. Another rough and ready, but probably sound rule would be that no sentence involving detention or supervision should be imposed on *first offenders* without a social inquiry report.¹⁸

An impressive number of judges and magistrates who have met with the Committee have stressed the necessity for adopting the *principle* of pre-disposition reports. The Committee also takes note that in their representations to the Prévost Commission on the Administration of Justice, the Judges of the Sessions of the Peace for the District of Montreal have made a strong plea for the extension of the provincial probation service which is in the course of being implemented, and for the availability of pre-sentence reports on a regular basis.

The Committee is of the opinion that minimum mandatory sentences in cases other than murder constitute an unwarranted restriction on the sentencing discretion of the court.

The Committee recommends that:

- (a) existing statutory provisions which require the imposition of minimum mandatory sentences of imprisonment upon conviction for certain offences other than murder be repealed;**
- (b) no sentence of imprisonment be imposed upon an offender not proved to have been previously convicted unless a pre-disposition report has been submitted to the court;**
- (c) no sentence involving imprisonment for more than six months be imposed on any offender unless a pre-disposition report has been submitted to the court;**
- (d) no sentence involving imprisonment be imposed upon a young adult offender (as defined in Chapter 21) unless a pre-disposition report has been submitted to the court.**

It is the view of the Committee that the person preparing a pre-disposition report may properly be invited to make a recommendation as to a suitable disposition. In many cases, at the moment, such recommendations are not made, due to an understandable fear that to do so would be to interfere with the function of the court.

¹⁸ "The New Society", September 18, 1968.

Finally, the Committee points out that the pre-disposition report should properly form part of the correctional record of an offender, and hence be made available to the correctional authorities.

The Committee recommends that:

- (a) where a sentence of imprisonment has been imposed upon an offender preceded by a pre-disposition report such report be transmitted forthwith to the institution in which the offender is incarcerated.**
- (b) such documents be coded to provide the basis for research as to the extent to which correctional aspirations and predictions are satisfied.**

Magistrates or judges should, of course, when circumstances so warrant, hold one or more pre-sentence hearings in the presence of all parties or their representatives, to obtain proper assistance in the consideration of any matter relevant to the sentence and also to resolve any discrepancies between the pre-sentence report (or other information the court has received) and the defendant's own representation, if any.

There is no doubt in the minds of the members of the Committee that the correctional process, as has been expressed earlier, ought to be a continuum in which disposition is regarded as a vital link between, on the one hand, the law enforcement authorities who have brought a suspect before a court and, on the other hand, such institutions or persons as will be entrusted with the help, guidance, custody, resocialization or rehabilitation of the offender. Cooperation between these different disciplines is essential if corrections in Canada is to cope with 20th century problems and prepare for 21st century situations.

Reasons for Sentence

Clearly articulated reasons would serve at least three purposes: to provide material for synthesis and development of sentencing policies by the courts of appeal; to incorporate the offender in the correctional process in the hope that the rational statement of aims might influence his attitude to his sentence; to inform the public as to the expectations and performance of the courts.

At the present time, relatively few magistrates and judges give anything but very perfunctory reasons for sentencing offenders.

Judges should properly be required to give reasons for the particular disposition of a criminal case just as they are presently required to charge a jury. A judge should indicate why he selected a particular disposition and the aims which he hoped to accomplish. If suitably recorded, such selection and expectation would be available for valuable empirical research.

The Committee has considered recommending an immediate change in legislation to require the giving of reasons for sentence. However, in view of the fact that in many areas of Canada court calendars are crowded and auxiliary services inadequate, the Committee makes no recommendation for a change in legislation at this time with respect to all sentences. We have recommend earlier that no sentence of imprisonment should be imposed unless it is necessary for the protection of the public.

The Committee recommends that the Criminal Code be amended to provide that no sentence of imprisonment should be imposed without an accompanying statement of reasons.

The Sentencing Authority

Training and Education

It is well known that in Canada 90 per cent to 95 per cent of all criminal cases are heard and disposed of by magistrates or provincial judges, county or district court judges or, in the Province of Quebec, by judges of the court of the sessions of the peace or provincial or municipal judges. Judges of the high court handle the balance, the percentage of which hovers between 5 per cent and 10 per cent.

Sentencing or disposition is a value judgment and, as we have pointed out at the beginning of this chapter, it is a heavy responsibility to rest on the shoulders of one person. Appeals with leave are available to those who feel aggrieved by the sentence. However, such appeals are relatively infrequent when compared to the total number of sentences rendered.

In continental Europe, judges who constitute a distinct profession from that of a barrister or solicitor (*avocat* ou *avoué*) generally sit in groups of three, so that sentencing is not left to the discretion of one person.

Since March 1, 1959, a new "school" for future judges has been established in France under the name of "Centre National d'Études Judiciaires". It was sponsored according to the following principles:

La lecture du Code ne suffit plus au juge. Plus encore que de traités et de procédures celui qui tiendra le glaive, a besoin de l'expérience des hommes et des choses . . . La mission humaine du juge de demain avant tout requiert de lui une connaissance de la vie et des êtres, une compréhension . . . des grands courants de pensée, de la transformation du monde si rapide et si complexe de nos jours.²⁷

In Canada, it is a single judge who must assume the onerous duty of imposing sentence. Judges are not required, either before or after their appointment to the Bench, to participate in courses especially designed to assist them with respect to sentencing. It has been said, of course, that judges are trained and educated every day of the year by the barristers who plead before them. While this may be true, the value of the teaching and the competence of the teachers vary immensely.

In the United States, since 1964, the National College of State Trial Judges annually conducts a four-week programme of intensive study primarily for judges who have recently been appointed to the Bench. In the first two years, 200 judges from forty-nine states attended classes at the College. A case method of instruction is used in the course on sentencing. The judges

²⁷ Georges Verpraet, «Le nouveau visage de la magistrature», Paris, ministère de l'Éducation nationale. Bureau universitaire de Statistique et de Documentations scolaires et professionnelles, 1966, pp. 53 and 54.

are given a set of pre-sentence reports and the sentence which each judge selects is discussed and evaluated by the other judges in the class. The Federal Sentencing Institute Programme was inaugurated in 1959 and the States of California, New York and Pennsylvania were chosen to carry on institutes, sixteen of which have been held and the judges of all circuits have had an opportunity to participate in at least one institute.¹⁸ The first California Institute followed the procedures used in the federal system.

Other ways and methods have been used such as the "sentencing councils" which is a procedure by which several judges of a multi-judge court meet periodically to consider what sentences should be imposed in pending cases. They have been instituted on a regular basis in three United States District Courts. In Canada, a seminar on the "Sentencing of Offenders" took place at the Law School, Queen's University, Kingston, from June 4 to June 15, 1962. Conferences of county court judges, magistrates and judges of the sessions of the peace have taken place in several of the provinces and are becoming a yearly institution.

The Centre of Criminology of the University of Toronto convened a National Conference of Judges on Sentencing in 1964.

In June 1965, a week-long National Conference on the Prevention of Crime was held under the same auspices. It was attended by judges of different jurisdictions, including magistrates, judges of the sessions of the peace, county court and superior court judges who participated in work groups, together with law enforcement officers, university professors, correctional specialists, criminologists and legislators.

The question of sentencing was also discussed on many occasions between members of various disciplines, including the judiciary, under the auspices of the Centre of Criminology of the University of Montreal.

At the "Colloque international et interassociations" held at Bellagio, Italy, from the 6th to the 10th of May 1968, sentencing was the sole subject to be studied. The report of the meeting contains the following observations:

Le deuxième colloque avait pour objet la question aussi délicate que complexe du "sentencing", cette élaboration de la sentence pénale dont les aspects sont si variés. Il s'agissait d'une vaste problématique qui n'intéresse pas seulement les personnes qui administrent la justice pénale (juges, procureurs, avocats, experts, pénologues et policiers) mais aussi tous ceux qui s'intéressent aux divers domaines de la lutte contre la criminalité et les déviations sociales dangereuses, comme du traitement des délinquants et des personnes de conduite irrégulière . . .

Le rapporteur traita de la formation technique et culturelle des magistrats, des avocats, des experts et des autres collaborateurs de justice . . .

¹⁸ United States. President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: The Courts*. Washington: United States Government Printing Office, 1967, p. 22.

Il fut notamment relevé que les problèmes relatifs aux «enquêtes sociales» et aux «observations de personnalité» se poseraient tout différemment si le procès pénal était divisé en deux phases, se terminant respectivement par la décision d'imputabilité et par la décision de sanction . . .¹⁹

We welcome this evidence that the judiciary are prepared to participate in programmes of this nature.

Because of the fact that lawyers form the greatest majority of those who are appointed to the Bench, it is essential that proper training and education in criminology, psychology, social science and sociology be available to all students-at-law. Moreover, once an appointment is made to the Bench, irrespective of the court to which the appointment is made, but with an accent on the criminal courts, refresher courses should be attended by all new incumbents.

Sabbatical Leaves

The Committee has directed its mind to the possibility that members of the judiciary might be given leave of absence on full pay periodically, in the same way that members of the academic community have been given sabbatical leave. The Committee is of the opinion that great advantage would flow to the Bench from an opportunity to participate in academic life either by way of further study or by joining the faculty of a university as a visiting professor. Both federal and provincial governments should give serious consideration to the creation of such a scheme of sabbatical leave. Both Bench and university would benefit greatly from such an interchange.

This idea of training, education and meeting with various disciplines is gaining favour and momentum in all quarters. To quote Eric Stockdale:

By all means let the judges express their views but let them do so across a conference table in the presence of other interested parties, and let sweeping statements be checked by research. One suspects that two immediate benefits would result. First, the judges would speak as individuals with different, and sometimes opposing views. Secondly, they would be able to modify their views on hearing the opinions of other experts, whose views they could come to respect on arguing with them face to face. The converse would also be true. In England we rightly respect our judiciary, but we may have made the mistake in the past of placing our judges on a pedestal, and of regarding them too much as a symbol of semi-divine wisdom and justice. In consequence, criticizing a judge is generally considered to be only slightly less grave than speaking disrespectfully of the Queen, whilst being rather more serious than blasphemy. By all means let us keep the trumpets for the opening of the Assizes, but let the judge argue his views on the Judges' Rules, or flogging, or probation, across the table with police officers, psychiatrists and others. A judge who has discovered from contacts outside his court that many psychiatrists are sensible practical men with their feet

¹⁹ Bulletin de la Société Internationale de Défense Sociale, n° 11, p. 77 et seq. Imprimerie Amibel, Bruxelles, Belgique (1968).

on the ground, is more likely to listen with respect to their evidence in court, and they will come to respect him more if he tries to improve his professional skills by an exchange of views.²⁰

Programmes now exist in the State of California to cover education and training for criminal justice in a great number of institutions of learning.²¹ Recently the Department of Justice of Canada has provided for a seminar of superior court judges at which will be discussed developments in criminal law, statutory interpretation and external relations of the courts with the law reform agencies. The sentencing of prisoners will also be considered.

Mr. A. Doucy, in his preface to the work of Madame L. de Bray, Inspectrice principale honoraire au Ministère de la Justice, Service des Prisons, (Belgique) has put the issue well when he wrote:

L'évolution de la politique criminelle impose de plus en plus *au sociologue* de rejoindre *le juriste et le criminologue*. La délinquance est davantage envisagée comme un phénomène social et la conception abstraite de la responsabilité morale cède progressivement devant une acception concrète de la responsabilité sociale. (emphasis added)²²

The Committee recommends that:

- (a) conferences of judges and magistrates in all jurisdictions be held with a view to discussing matters related to corrections with law enforcement officers, crown prosecutors, defense attorneys, social workers, sociologists, probation and parole officers and officials, criminologists and correctional officers (including chaplains) and that these be arranged at regular intervals so as to allow for discussion of common correctional problems from different points of view.
- (b) groups of judges and magistrates be invited on a regular basis to attend federal and provincial correctional institutions for the purpose of familiarizing themselves with the correctional facilities available.

Courts of Criminal Appeal

No provision is made under Canadian law for the creation and maintenance of courts of criminal appeal. The Committee's concern is that the development of a consistent sentencing policy is hampered by the absence of specialist courts charged with the responsibility for synthesis and exposition of principle. It is our view that serious consideration should be given by the provinces to the possibility of establishing provincial courts of criminal appeal as a division of the provincial supreme court in those provinces where the volume of

²⁰ Stockdale, Eric. *The Court and the Offender*. London: Victor Gollancz Ltd., 1967, pp. 17 and 18.

²¹ Education and Training for Criminal Justice, a Directory of Programs in Universities and Agencies (1965-1967).

²² *Travail social et délinquance* (1967) Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles. Preface by A. Doucy, Directeur de l'Institut de Sociologie.

criminal litigation would justify the creation of such a separate court. The Committee envisages that such a court of criminal appeal would be constituted by judges of the appellate division with special skills and experience in criminal law.

Non-Judicial Sentencing

Many of those interested in corrections have considered the advisability of establishing sentencing authorities chosen among specialists other than the judiciary. In some few jurisdictions, this step has been taken. The following description given by an eminent writer in the field of corrections in the United States of America appears to reflect the practice in some states:

In California and Washington the discretion of the judge is limited when he commits the defendant to a penal or correctional institution. He does not determine the duration of the term; in fact, his commitment is for the maximum provided by the statute, and subsequently the sentence limits are fixed by a board. In California the Adult Authority determines, and may redetermine after six months, the length of time the prisoner shall serve. Before acting, the Authority must give notice to the judge, the district attorney, and the sheriff. It then fixes a term not more than the maximum of the statute for the offence and not less than the minimum so provided. The sentence fixed is subject to revision by the board. In Washington the Board of Prison Terms and Paroles has similar authority with respect to the minimum term.²³

Administrative sentencing has, on the other hand, been described as:

mainly a form of indeterminate commitment, like other forms that provide for automatic maximum terms, and suffering, therefore, the same destructive features, principally terms so long that they almost defeat efforts at rehabilitation...²⁴

Members of the Committee were given the opportunity to attend sittings of the California Adult Authority. They were impressed by the thoroughness with which hearings of the parole applications were conducted as well as with the exhaustive social references and information contained in their respective files.

We are of the opinion that the sentencing authority should make the fullest possible use of experts and knowledgeable members of other disciplines such as psychiatrists, psychologists, probation officers, social workers, criminologists, in short, of an array of talent well-versed in correctional philosophy. But those disciplines must, in turn, involve themselves in active participation in all phases of the criminal justice system.

As an alternative to having sentencing responsibility centered in a single person, Dr. Nigel Walker has suggested "a small board, with a full-time chairman and part-time members who are at other times engaged in work

²³ Sol Rubin, *The Law of Criminal Correction*. St. Paul: West Publishing Co. (1963).

²⁴ *Ibid*, p. 130, par. 14.

connected with the penal system. The judiciary should be represented on it, and so should the police, forensic psychiatry and psychology, and the probation service."²⁵

In principle, there would seem to be no objection to this arrangement. But the drain it would impose on all disciplines concerned would soon become a major obstacle. Additional delays would be encountered. Majority adjudications would have to be the rule, with one dissenting voice sufficient to provide for an appeal. On the other hand, if the non-judicial members are given the status of "assessors", or "experts" (as in Admiralty Court, for example) there would be danger of frustration on their part, or of quasi-automatic concurrence.

"Collégialité", as it is called in French-speaking countries of Continental Europe, has been severely criticized as follows by two well-known authorities in criminology:

Pour la plupart des affaires, il n'existe pas de délibéré (90% des décisions sont rendues «sur le siège»). Le principe dilue la responsabilité de ceux qui ont rendu la sentence, et la justice serait sans doute meilleure et plus efficace si elle était rendue par des juges uniques à qui l'on ferait une situation matérielle et morale supérieure à celle que possèdent aujourd'hui les magistrats. Enfin, le système de la collégialité est évidemment moins économique que celui du juge unique.

Aussi, n'est-il pas étonnant que le système du juge unique ait de nombreux adeptes. Très en faveur près des anglo-saxons (mais leur organisation judiciaire est faite différente de la nôtre), il a été consacré aussi par des pays dont l'organisation judiciaire est voisine de la nôtre.²⁶

On the other hand, the Committee has studied the question of sentencing councils as they operated in some states, and more especially in the District Court of the Eastern District of Michigan.²⁷ But such councils, limited in scope as they are, can only work in those places where there are three or four judges available in the same location and preferably in the same building. Regional meetings would prove an unsatisfactory substitute.

In conclusion, the Committee does not favour the establishment of sentencing boards.

The Committee recommends that power to pronounce a sentence or disposition remain vested in the magistracy and the judiciary as heretofore, but subject to all its other recommendations regarding sentencing.

²⁵ The New Society, *op. cit.*

²⁶ Pierre Bouzat et Jean Pinatel. *Traité de Droit Pénal et de Criminologie*. (Paris: Dalloz), 1963, Vol. II, p. 868, No. 1122.

²⁷ *Proceedings of the Seminar on The Sentencing of Offenders*, Queen's University, Kingston, Ontario. June 4-June 15, 1962.

12

MENTALLY DISORDERED PERSONS UNDER THE CRIMINAL LAW

In considering this difficult and sensitive area, we were most fortunate in obtaining the views of a multi-disciplinary body which was concurrently examining many similar issues. The Canadian Mental Health Association's Committee on Legislation and Psychiatric Disorder¹ composed of psychiatrists, lawyers and other professionals from across Canada collaborated closely with us. Consequently, we have had the full benefit of their knowledge and experience.

The substantive law relating to the defence of insanity has long been a source of controversy among lawyers and psychiatrists. Evolved originally from the Rules in *M'Naughten's Case*,² the law in Canada is now embodied in section 16 of the *Criminal Code*, which provides:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
- (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
- (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.
- (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

¹The subject Committee has investigated, reported and published on many fields of the law as it relates to the mentally disordered. See Chalke *et al*, *The Law and Mental Disorder—Part One: Hospitals and Patient Care* (Toronto: Canadian Mental Health Association, 1964); Chalke *et al*, *The Law and Mental Disorder—Part Two: Civil Rights and Privileges* (Toronto: Canadian Mental Health Association, 1967). The third and final volume—dealing with the criminal process—is in press.

²(1843), 10 Cl. & F. 200.

A defence of insanity, when established, completely exempts the individual from criminal responsibility. He is found "not guilty by reason of insanity", and as a result he not accountable within the ordinary correctional process. Such a person is, in the interests of public safety, placed in a controlled situation which is dealt with later in this chapter.

We do not voice opinions on the ingredients of the substantive law as it relates to the insanity defence, since it is not within our terms of reference. The test employed, however, should not be regarded as an unimportant matter from the corrections aspect. Indeed, the test of responsibility happens to determine who will and who will not be channelled through the correctional system. In this context, our Committee feels justified in taking a brief look to see where we in Canada find ourselves in respect of the insanity defence.

Generally speaking, the terms of section 16 of the *Code* are criticized as not conforming with modern psychiatric principles. A significant number of informed professionals share the view that if contemporary psychiatric knowledge were recognized in a new test of criminal responsibility, it would result in many more persons being exempted from criminal liability. Those who advocate a broader basis of exemption are not without ready substitute tests. Over the years, many alternative tests of criminal responsibility have been formulated and some of these implemented. We think it appropriate here to document some of them.

*The New Hampshire Rule*³

No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally deficient or has disease of the mind if such act or omission is the product of such deficiency or disease of the mind.

*Irresistible Impulse Doctrine*⁴

1. Was the defendant at the time of the commission of the alleged crime as a matter of fact afflicted with a disease of the mind, so as to be either idiotic, or otherwise insane?
2. If such be the case, did he know right from wrong as applied to the particular act in question. If he did not have such knowledge, he is not legally responsible.
3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:
 - (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.
 - (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect as to have been the product of it solely.

³ *State v. Pike* (1869, 49 N.H. 395; see also *State v. Jones* (1891), 50 N.H. 369.

⁴ *Parsons v. State* (1866), 81 Ala. 577, 2 So. 854 (terms for the jury).

*Durham Rule*⁵

An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

*American Law Institute Model Penal Code*⁶

Section 4.01. Mental Disease or Defect Excluding Responsibility.

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
- (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

*Rule Recommended by Gowers Commission*⁷

No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally defective or has disease of the mind to such a degree that he ought not to be held responsible.

*Currens Rule*⁸

The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

*Freeman Rule*⁹

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The relevant law in Canada was, just over a decade ago, the exclusive subject of a Royal Commission. The report¹⁰ of the Commissioners was presented in 1956 and concluded essentially that subsection 2 of section 16 afforded a sufficiently wide exemption from criminal responsibility. Emphasis was placed upon the word "appreciating" in relation to "appreciating the nature and quality of an act". Incapacity to "appreciate", it was felt, had been receiving an interpretation which was acceptably broad. The Rules in *M'Naughten's Case* had not used the word "appreciate" but the word "know". "Know" is stated to have a more restrictive meaning than "appreciate". Two of the five Commissioners, however, while agreeing with the interpretation

⁵ American Law Institute, Model Penal Code, Article 4. Responsibility (1955).

⁶ *Durham v. United States* (1954), 214 F. 2d 862, at pp. 874-875.

⁷ *Report of the Royal Commission on Capital Punishment 1949-53* p. 116, para. 333, (Cmd. 8932, 1953), London: Her Majesty's Stationery Office.

⁸ *United States v. Currens*, (1961), 290 F. 2d 751, at p. 774.

⁹ *United States v. Freeman* (1966), 357 F. 2d 606.

¹⁰ Report of the Royal Commission on *The Law of Insanity as a Defence in Criminal Cases*, (1956), Hull: Queen's Printer.

of the majority, concluded that the broad interpretation was not the usual one given by the Canadian criminal courts. The dissentients would have substituted a new test of criminal responsibility.

We are of the view that section 16 of the *Criminal Code* could now reasonably stand a full and complete reassessment. The fact is that the 1956 report, on the vital point, was decided upon a close division of three to two members. Moreover, in a field so dynamic, the period which has elapsed since 1956 has, we are sure, seen changes in psychiatric thinking which could well place us in a far better position now to evaluate the fairness of the law. Other tests proposed since 1956 could, at the same time, be taken into account.

One point potentially to be dealt with in reassessing the provisions relates to that arm of subsection 2 of section 16 referring to "knowing that an act or omission is wrong." Some thought might be directed to the possibility of extending the broader exemption concept through substitution of the word "appreciating" for "knowing".

The Canadian Mental Health Association's Committee, referred to earlier, has, in the context of other proposals, recommended that the defence of insanity under section 16 of the *Criminal Code* should be confined to capital cases only. Without passing comment on such a recommendation, we think that it is one which can be explored if the substantive law relating to the defence of insanity were reconsidered on a comprehensive basis. Our Committee's proposals and recommendations rest upon the assumption that some form of statutory defence of insanity will continue.

Any extensive reconsideration relating to the issue of responsibility would, of course, be bound to take cognizance of the concept of "diminished responsibility". In this connection, reference would have to be made to the English *Homicide Act, 1957*¹¹ which, by virtue of section 2, reduces the offence of murder to manslaughter where the defence of diminished responsibility is established. As a point of interest, it should be noted that something akin to the defence of diminished responsibility might be available even in the absence of a statutory defence.¹²

The vigorous debate concerning the issue of criminal responsibility has tended to minimize the attention directed to other related questions which are equally, if not more significant than "insanity" at the time of the alleged offence. Under the present law, there are various stages during both the criminal trial and correctional processes at which the mental condition of an accused or convicted person can be questioned. An accused may be specially remanded for psychiatric examination pursuant to certain sections of the *Criminal Code*.¹³ Such remands have sometimes had the effect of excluding

¹¹ 5 & 6 Eliz. 2, c. 11.

¹² See the English case of *Regina v. Lenchitsky*, (1954) *Criminal Law Review* 216, where it was held by the English Court of Criminal Appeal that the jury were entitled to take into consideration the fact that the accused was a feeble-minded person in assisting them in coming to a conclusion as to whether or not he had an actual intent to kill or inflict grievous bodily harm.

¹³ See ss. 451(c), 524(1a) and 710(5). Provincial legislation also appears available for the same purpose in certain jurisdictions: see, for example, *The Mental Health Act, 1967* (Ontario), S.O. 1967, c. 51, s. 15.

the criminal process either temporarily or permanently, without the person having been found by the court to be unfit to stand trial.¹⁴ Where a court finds unfitness to stand trial, the trial of the accused is precluded until such time as he is fit for that purpose.¹⁵ As already mentioned, an accused who does in fact stand trial and with respect to whom the court finds insanity at the time of the act charged, is acquitted on that ground.¹⁶ An appeal court may substitute such a verdict for a conviction.¹⁷ Once a person is convicted, there are yet provisions for conducting special determinations into his mental condition. These determinations could take the form of a pre-sentence report to assist a court in ascertaining what should be done with the individual. There are legislative provisions or procedures for conducting psychiatric examinations at the post-sentence level as aid to the federal cabinet in deciding whether or not to commute the sentence of death;¹⁸ by penitentiary¹⁹ or provincial correctional²⁰ officials where it is indicated that a penitentiary or provincial correctional institution is not the appropriate place of confinement; or to assist the National Parole Board or a provincial parole board in its deliberations.

A determination of "dangerousness" following a finding of guilt is another phase where mental disorder is relevant to the criminal process. This aspect is dealt with separately in the chapter embracing habitual and dangerous offenders.

Psychiatric Services to the Courts

Our Committee has studied various systems which, in different ways, provide for psychiatric guidance to be given to criminal courts. In addition, we have had the advice of many experts in order to arrive at a sound position in keeping with what would be most appropriate in Canada today. The crucial question is whether the adversary system should be modified to enable a court to have attached to it, or to appoint, a psychiatrist or panel of psychiatrists to serve as an "assessor" on psychiatric matters, with particular reference to the issues of fitness to stand trial and criminal responsibility. Many eminent psychiatrists have not felt that such a modification would be feasible or desirable and we have come to a similar conclusion.

Much of the criticism levelled against an adversary type proceeding on psychiatric issues is that the criminal trial forum becomes a "battle of the experts". We do not view this so-called "battle" necessarily as an undesirable

¹⁴ Consider the possibility of a person being remanded for observation to a psychiatric facility and being "certified" there to be mentally disordered and, by some arrangement, the criminal trial process appears to be discontinued. Also see s. 527 of the *Code* and its potential employment before trial having the effect of excluding further trial proceedings.

¹⁵ *Code*, s. 524.

¹⁶ *Code*, s. 523.

¹⁷ *Code*, s. 592(1) (d).

¹⁸ See a description of this procedure contained in the McRuer Report on Insanity, *ibid.*, footnote 10, at pp. 1-3.

¹⁹ *Penitentiary Act*, S.C. 1960-61, c. 53, s. 19.

²⁰ See, as an example, *Mental Patients Institutions Act* in Quebec, R.S.Q. 1964, c. 166, s. 24.

practice since both the prosecution and defence are entitled to seek out and put forward the testimony of any expert who supports the argument presented for the respective sides. We do feel, however, that it is possible to alleviate certain of the unfortunate implications of contradictory psychiatric evidence. This could be done by restricting the latitude for disagreement. Specifically, there is no reason why the experts for opposing sides could not exchange reports with a view to resolving as many of their differences as possible. A mandate to strive for agreement might very well result in such agreement. After all, psychiatric experts—as part of the criminal trial forum—do have a common purpose: that is, one of assisting the court in arriving at a fair and just verdict.

The Committee recommends that where psychiatric evidence is to be presented by the prosecution and the defence, the judge or magistrate should be empowered—through amendment to the Code—to require the respective sides to exchange psychiatric reports, thereby minimizing the risk of disagreement which, so often, arises purely out of the element of surprise at trial.

Recognizing that short psychiatric examinations taking place in a common gaol are, in many instances, felt to be unsatisfactory, our Committee directs its attention now to the laws concerning remands for psychiatric observation. Three sections of the *Code* deal specifically with remanding a person charged with an offence for such observation. These are sections 451(c), 524(1a) and 710(5) which deal respectively with remands on preliminary inquiry, at trial of an indictable offence and upon trial of a summary conviction offence. In the case of each of these sections, the duration of remand may be for a period of up to thirty days, and each requires as a condition precedent the supporting evidence of a medical practitioner that the accused is believed to be “mentally ill”.

In examining these provisions, we have also looked at provincial statutory provisions which purport to authorize a court to remand an individual for psychiatric observation even where the offence charged is one under the *Criminal Code*.²¹

While some persons doubt the constitutional validity of a provincial statutory authority for this purpose, the question would be purely academic were the *Code* provisions sufficiently wide and flexible to accommodate appropriate remands in every case. We are of the opinion that the three pertinent sections of the *Code* could stand improvement from the point of view of the aspects discussed below.

The Committee recommends that the provisions respecting remands for psychiatric observation under the Code be amended in such a way as to: (1) allow a remand for up to sixty days. (It is not uncommon for the authori-

²¹ See, for example, Saskatchewan's *Mental Health Act, 1961*, S.S. 1961, c. 68, s. 17 as amended.

ties at a psychiatric facility to feel that additional time, in some cases, is required in order to reach a sound judgment. The court has the power to set the period of remand and could, in its discretion, prescribe a shorter period. Moreover, should it happen that the authorities at the psychiatric facility have completed their observation before the period of remand has expired, arrangements could be made to have the individual returned to court at the earliest point possible.) (2) substitute the term "mentally disordered" for the term "mentally ill". (The term "mentally ill" is not defined in the Code. There are some who feel that this term, popularly interpreted, would not include the "mentally retarded". The existence of mental retardation is equally significant for the purposes of the criminal trial process as is mental illness. "Mental disorder" is more and more appearing in legislation as an all-embracing generic term. In order that there be no mistake of interpretation, we propose along with the substitution of term, that "mental disorder" be defined in the Code as "any disease or disability of the mind."²²) (3) enable a court to order a remand in the absence of the evidence of a physician, since delay may otherwise be occasioned. (We must recognize that legislation is intended to serve all regions of the country and it is still the case that a physician is not always readily available in many of these areas. We do, however, feel that the circumstances where remands are ordered in the absence of such supporting evidence, should be compelling ones. Consequently, we would suggest that an amendment be framed to include expressly that "compelling circumstances" do exist, thereby restricting those remands ordered without supporting medical evidence.)

The Committee wishes to point specifically to section 527 of the *Criminal Code*. Subsection (1) of that section provides that:

The Lieutenant-Governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is in custody in a prison in that province, order that the person be removed to a place of safe-keeping to be named in the order.

The foregoing provision has been used in two basic ways. Firstly, it has been employed to transfer to a mental hospital a prisoner who is serving a sentence in a provincial correctional institution or gaol. Parallel legislation is found in the provincial sphere to accomplish a similar purpose.

Secondly, subsection (1) of section 527 authorizes the removal of a prisoner to a mental hospital at the pre-trial level. Such transfers appear to have been effected where it appears that the accused is so mentally disordered and in need of hospitalization that a decision is taken by the administrative authorities not to proceed to the fitness to stand trial issue. Our Committee believes transfers on such a basis to be dangerous. It is possible that the stringent measures inherent in detention under the authority of the lieutenant-governor could be applied to cases without the individual

²²This is precisely the definition attached to the term "mental disorder" in Ontario's *Mental Health Act, 1967*, S.O. 1967, c. 51, s. 1(f).

at all coming before a judicial officer. While we do not question the humanitarian motives of officials who have brought about pre-trial transfers under the authority of section 527, we believe the potential loss of rights to the individual could lead to outstanding injustice. Other recommendations contained in this chapter of our report, particularly the one dealing with amending the Code to permit advancement of the fitness to stand trial issue, would seem to negate altogether occurrence of the type of situation which has led to the use of section 527 at a pre-trial level.

The Committee recommends that the Code be amended so as to restrict the use of the transfer contemplated to sentenced prisoners.

*Fitness to Stand Trial*²³

The Canadian law concerning fitness to stand trial is embodied in section 524 of the *Criminal Code*. Where it appears that there is sufficient reason to doubt that an accused person is, "on account of insanity", capable of conducting his defence, a court, judge or magistrate may, at any time before verdict, direct that an issue be tried whether the accused is then unfit to stand his trial. The *Code* does not define "insanity" for this purpose, but the criteria used to determine fitness to stand trial generally involve the answers to the following questions: does the accused have the capacity to understand the nature and object of the proceedings against him?; is he capable of comprehending his own condition in reference to such proceedings?; is he capable of making a rational defence?

The determination of fitness to stand trial is one which is made by a jury, unless there is no jury sitting in which case the judge or magistrate renders a verdict on that issue. Where the verdict is that the accused is not unfit to stand trial, the arraignment or the trial proceeds as if no such issue had been directed. Where, however, the verdict is one of unfitness to stand trial, the court, judge or magistrate must order that the accused person be kept in custody until the pleasure of the lieutenant-governor of the province is known. A person found unfit to stand trial may be subsequently tried on the indictment.

The concept of fitness to stand trial is often confused with that of "certification" to a mental hospital. Unlike the criteria employed to determine fitness to stand trial which relate solely to the criminal trial process, the question of "certifiability" has to do with whether the combination of a person's mental condition and his actions requires mental hospitalization on a compulsory basis. While mental hospitalization may be, and in most cases is medically indicated for a person who is unfit to stand trial, the two concepts do not always go hand in hand. Consequently, it is possible that an individual found unfit to stand trial is not a proper candidate for mental hospitalization.

²³ See the comprehensive treatment given to this topic in Swadron *Detention of the Mentally Disordered*, Butterworths (Toronto: 1964), especially Chapter 9.

Conversely, it would be perfectly consistent with the principles involved for some patients in mental hospitals to undergo a criminal trial. Our Committee emphasizes these points.²⁴

Canadian practice sees a resolution of the fitness question as soon as the matter is placed in doubt. This has meant that the special issue has sometimes been determined as a preliminary one at the commencement of a trial. Should the accused be found unfit under such circumstances, not only is there no opportunity to present a defence, but the prosecution has not been called upon to test its own case. The main issue at trial, that is innocence or guilt, is left untouched. Some might argue that the accused has no cause for complaint since he should be held in a mental hospital in any event. As we point out above, however, a finding of unfitness should not be equated to a determination that the person requires mental hospitalization. Had it not been for the existence of a criminal charge, we believe that a number of persons who are now confined as unfit to stand trial would be in the community.

Although it is possible that persons found unfit will be returned to court to stand trial at a subsequent time, many will not have such an opportunity. Where the accused has a certain degree of mental retardation, for example, he is, and will always be unfit to stand trial. To state the potential injustice at its highest, it is conceivable under the law for an innocent person who does not require hospitalization to be detained for the rest of his life. Such a situation is shocking and, by amendment to the *Criminal Code*, we believe that the risk can be minimized. It should be permissible under prescribed circumstances, for a judge to postpone the trial of the fitness issue so that, where possible, the general issue of guilt or innocence can be developed if not disposed of altogether.

Clause 45 of Bill C-195 would have amended section 524 of the *Code* to permit the court, judge or magistrate to postpone directing the trial of the fitness issue until any time up to the opening of the case for the defence, where the issue arose before the close of the case for the prosecution. Where the court, judge or magistrate had postponed direction of the trial of the special issue and the accused was acquitted at the close of the case for the prosecution, the issue would not have been tried. The Canadian Committee on Corrections endorses the principle embodied in the amendment which was proposed, but believes that the special issue could be postponed even beyond the point of opening of the case for the defence.

The Committee recommends that the Code be amended to authorize postponement of the trial of the fitness issue beyond the stage which Bill C-195 would have allowed. There is no reason why the defence itself should not be allowed to present evidence before going ahead with the trial of the fitness issue. In this way, the defence itself could call witnesses to establish a defence of, for example, alibi or self-defence.

²⁴ See a discussion relevant to this point in Swadron, *The Unfairness of Unfitness* (Guest Editorial), 1966, 9 *Canadian Bar Journal* 76, which elaborates on this issue and also puts forward an argument for amending the *Code* to permit the postponement, in certain cases, of the issue of fitness to stand trial.

Another innovation which was sought to be introduced via Bill C-195, had to do with representation by counsel where fitness is in issue. Also by clause 45, this Bill would have required a court, where it appeared that there was sufficient reason to doubt fitness, to assign counsel to act on behalf of the accused if he was not already so represented.

The Committee recommends that such assignment of counsel be guaranteed by law where fitness to stand trial is an issue: we believe this right to be fundamental.

No appeal lies under the present *Criminal Code* from findings of either fitness to stand trial or unfitness to stand trial. In the case of a fitness finding which led to a conviction, the person convicted would have to allege that the conviction was bad since it was based upon a trial which should not have been held. Where the verdict is one of unfitness to stand trial, the matter can be brought before the court again only by subsequent trial. We concede that an appellate court is not in as good a position to determine the issue of fitness as the court at trial. Nonetheless, we believe that maximum flexibility and process is desirable to meet the ends of justice. The provisions of Bill C-195, had they been enacted, would have provided for appeals from determinations on the fitness issue.

The Committee recommends that a finding of fitness to stand trial or unfitness to stand trial be subject to statutory appeal.

Most of the recent attention in regard to the fitness issue has been focussed upon the need for authorizing postponement of the issue at trial. Some years ago, the late H. H. Bull, Q.C., eminent Toronto prosecuting attorney, expressed the view that a magistrate having jurisdiction to hold a preliminary hearing should also have jurisdiction to hear and determine whether the accused was, when called for preliminary hearing, unfit to stand trial. Mr. Bull pointed out to the McRuer Commission on Insanity²⁵ that "by leaving the issue to be tried by the tribunal having jurisdiction to try the offence the accused is often required to remain for some considerable time in the common gaol, when in fact it is obvious and well known that he is on account of insanity unfit to stand his trial." The Commissioners termed Mr. Bull's suggestion "commendable" and reported that: "We think that a person who is unfit to instruct counsel at a preliminary hearing ought not to be asked to undergo a preliminary hearing." Our Committee concurs in the position taken by the McRuer Commissioners. It should not be difficult to formulate procedural rules appropriate to a change of law in this respect. Moreover, the protection which would be afforded by review bodies (which we recommend later in this chapter) for persons detained under the authority of a lieutenant-governor's order should provide an adequate safeguard to the

²⁵ Ibid., footnote 10, at p. 5.

individual. That the ordinary course of the criminal law could require severely disturbed persons to languish in prison awaiting assizes is, to us, clearly unacceptable.

The Committee recommends that the Criminal Code be amended to allow, in appropriate cases, the fitness issue to be considered upon preliminary inquiry.

We have considered whether the presence of the accused should be mandatory during the trial of the fitness issue. This question arises because his appearance in person, experts suggest, could in certain instances cause him psychological damage. We accept that there are some instances wherein the fitness hearing would better take place in the absence of the individual than risk aggravation of his mental state.

Subsection 2 of section 557 of the *Code* provides that the court may:

- (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible, or
- (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.

Subject to these clauses, by virtue of subsection 1 of section 557 an accused person must be present in court during the whole of his trial. In respect of the trial on the main issue, our view is that the provisions of section 557 are straightforward and adequate. There is some doubt, however, what the situation is in the case of a hearing on the issue of fitness to stand trial. Determination of the fitness issue may not, strictly speaking, be part of the trial proper, and the *Code* is silent on whether the quoted provisions may be applied to a fitness hearing. We think that an accused should be in attendance when his fitness to stand trial is being determined, except where compelling circumstances exist to justify proceeding in his absence. The court should have a discretionary authority to permit, upon application, the trial of the fitness issue without the accused having to appear. Such an authority, we submit, would be clear only if expressly conferred by the *Code*.

The Committee recommends that an amendment be made to section 557 to authorize, in appropriate cases, the trial of the fitness issue in the absence of the accused person.

Detention under Warrant of the Lieutenant-Governor

Where an accused is found not guilty on account of insanity or unfit to stand trial, section 526 of the *Criminal Code* authorizes the lieutenant-governor of the province to make an order for the safe custody of the accused in the place and in the manner that he may direct. The lieutenant-

governor, by virtue of section 527 of the *Code*, is authorized also to make an order for the "safe-keeping" of an individual where, upon evidence satisfactory to the lieutenant-governor, the individual is "insane, mentally ill, mentally deficient or feeble-minded" and is in custody in a prison.

Detention under "Executive Pleasure" is a most drastic legal measure. The duration of the detention is absolutely indeterminate. There is grave doubt whether, even by extraordinary legal remedy, the discretion of the lieutenant-governor can be reviewed by the courts.

Despite the far-reaching effect of detention under the lieutenant-governor's authority, population statistics are generally not published. Indeed, in most instances they are not even collected. This is a singular situation. It is also alarming.

In some provinces, such individuals are detained both in prisons and in mental hospitals, although detention in a prison is a rare exception. In those provinces where detention may be either in prison or a mental hospital, the jurisdiction over them is not to be found in one administrative authority. Requests for information for the purposes of this report led, in some instances—even where only one governmental department had jurisdiction—to an initial collection of statistical data. From information received, we would estimate that there are now approximately one thousand persons so detained in Canada. Because the various legal circumstances under which persons may be confined pursuant to the authority of a lieutenant-governor tend often to be complicated, we cannot state frankly that this is a reliable figure, but merely a rough estimate.

Some individuals found detained under lieutenant-governor's warrants in a given province, were they in another province, would be detained under another authority. Such situations may result either from diversities of provincial legislative provisions or disparities in practice.

An illustration of diversity in legislation is to be found in the case of transferring a person in custody in a prison to a mental hospital. Such transfers may be effected by lieutenant-governor's warrant under the *Criminal Code* (and under provincial enactment in certain provinces). Other provinces have legislation authorizing the transfer by other means: for example, by attorney-general's order.

Disparate practices are evidenced by the manner in which cases of accused persons are handled. For example, a man charged with a relatively minor offence in one province and "certified" mentally disordered may become the subject of lieutenant-governor's warrant detention. In another province, a person charged with murder might be held under a medical certification procedure and not a lieutenant-governor's warrant. Such disparities are difficult to comprehend. Moreover, inconsistent practices exist also domestically within given provinces.

The conditions of detention of persons held under lieutenant-governor's orders are, in many jurisdictions, upsetting. Observers report that the circumstances of detention, treatment and programme offered to such persons vary from province to province. While we are told that some of these conditions

are remarkably good in particular provinces, the situation in others is no less than shocking and appalling in this day and age. Most provinces do not have adequate facilities for keeping such individuals. One of the obvious reasons for this is that a majority of provinces do not have a sufficient number of patients held under such custody to enable an adequate programme to be established. Not infrequently, provinces with a smaller population of persons so detained request provinces with better programmes to make their facilities available. Some suggest that certain provinces pool their resources and establish regional interprovincial facilities in this regard. There is no easy solution to the problems with which we are here confronted.

The degree of security provided for these persons varies widely. Some facilities described as of a "maximum security" nature are hardly secure. Certain liberties which may be afforded lieutenant-governor's warrant patients in one province may not be granted in another province. These are matters which demand close re-examination within each province. Furthermore, all provinces should collaborate in examining what each of the others offers, better to determine what should be minimum standards.

When one thinks of custody pursuant to an order of the lieutenant-governor, the mind may automatically focus upon the need for a maximum security setting as the place of detention. While it may be true that the criminal charge involved in the majority of cases of those acquitted on account of insanity or found unfit to stand trial is classified as a serious one, this is not always the case. Lesser, and what many would feel are minor charges representing no danger have and may be involved. Accordingly, custody awaiting the pleasure of the lieutenant-governor should not always evoke further detention of a maximum security nature. Indeed, our Committee can envisage instances where it is secure and desirable for the lieutenant-governor to issue his initial order, not for further custody, but for discharge from custody. We believe that appropriate measures should be taken in each province to screen those who await the pleasure of the lieutenant-governor in the first instance, to determine what will be a proper disposition in each case on its individual merits. Flexibility of disposition is essential. The reinforcement of community psychiatric facilities is making it more and more possible for a greater number of individuals to be treated and cared for in the community. There appears doubt whether the flexibility of disposition which we contemplate is authorized under the present terms of the *Code* and this question should be resolved.

The Committee recommends that section 526 of the Code be amended so as to remove any doubt that an order of the lieutenant-governor may encompass a broad scope of disposition, including discharge from custody in the initial instance.

The stringent effect of detention under a lieutenant-governor's order combined with the often disturbing conditions under which these unfortunates are kept demand that there be adequate reviews of their cases. If one were to trace the history herein, discharge from lieutenant-governor's custody

was not too many years ago a rare exception. Although there is a common belief that lieutenant-governor's warrant custody means detention for life, this no longer holds true. Persons have been and are being discharged and returned for trial throughout the country. However, there is a need for greater checks and balances than now exist in most provinces. Unlike the situation with noncriminally involved mental patients, hospital authorities are not in a position legally to dictate when a lieutenant-governor's warrant patient leaves hospital.

The need is clear for properly constituted review boards with appropriate safeguards built into their procedural functions. We do not find it necessary to describe in detail the various procedures adopted in the individual provinces for the consideration of the cases of lieutenant-governor's warrant patients. These range from the appointment of *ad hoc* committees who are given no procedural guidelines with which to work to special statutory provisions guaranteeing the right to a review, coupled with prescribed procedures therefor.

The Committee recommends that there be adequate review, provision for which is made by statute, of every person in Canada who is detained under the authority of an order made by a lieutenant-governor.

As to the adequacy of review, we offer the following guidelines:

- (a) Because of the unique nature of the detention, reviews should take place automatically and not be dependent upon applications therefor.
- (b) Reviews should be conducted periodically in each case, but not less than once in each year.
- (c) The reviewing body should be multi-disciplinary in composition, having psychiatric, legal, and lay membership.
- (d) Review procedures should be such that due regard is given to civil rights including the right to be represented by counsel if the individual so chooses.

Concerning the passage of appropriate legislation, and the establishment of machinery for review, we have considered the various possibilities involved. There is a constitutional question arising since, on the one hand, orders for detention derive their authority from the *Criminal Code*. The lieutenant-governor who makes the order is, however, acting on behalf of his own province in a manner apparently unfettered by the *Code* as to the way in which his discretion is exercised. The constitutional issue, if tested, would hinge upon the answer to the question of when has the criminal trial process run its course. We find it unnecessary to discuss this question, as detention of such persons should hardly be a matter of conflict between any of the legislatures and Parliament. The important consideration is that the field be occupied and there be some legislation, of application in every province, dealing with the review of persons held on the order of the lieutenant-governor. In this regard, we put forward the following avenues of approach:

- (a) It would be in order for any province to enact its own legislation and establish its own reviewing body or bodies for these purposes.
- (b) Where, for any reason, a province does not see fit to enact its own legislation in this regard, it is essential for that province to rely upon legislation which would be passed by Parliament.
- (c) Statutory provisions within the federal sphere, which would be amendatory to the *Criminal Code* could assume a variety of forms. They should not be universally mandatory, since their application is indicated only for those provinces having to rely upon them. We have given serious thought to the pertinent proposals embodied in clause 46 of Bill C-195 (1957). If the interpretation of that proposed amendment is such that the provisions would be universally permissive, we cannot agree that the course is a good one to follow: the door would be left open for no review machinery to exist in any province not having its own legislation for review. Clause 46 may represent no more than a series of guidelines which might be adopted by a province. What is required is a guarantee that every province have review mechanisms.

The Committee recommends that any amendment placed in the Code should provide to apply in those provinces where the field is not already occupied. Even then, there are two modes of dealing with the matter. One would involve provision for review bodies to be established by the individual province concerned. The second would see the creation of a federal reviewing body to handle these cases for any province having no such body of its own. We lean in favour of the establishment of a federal reviewing body. The existence of such a body would likely be welcomed by certain provinces.

One further point should be made. Detention under order of the lieutenant-governor being discretionary, the review body is nothing more than advisory in function. This being so, the lieutenant-governor or cabinet (where the effective decision is made there), as the case may be, need not follow the advice of the review body. While we recognize that these matters should be given serious consideration in every interested forum, it is to be hoped that the recommendations emanating from the review machinery are accorded the weight they deserve when the ultimate determination is made.

Hospital Permits

One of the most crucial questions considered by our Committee was whether a Canadian criminal court should have the power to sentence a person to a mental hospital. We have examined the issue in an exhaustive manner. Later in this chapter, procedures and practices relating to the transfer of sentenced prisoners from penitentiaries and other correctional institutions to mental hospitals are discussed. Such transfers, however,

take place at a point after the individual has undergone the court process. They are arranged by administrative authorities. It has been stated that if transfers could be arranged with ease at the commencement of an individual's sentence, it might not at all be necessary to provide a legislative system which would allow a court to have any involvement. Indeed, it has been argued that an individual, by virtue of legislative transfer provisions, could be sent directly from a court to a mental hospital, thereby short-circuiting the need for him physically to be placed in a prison previous to hospitalization. This argument, however, skirts the issue of whether the court should be involved in directly determining the disposition.

When an individual is placed in the court process, he is the centre of attention and an excellent opportunity is thereby afforded of observing the needs of his particular circumstances. Once sent to prison, there is a risk that any mentally disordered condition from which he suffers will go undetected. In those instances where mental hospitalization is indicated at the time of verdict and sentence, appropriate steps should be taken then.

We have studied the concept of "hospital orders" under the English *Mental Health Act, 1959*²⁸. By virtue of that statute, under certain circumstances, a court may authorize by order a convicted person's admission to and detention in a hospital. A court of assize or quarter sessions in the case of a conviction of an offence the sentence for which is not fixed by law, or a magistrates' court in the case of a conviction of an offence punishable on summary conviction with imprisonment, may so authorize where the following conditions are satisfied:

- (a) the court is satisfied, on the written or oral evidence of two medical practitioners. . . .
 - (i) that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; and
 - (ii) that the mental disorder is of a nature or degree which warrants the detention of a patient in a hospital for medical treatment, . . . ; and
- (b) the court is of opinion, having regard to all the circumstances including the nature of the offence and the character and the antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.

In limited cases, under the English statute, a "hospital order" may be made without convicting the accused, notwithstanding that he could be properly convicted. Such an order is limited to certain offences tried in magistrates' courts and further restricted to persons suffering from mental illness or severe subnormality. The hospital to which the offender is to be sent is specified in the court order. The court has no jurisdiction to make a hospital order unless it is satisfied that arrangements have been made for the admission of the offender within twenty-eight days to the hospital, in the event of such an order being made. Where a court makes a hospital

²⁸ 7 & 8 Eliz. 2, c.72.

order, it cannot pass sentence of imprisonment, impose a fine or make a probation order in relation to the offence, but may make any other order which it has the power to make. In certain instances, a court has the power to restrict discharge from the hospital. Where an order is made by a court of assize or quarter sessions, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public so to do, the court may further order that the offender be subject to special restrictions either with or without limit of time or during such period as the order specifies. Certain matters in relation to the custody of a patient held under a restriction order, such as the granting of a leave of absence, transfer and discharge, are exercisable only with the consent of the Secretary of State. The Secretary of State may, while a restriction order is in force, discharge the patient from hospital, either absolutely or with conditions. The statute contains provision for certain persons convicted by a magistrates' court also to become the subject of a restriction order through that court committing him to the custody of quarter sessions.

Our observers who travelled across the country and interviewed many interested persons asked the specific question whether a system of "hospital orders" referred to above should be adopted in Canadian law. The reaction they received was mixed, but basically against the English system as it is structured. Those identified with mental health facilities were particularly concerned that a court should appear to have the right to order admission to and restrict discharge from hospitals. It was felt that hospital officials should be able to determine who, based upon appropriate admission criteria, would be admitted to and discharged from psychiatric facilities. Most of those whose opinions were sought did not object to persons coming to their hospitals directly from the courts, but felt that it was the hospital authorities' decision to make.

We agree that hospital authorities should be able to control the flow of admissions and discharges within their facility. The appropriate gauge, as we see it, would be the criteria utilized with respect to admission and discharge as contained in the mental health legislation of a given province. Hospital officials should have no objection whatsoever to admitting as patients those who would qualify under the relevant laws in that regard. Moreover, if such officials could dictate discharge pursuant to their sound judgment based upon the criteria in statutes governing "civil" mental hospitalization, they would be in control of the entire hospitalization cycle.

The Canadian Committee on Corrections concludes that there is now an opportunity to establish a fresh system within our criminal law, using a concept known as a "hospital permit". Where it is indicated that an offender would benefit from treatment in a psychiatric facility, the court should be empowered to authorize placement of the individual in such a facility. This placement would be conditional upon the circumstances being such that his eligibility otherwise met the terms of the mental health legislation in

the particular province involved. The person could spend as long a period of his sentence as, in the opinion of the hospital authorities, was justified. Hospitalization in this instance would not exceed the total period of imprisonment imposed, unless the individual were continued as an involuntary patient on the basis of the mental health legislation of that province. Our Committee is strongly of the view that the innovation proposed is a much-needed reform to our law.

The Committee recommends that the Code be amended to authorize a court to issue a "hospital permit" to allow an offender to benefit at once from treatment in a psychiatric facility.

The relationship between criminal law and mental disorder envisaged by the Committee would then be as follows:

1. A person so mentally disordered as to be unfit to stand trial would be withdrawn from the criminal process at the earliest convenient point and dealt with on the authority of a lieutenant-governor's warrant.
2. A person found not guilty by reason of insanity would be withdrawn from the correctional process and dealt with on the basis of a lieutenant-governor's warrant.
3. A person fit to stand trial and found guilty, might be disposed of in appropriate cases by discharge without conviction upon condition that he avail himself of psychiatric help. A similar condition could be imposed where sentence was suspended and a probation order made.
4. A person fit to stand trial and found guilty, might be sentenced to a term of imprisonment. In appropriate cases, the court might issue a hospital permit which would permit the offender to enter a hospital for treatment and to provide that time spent in hospital should count towards sentence. The Committee envisages that these hospital permits would be issued in conjunction with relatively short sentences of imprisonment and that in appropriate cases, the parole authorities would permit the offender to be discharged from the hospital directly to serve the balance of his sentence under control in the community.
5. A person sentenced to imprisonment and to whom no hospital permit had been issued, would have available such psychiatric services as exist within the penitentiary or other correctional system subject to the possibility of transfer to an outside hospital.

It follows that certain psychiatric facilities not heretofore having accommodated patients somehow involved with the criminal law should now be expected to do so. This is a matter which, of course, must depend upon local circumstances but, in any event, it is something which should naturally result from the growing concepts of community psychiatry.

Mentally Disordered Persons in Correctional Institutions

Even if the recommendation we make concerning "hospital permits" is implemented, there will, of course, still be many mentally disordered convicted persons who are not appropriate candidates for psychiatric hospitalization *per se*. Psychiatric treatment may be indicated for them. During their period of imprisonment there may be a need for transfer to a psychiatric facility. Accordingly, we have directed our attention to the services available for identification and treatment at correctional institutions. Observers report that these services vary from jurisdiction to jurisdiction and domestically within any given jurisdiction. Although we could point to some services in this regard which are considered adequate, the cross-Canada picture indicates that most psychiatric services within correctional systems are minimal and leave much to be desired.

The Canadian Committee on Corrections believes that no mentally disordered person serving a sentence of imprisonment should be deprived of mental health services which would be available to him if he were not in custody. All penitentiaries and prisons should have psychiatric consultants and access to treatment services.

Where a prisoner in a penitentiary or other correctional institution requires treatment outside of that institution, such treatment should be given to him without delay. There is legislation, both in the federal and provincial spheres authorizing the transfer of a prisoner to a psychiatric facility. Reference is made to section 527 of the *Code* which, through the vehicle of an order of the lieutenant-governor, provides authority for the placement of a mentally disordered prisoner in a psychiatric facility. There also exists provincial legislation to effect a similar purpose. Section 19 of the *Penitentiary Act* makes provision for the transfer of penitentiary inmates to provincial psychiatric facilities. Once again, there seems to be a large variation with respect to the ease and speed involved in effecting such transfers. Some enabling legislative provisions permit transfers to take place by local arrangement, thereby facilitating early treatment. For the most part, however, the pertinent provisions of the law require that central administrations be involved and transfer for treatment is delayed. We sympathize with the position of those officials who take it upon themselves to conduct transfers before arrangements are fully satisfied purely out of humanitarian motives. Yet, we believe these officials should not be expected to do so.

The Committee recommends that statutes providing the authority for transfers from correctional institutions to psychiatric facilities be amended, where indicated, so as to allow transfers to take place immediately upon the basis of local negotiation.

Where the transfer is one from a provincial correctional institution to a provincial mental hospital, only one level of government is concerned. On the other hand, where the inmate to be transferred is in a peniten-

tiary, two levels of government are involved. In most areas of the country, a suitable degree of cooperation between the federal authorities and the particular provincial authorities is maintained. There are instances, however, where provincial authorities flatly refuse to accept for treatment mentally disordered inmates from the penitentiary. The theory of the officials who do not wish to accept these inmates for treatment is based upon the proposition that the penitentiaries should provide their own psychiatric services. Our Committee finds this situation appalling and is of the opinion that there is no room for intergovernmental dispute in a matter of this kind. We believe it is the duty of all of those involved to ensure the well-being of every individual by placing him in that setting which is most appropriate to his needs. It is more important that all available services be employed to their fullest extent than individuals to suffer merely because one governmental agency insists that the responsibility lies with another governmental agency.

Looking across Canada at psychiatric facilities for those who have in some way been involved with the criminal law, the Canadian Committee on Corrections recognizes a need for the federal government to provide additional resources. Installations such as the Penetanguishene Psychiatric Hospital in Ontario and L'Institut Philippe Pinel in Quebec serve a valuable purpose. Not all provinces, however, are endowed with the fortune of being able to maintain facilities of such a nature.

To bridge an obvious gap, our Committee recognizes as desirable the planned establishment of special medical centres in penitentiaries. Such centres could not only serve the needs of penitentiaries, but they could be placed at the disposal of those provinces which have neither the resources nor the number of inmates to justify an adequate programme. Penitentiary medical centres could certainly be employed for housing provincial prisoners from reform or correctional facilities. Moreover, some consideration could be given to the possibility of placing additional categories of persons therein. For example, it might be indicated that persons acquitted on account of insanity would be appropriate candidates for penitentiary medical centre care.

The Committee is aware of the understandable concern that there is, in some cases, a risk of an extremely dangerous offender being released at the expiry of his sentence. Legislation in all provinces protects, to some extent, the public from the risk involved in the release of an offender who is mentally disordered and dangerous. Prior to such a release, the custodial authorities may arrange psychiatric examination and invoke the application of civil "commitment" proceedings, thereby ensuring the continuing protection of the public.

This protection is, however, limited by psychiatric interpretation of the limits of "mental disorder". A dangerous "psychopath" or "sociopath" may well not fit into the psychiatric definition of a mentally disordered person.

We have looked at the difficulties presented by the "psychopath" or "sociopath". It is clear that we are not coping with him effectively. This is not a problem peculiar to Canada, but it is a universal one. Special facili-

ties are needed for him, coupled with the opportunity for research. We believe that the penitentiary medical centres for some and special correctional units for others could serve in this way. In the absence of acceptable data, the Committee makes no recommendation with respect to this class of offender.

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THE DANGEROUS OFFENDER

It appears to the Committee that the protection of the public from unlawful violence, or from unlawful conduct which represents a serious threat to the physical safety of citizens, is one of the most urgent problems of the criminal law.

The President's Commission on Law Enforcement and Administration of Justice stated:

Obviously the most serious crimes are the ones that consist of or employ physical aggression; wilful homicide, rape, robbery and serious assault. The injuries such crimes inflict are grievous and irreparable. There is no way to undo the damage done to a child whose father is murdered or to a woman who has been forcibly violated. And though medicine may heal the wounds of a victim of a mugging, and law enforcement may recover his stolen property, they cannot restore to him the feeling of personal security that has been violently wrested from him.¹

The Committee agrees with the view expressed by Professor J. Ll. J. Edwards, Director of the Centre of Criminology, University of Toronto, that in determining priorities of research, a place of high importance should be given to research directed to the development of improved methods of identifying the dangerous offender.

The Committee also takes the view that improved methods of identifying the dangerous offender would promote a wider acceptance of community-based treatment for non-dangerous offenders with a consequent reduction in the use of imprisonment as a correctional measure.

The Committee has examined the present Canadian habitual offender legislation and dangerous sexual offender legislation with a view to determining their adequacy to protect the public from the dangerous offender, as well as with a view to determining whether they are capable of being

¹ United States. President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington: Government Printing Office, 1967, p. 3.

applied and have been applied against persons who are not dangerous in terms of representing a threat to personal safety.

Habitual Criminals

The present legislation with respect to habitual offenders is contained in sections 660, 662, 663, 665, 666 and 667 of the Criminal Code. Section 660 of the Criminal Code provides:

660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if, [1960-61, c. 43, s. 33(1)]
- (a) the accused is found to be an habitual criminal, and
 - (b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.
- (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 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
 - (b) he has been previously sentenced to preventive detention.
- (3) At the hearing of an application under subsection (1), the accused is entitled to be present. 1960-61, c. 43, s. 33(2).

Section 662 of the Criminal Code provides:

662. (1) The following provisions apply with respect to applications under this Part, namely,
- (a) an application under subsection (1) of section 660 shall not be heard unless
 - (i) the Attorney General of the province in which the accused is to be tried consents,
 - (ii) seven clear days' notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and
 - (iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and
 - (b) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor either before or after

conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

- (2) An application under this Part shall be heard and determined by the court without a jury. 1960-61, c. 43, s. 35(1).
- (3) For the purposes of section 660, where the accused admits the allegations contained in the notice referred to in paragraph (a) of subsection (1), no proof of those allegations is required. 1959, c. 41, s. 30.
- (4) Where an application under subsection (1) of section 660 or subsection (1) of section 661 has not been heard before the accused is sentenced for the offence for which he has been convicted, the application shall not be heard by the judge or magistrate who sentenced the accused but may be heard by any other judge or magistrate who might have held or sat in the same court.
- (5) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and to be signed by the Attorney General is prima facie evidence of such nomination or consent. 1960-61, c. 43, s. 35(2).

Sub-section 2 of section 665 of the Code provides:

665. (2) An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformatory treatment as may be prescribed by law.

Section 666 of the Criminal Code reads:

666. Where a person is in custody under a sentence of preventive detention, the Minister of Justice shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions. 1960-61, c. 43, s. 39.

Section 24 (5) of The Parole Act, however, provides that the powers, functions and duties of the Minister of Justice are transferred to the National Parole Board, established by the Act.

Section 667 of the Code makes provision for an appeal by a person sentenced to preventive detention either as an habitual offender or as a dangerous sexual offender.

Habitual offender legislation was enacted in Canada in 1947. The legislation was derived from the English statute, *The Prevention of Crime Act*, 1908, and was enacted in Canada at a time when its defects were already being recognized in England. As Mr. Arthur Maloney has observed, when this legislation was first introduced into Parliament, "the then Minister of Justice,

Mr. Ilsley was far from being positive about it."² Section 37 of *The Criminal Justice Act* of 1967, has since abolished preventive detention in England. Under the present Canadian habitual offender legislation, a person found to be an habitual criminal may be sentenced to preventive detention for an indeterminate period, which may be for life, subject to a yearly review.

In England, The Criminal Justice Act, 1948 (prior to the abolition of the provision for preventive detention in 1967) provided for a sentence of preventive detention of not less than five years and not more than fourteen years.

The basic concept of preventive detention was that it was not imposed as punishment, but to remove an incorrigible offender from society for a long time.

It is of the essence of the system that the offender is not being punished for the last offence of which he was convicted but is confined for the protection of society, and for a period which will, in all probability, far exceed any period for which he would have been imprisoned as a punishment.³

In Canada, persons sentenced as habitual offenders to preventive detention are neither kept in a special institution nor in a special part of existing penitentiaries. Incarceration may be limited only by the natural life of the person so sentenced. The recommendation contained in the Archambault Report that habitual offenders be confined in separate facilities has not been implemented.

The Committee is of the view that indeterminate detention which may be for life can only be justified in the case of *dangerous* offenders.

Failure of Habitual Offender Legislation in England

A number of studies of preventive detention in England have indicated that it was most frequently used in relation to the persistent petty offender who is a serious social nuisance, but not dangerous in terms of violence.

A report on a study of persistent offenders by W. H. Hammond and Edna Chayen states:

We found that in some ways the offenders sentenced to preventive detention are less of a danger to society than many given long terms or other sentences of imprisonment; many of the preventive detainee's current and also past offences are quite trivial and these offenders include very little violence among their offences.⁴

The report also states:

There is some danger of preventive detainees being regarded as the dregs of the criminal population for whom there is little hope save to keep them away

² Maloney, Arthur E.M., Q.C. "Proposed Amendments to the Criminal Code". 1 *Crim. Law Q.* 207, p. 209 (1957-58).

³ Great Britain, *Prisons and Borstals*. London: Her Majesty's Stationary Office, 1960, at p. 45 and quoted in Hammond, W. H. and Edna Chayen, *Persistent Criminals*. London: Her Majesty's Stationary Office, 1960, p. 10.

⁴ Hammond, W. H. and Edna Chayen, *Persistent Criminals*. London: Her Majesty's Stationary Office, 1960, p. 10.

from society (as indeed is implicit, to some extent in the nature of the sentence) yet only a small proportion of offenders sentenced to preventive detention had ever been given corrective training, many had never received any other treatment than imprisonment and for two-thirds, probation had never been tried.⁵

Recently, Dr. Leon Radzinowicz has eloquently described the failure of preventive detention in England:⁶

Yet preventive detention has been a conspicuous and notorious failure. The Prevention of Crime Act of 1908 provided an additional sentence of detention for the habitual criminal convicted of an offence punishable by penal servitude. During the debates Lord Gladstone reiterated that it had been devised as a weapon against the dangerous, hardened offender, not against those who were "a nuisance rather than a danger to society". But only three years later Winston Churchill had to hammer home this lesson in a memorandum and letter to the police. The aim was to gain control over the professional, the offender who had given himself up to a life of crime. In the main he would be a man over 30 who had already failed to respond to penal servitude and who had again been convicted of a serious offence. His dangerousness would be confirmed by such factors as the use of violence in conjunction with his other offences, the possession of firearms or other lethal weapons, and the sophistication of his tools or techniques. . . .

Still more serious, it became clear that Churchill's warning had been forgotten, that the sentence was being imposed largely upon the wrong offenders. The majority were merely offenders against property, property often worth less than £100. Only a tenth of them had committed violence against the person, sexual crimes or robbery. Serious criminals such as bank robbers and wage snatchers were more likely to be dealt with by long fixed terms of imprisonment. It was again the nuisances rather than the dangerous, the sort of inadequates described by Dr. West, who were the chief recipients of preventive detention under the 1948 Act.

When these so-called indeterminate sentences of preventive detention and corrective training were introduced, the continent of Europe again looked upon England as the precursor in an enlightened approach to the problem of combining security for the community with humane conditions for the offender. But it has come to nothing. The indeterminate factor in their release has given rise to much sense of unfairness and has shown no compensating advantages in reformation. Until recently the men were not being provided with a regime very different from that of others in central or regional training prisons. They have tended to become less rather than more able to stand on their own feet. The value of the sentence as a general deterrent has appeared to be slight, especially as it has been used in so few cases. And because it has been comparatively little used, and for minor rather than for dangerous criminals, it has failed to fulfil its promise as an additional means of protecting the public.

⁵ *Ibid*, p. 187.

⁶ Radzinowicz, Leon. "The Dangerous Offender." 41 *The Police J.* 411 (1968).

Habitual Offender Laws in the United States

Myrl E. Alexander, Director, United States Bureau of Prisons, has expressed similar views with respect to the failure of habitual offender statutes in the United States.⁷

The fact is, however, that habitual offender statutes are inherently futile, and they always turn out to be a travesty on our concepts of justice. They usually make no distinction between relatively minor felonies such as forgery and car theft and major felonies such as robbery and murder. They permit no consideration of the circumstances surrounding the commission of the previous offences nor the current offence. They really permit no consideration of the question 'is the defendant much of a menace to society'?

And he concludes:

Instead of passing more mandatory penalty laws and more habitual offender laws, we should repeal those we have now and once and for all reject the philosophy expressed in them.

In an article entitled *Penal Reform and the Model Sentencing Act* by Alfred P. Murrah and Sol Rubin,⁸ the authors state:

In its investigation of sentencing, the Council of Judges of the National Council on Crime and Delinquency, the body charged with the responsibility of drafting the *Model Sentencing Act*, began with what it considered to be the most urgent consideration of the penal law: the assurance of public safety.

Attention was first focused on the proper disposition of the dangerous offender, for it is in this area that existing sentencing laws are most glaringly ineffective. The so called Baumes Laws, which provide increased penalties for second, third, and fourth offenders (including, in some cases, life terms for the latter two classes), too often do not have their major impact on the dangerous offender. Many of the defendants sentenced under laws of this type are the 'small fry' of the underworld; frequently they are only property offenders.

Application of the Present Habitual Offender Legislation in Canada

From the introduction of habitual offender legislation in Canada up to August 30, 1968, 159 persons were found to be habitual criminals. Four of the 159 were not sentenced to preventive detention. In 18 cases, the finding that the offender was an habitual criminal or the sentence of preventive detention passed upon the offender, was set aside on appeal.

Prior to the amendment to the Criminal Code in 1960-61, section 660 of the Criminal Code permitted the passing of a sentence of preventive detention upon an offender found to be an habitual criminal *in addition* to any sentence imposed for the offence of which he was convicted. The amendment to the Criminal Code in that year eliminated the mandatory determinate sentence.

⁷ Alexander, Myrl E. "A Hopeful View of the Sentencing Process". 3 *American Crim. Law Q.* 189, p. 197 (1964).

⁸ 65 *Columbia Law Rev.* 1167 (1965).

One person found to be an habitual criminal under the provisions of the Criminal Code prior to 1961, was released on the expiration of his definite sentence. Another person similarly found to be an habitual offender was released on parole, and his parole has expired on the termination of the definite sentence.

Nine detainees have died in custody and six have died while on parole. One detainee has been transferred to a mental hospital. Fifty-one of those found to be habitual criminals were on parole as of August 30, 1968 and 72 detainees were in custody as of that date.⁹

In the view of the Committee, the deterrent effect of the habitual offender legislation is necessarily slight, owing to its infrequent application.

Moreover, we have not been able to discover any consistent or rational basis upon which it has been invoked. Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice among the few offenders against whom it has been invoked.

Specifically, on February 26, 1968, there were 80 persons in Canadian penitentiaries who had been sentenced to preventive detention under the habitual offender provisions of the Criminal Code.¹⁰ The Committee has examined the lifetime criminal records of these 80 persons sentenced to preventive detention as habitual offenders with a view to ascertaining the class of persons to whom the legislation had been applied. We have done this in order to determine whether the legislation had been applied in such a way as to protect the public from the dangerous offender or whether, on the other hand, it has been principally applied to non-dangerous offenders.

The total offences committed by the 80 persons during their lifetime, including offences committed in other jurisdictions but excluding juvenile offences, amounted to 2228 offences. A breakdown of the offences is included in the annex to this chapter. Two thousand and fifty-one convictions were in respect of property offences, narcotic drugs and miscellaneous offences, including vagrancy, trespass, and drunkenness. The most numerous single class of offences was theft and breaking and entering, which comprised 1219 offences. Fraud, and related offences, was the next most numerous class, containing 270 offences ranging from conspiracy to defraud to obtaining food by false pretences.

Of the total of 2228 offences, 177 were offences against the person, ranging from assaults and affrays to armed robbery. Robbery has the dual character of being both an offence against the person and against property. There were 79 convictions for robbery. There were 77 convictions for assault—virtually all of which would appear not to be of a serious nature as appears from the penalties imposed. Five convictions were for wounding, nine were

⁹ Statistics supplied by National Parole Board.

¹⁰ The sentences of preventive detention passed upon two of 80 persons have since been quashed on appeal; one of the detainees has died, and an examination of the finger-print serial record of one of the 80 persons shows that he was released on parole shortly before February 26th, 1968. The records of these four persons have, however, been included for statistical purposes.

for indecent assault, three were for rape, one was for attempted rape, two were for kidnapping and abduction, and one was for manslaughter. There were, accordingly, approximately 13 offences against property or for offences other than against the person, for every offence against the person.

The average age of the 80 detainees when the sentence of preventive detention was passed was 40.4 years. The youngest was 25 and the oldest 63.

The average age at which the first serious offence against the person was committed is 26.2 years.

The average age at which the last serious offence against the person was committed is 32 years.

These figures tend to support the conclusion that a weakness in the application of the legislation is that it appears to be most frequently applied against the offender at a time when his behaviour pattern has assumed a non-violent character.

For the purpose of the following analysis, the Committee has not included within the category of serious offences against the person, common assault, or other assaults (other than indecent assault), where the sentence imposed did not exceed three months.

Indecent assault, unlawful wounding, robbery, and attempted robbery, have however, been characterized as serious offences against the person, irrespective of the nature of the sentence imposed, together with rape, attempted rape, kidnapping and abduction, and manslaughter.

Twenty-three or approximately 27.5 per cent of the 80 persons sentenced to preventive detention as habitual offenders have not been convicted of any offence against the person. An additional eight have no conviction for a serious offence against the person. Consequently, approximately 37.5 per cent of those sentenced to preventive detention have either no convictions for offences against the person or have committed no serious offence against the person.

Twenty-two of the 80 persons have only one conviction for a serious offence against the person. Only three detainees among this group were sentenced to preventive detention as the result of an application for preventive detention made following such convictions.

Eleven detainees, or 50 per cent of this group, were sentenced to preventive detention as a result of the commission of an offence other than an offence against the person after an interval of more than ten years had elapsed from the termination of the sentence imposed in respect of the single conviction for the serious offence against the person.

In the case of five detainees out of this group, over 15 years had elapsed. The distribution of the length of the interval between the conviction for the single serious offence against the person, and the sentence of preventive detention as an habitual offender is shown in Figure 4. The distribution of the length of the interval between the single serious offence and the sentence of preventive detention adjusted for the sentence served for such offence is shown in Figure 5.

FIGURE 4 — GRAPHIQUE 4

INTERVAL IN YEARS BETWEEN ONLY SERIOUS OFFENCE AGAINST
A PERSON AND DETENTION AS HABITUAL OFFENDER

NOMBRE D'ANNÉES COMPRISES DANS L'INTERVALLE ENTRE
SEULEMENT LE DÉLIT GRAVE CONTRE LA PERSONNE
ET LA DÉTENTION COMME REPRIS DE JUSTICE

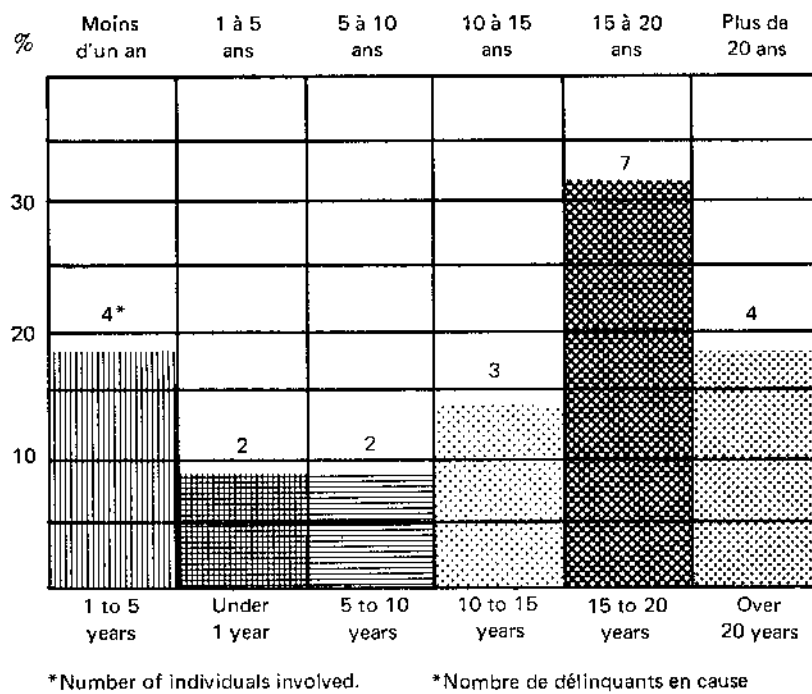
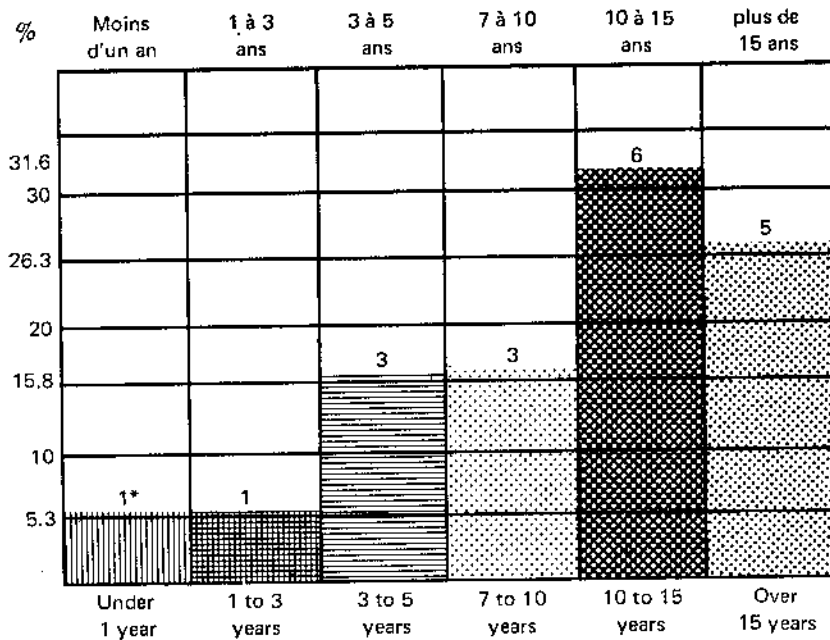


FIGURE 5 — GRAPHIQUE 5

DISTRIBUTION OF LENGTH OF INTERVAL BETWEEN ONLY SERIOUS OFFENCE AND DETENTION AS HABITUAL OFFENDER (ADJUSTED FOR SENTENCE SERVED FOR SINGLE SERIOUS OFFENCE)

RÉPARTITION DE LA DURÉE DE L'INTERVALLE ENTRE SEULEMENT LE DÉLIT GRAVE ET LA DÉTENTION COMME REPRIS DE JUSTICE (TENANT COMPTE DE LA PEINE IMPOSÉE POUR UN SEUL DÉLIT GRAVE)



*Number of individuals involved

*Nombre de délinquants en cause

Twenty-seven of the 80 persons have convictions for two or more serious offences against the person. Two out of this group had convictions for eight such offences.

However, only ten of these 27 persons with convictions for two or more serious offences against the person were sentenced to preventive detention as a result of the commission of a substantive offence against the person. The habitual offender provisions were invoked in the other 17 cases as a result of the commission of offences other than offences against the person.

The following table shows the limited use of the habitual offender legislation in relation to the 49 persons convicted of one or more serious offences against the person, out of the 80 detainees.

Also, the table shows that the habitual offender legislation was invoked following a conviction for a serious offence against the person against only 13 detainees out of 49 detainees with one or more convictions for serious offences against the person.

TABLE 3

Detainees under Habitual Offender Legislation Who Have Been Convicted of One or More Serious Offences against the Person, by Number of such Convictions and whether the Habitual Offender Legislation Was Invoked on the Occasion of One of the Convictions^a

	Number of Convictions for Serious Offences against the Person					Percent
	1	2	3 or 4	Over 4	Total	
Number of Detainees.....	22	11	9	7	49	
Per Cent of Detainees.....	44.9	22.9	18.4	14.3	100	
Habitual Offender Legislation Invoked on the Occasion of One of these Convictions.....	3	4	2	4	13	26.5
Habitual Offender Legislation not Invoked on the Occasion of One of these Convictions.....	19	7	7	3	36	73.5

^aIn those cases where the habitual offender legislation was not invoked on the occasion of one of these convictions for a serious offence against the person, it was invoked later on the occasion of an offence against property.

The inescapable conclusion is that the habitual offender legislation has been principally invoked in respect of offences against property.

It appears to the Committee that an examination of the criminal records of the 80 persons sentenced to preventive detention as habitual offenders supports the following conclusions:

1. That almost 40 per cent of those sentenced to preventive detention would appear not to have represented a threat to the personal safety of the public.

2. That perhaps a third of the persons confined as habitual offenders would appear to have represented a serious threat to personal safety.
3. That there is a substantial number within the 80 persons with respect to whom there is not enough evidence to warrant a conclusion that they represented a serious threat to personal safety.

The Committee concludes that while the present habitual offender legislation has been applied to protect the public from some dangerous offenders, it has also been applied to a substantial number of persistent offenders who may, perhaps, constitute a grave social nuisance but who do not constitute a serious threat to personal safety.

We also conclude that the present habitual offender legislation has been applied very unevenly across Canada, as the figures given below will demonstrate:

TABLE 4
Sentences of Preventive Detention on the 80 Persons
Found to Be Habitual Offenders, by Place

City	Number
Vancouver.....	39
Montreal.....	7
Edmonton.....	6
Winnipeg.....	6
Victoria.....	2
Calgary.....	2
Quebec City.....	2
Halifax.....	2
New Westminster.....	1
Burnaby.....	1
Revelstoke.....	1
Kelowna.....	1
Ft. McLeod.....	1
North Battleford.....	1
Swift Current.....	1
Brandon.....	1
Toronto.....	1
Windsor.....	1
Peterborough.....	1
St. Catharines.....	1
Belleville.....	1
Welland.....	1
Total.....	80

Forty-five of the 80 persons sentenced to preventive detention have been sentenced in British Columbia and 39, or almost one-half, have been sentenced in a single city.

TABLE 5
Sentences of Preventive Detention on the 80 Persons
Found to Be Habitual Offenders, by Province

Province	Number
British Columbia.....	45
Alberta.....	9
Saskatchewan.....	2
Manitoba.....	7
Ontario.....	6
Quebec.....	9
Nova Scotia.....	2
Total.....	80

The Committee considers that legislation which is susceptible of such uneven application has no place in a rational system of corrections.

Dangerous Sexual Offender Legislation

The Canadian dangerous sexual offender legislation is contained in sections 659, 661 and 662 of the Criminal Code.

A dangerous sexual offender is defined by s. 659 (b) of the Criminal Code as follows:

- (b) "Dangerous sexual offender" means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence. 1960-61, c. 43, s. 32.

Section 661 of the Criminal Code provides:

661. (1) Where an accused has been convicted of
- (a) an offence under
 - (i) section 136,
 - (ii) section 138,
 - (iii) section 141,
 - (iv) section 147,
 - (v) section 148, or
 - (vi) section 149, or
 - (b) an attempt to commit an offence under a provision mentioned in paragraph (a), the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.
- (2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

- (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.
- (4) At the hearing of an application under subsection (1), the accused is entitled to be present. 1960-61, c. 43, s. 34.

Under the provisions of section 661 of the Code, on an application under s. 661 for a determination that the accused is a dangerous sexual offender, the court is required to hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney-General.

It should be noted that where the court determines that the accused is a dangerous sexual offender, the court is required to sentence the offender to preventive detention.

The Committee has been informed by eminent psychiatrists that it is extremely difficult—if not impossible—to determine on the basis of an interview or two, with any reasonable degree of accuracy, whether an offender is a dangerous sexual offender. Frequently the opinion of two psychiatrists formed as a result of one or two interviews, supplemented by the evidence given at trial and an examination of such documentary evidence as may be available, constitutes the principal evidence upon which a finding is made that the accused is a dangerous sexual offender.

The Committee is gravely concerned that the present law permits a determination that a person is a dangerous sexual offender upon such an inadequate basis, with the resulting consequence that an indeterminate sentence must be imposed.

Dr. A. M. Marcus, Assistant Professor, Department of Psychiatry, University of British Columbia, in a paper entitled *A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada*,¹¹ presented at the 5th International Criminological Congress, held at Montreal, states:

The group were concerned regarding the testimony of the appointed psychiatrists by the Department of the Attorney-General. Undoubtedly the intention of the Act is to have independent expert opinion as a friend of the court. Psychiatric opinion given at the application is descriptive and concise. It is, however, observed by the group that in British Columbia, two or three men alone continually accept the responsibility for the courts when appearing as the psychiatric expert at the application.

It was noted that there is need for considerable care on the part of those concerned with the various phases of the application. In one case for application (Mr. B.) there was no probation officer to gather the facts of the

¹¹ 8 *Can. Journal of Corrections* 90 p. 95 (1966).

man's family background, he spoke only French and lacked a great deal of awareness regarding the proceedings. He pleaded guilty and was designated a sexual offender, although this was his first offence. Other variables that must be mentioned include the energy of the police department requesting the application and the particular Judge at the hearing.

If the application succeeds, a man receives a sentence to life imprisonment. A far more intensive investigation should be undertaken of persons for whom such an application is to be made.

It is suggested that an individual be examined following the application in a specially designated diagnostic or reception unit, with appropriate security measures, for a period of thirty to sixty days by a team of specialists, independent of the courts, functioning as a part of the Forensic Psychiatric Divisions of a University Medical School for example. It was felt that thorough investigation into all aspects of the man's personality and social background be undertaken prior to the hearing, so that detailed findings regarding an individual are available to the court.

A report to the Committee by Dr. George Scott, the consulting psychiatrist at Kingston Penitentiary, indicates that of the 20 persons presently confined in Kingston Penitentiary who have been sentenced as dangerous sexual offenders, nine (45 per cent) are not dangerous in terms of physical violence. Of the remaining 11 (55 per cent) considered dangerous, five or almost half are mentally ill and certifiable as such.

It also appears from the study conducted by Dr. Marcus that a significant number of persons found to be dangerous sexual offenders in British Columbia exhibited sufficient evidence of mental illness as to require long term treatment in an appropriate psychiatric setting.

Dr. Marcus states:

In terms of the standard psychiatric nosology the psychiatric diagnosis of each man examined is as outlined, yet a number of the men examined showed areas of reality distortion (Mr. G., Mr. K., and Mr. W.), impulsivity (Mr. G., Mr. K., Mr. L., and Mr. W.), poor judgment (Mr. G., Mr. L., and Mr. W.) and inappropriateness of affect (Mr. B., Mr. G., Mr. K., Mr. L., and Mr. M.) indicating severe psychiatric disturbance best described as borderline states requiring long term treatment in an appropriate psychiatric setting.¹²

The recent judgment of the Supreme Court of Canada in *Klippert v The Queen*¹³ indicates that the present dangerous offender legislation is not restricted to those who are dangerous.

The Committee was informed that as of February 26, 1968, there were 57 persons in Canadian penitentiaries sentenced to preventive detention as dangerous sexual offenders. The Committee has listed the places where the 57 persons were found to be dangerous sexual offenders. The present danger-

¹² *Ibid.*, p. 98.

¹³[1968] 2 C.C.C. 129.

ous sexual offender legislation appears to have been more uniformly enforced across Canada than the present habitual offender legislation, although it is obvious that substantial disparity exists with respect to its enforcement in different parts of Canada.

TABLE 6
Place where Accused Were Found to Be Dangerous Sexual Offenders

City	No.	City	No.	City	No.
Vancouver.....	8	Calgary.....	1	Cloverdale.....	1
Ottawa.....	4	Windsor.....	1	Sarnia.....	1
New Westminster.....	4	Inuvik.....	1	Cobourg.....	1
Burnaby.....	3	Owen Sound.....	1	London.....	1
Hamilton.....	3	Fort Erie.....	1	Peterborough.....	1
Regina.....	2	Winnipeg.....	1	Welland.....	1
Quebec City.....	2	Moose Jaw.....	1	Vernon.....	1
Montreal.....	2	Richmond.....	1	Nelson.....	1
Edmonton.....	2	Charlottetown.....	1	Drumheller.....	1
Toronto.....	2	Amherst.....	1	Sault Ste. Marie.....	1
Yellowknife.....	2	St. Catharines.....	1	South Porcupine.....	1
				Williams Lake.....	1
				Total.....	57

TABLE 7
Province where Accused Were Found to Be Dangerous Sexual Offenders

Province	Number
Ontario.....	20
British Columbia.....	20
Quebec.....	4
Alberta.....	4
Saskatchewan.....	3
North West Territories.....	3
Nova Scotia.....	1
Prince Edward Island.....	1
Manitoba.....	1
Total.....	57

The Committee considers that dangerous sexual offenders constitute only one type of dangerous offender and that it would be preferable to enact legislation which would encompass all dangerous offenders.

Dr. Manfred Guttmacher, an outstanding authority in this field, has said:

Thus I find it far sounder psychiatrically to include the really serious sex offenders among the general group of dangerous offenders than to isolate them in a separate category. This is justified from a practical point of view, for the disposition and treatment of the dangerous sex offender need not differ radically from that of the more general group.¹⁴

This is the view which is reflected in the *Model Sentencing Act*¹⁵, previously referred to.

Another approach employed to detect and confine dangerous offenders—one which has been as ineffective as the Baumes Laws—is the enactment of sexual psychopath laws. These laws have not been uniformly enforced, and the inequities in their application are a reflection more of varying judicial attitudes than of any distinctions in the 'danger potential' of different offenders. Many sex offenders are, in fact, harmless individuals who would profit more from treatment under out-patient supervision than from enforced confinement in an institution—especially a penal institution. Furthermore, in view of the scarcity of diagnostic resources in nearly all State correctional services, it would be more sensible to expend such efforts for the purpose of detecting all types of dangerous offenders, whether their crimes involve sex offences or not, rather than use them, as is now being done, almost entirely for sex offences.¹⁶

Conclusions and Recommendations of the Committee

The Committee recommends that the present habitual offender legislation and dangerous sexual offender legislation be repealed and replaced by dangerous offender legislation.

In recommending the repeal of the existing habitual offender legislation, the Committee has been influenced by the following considerations:

- (a) The present legislation is broad enough to bring within its reach persistent petty offenders, many of whom are essentially inadequate, non-dangerous people.
- (b) The present legislation has in fact been applied, in a substantial percentage of cases where it has been invoked, to persistent offenders, who while constituting a serious social nuisance, are not dangerous. The Committee considers that such persistent offenders can be appropriately dealt with by substantial sentences, when warranted, under the appropriate provisions of the Code.
- (c) The present habitual offender legislation is so framed that many seriously dangerous offenders are beyond its reach because of the

¹⁴ Guttmacher, Manfred S., M.D. "Dangerous Offenders". 9 *Crime and Delinquency* 381 (1963).

¹⁵ Prepared by the Advisory Council of Judges of The National Council on *Crime and Delinquency*.

¹⁶ Murrain, Alfred and Sol Rubin. "Penal Reform and the Model Sentencing Act". 65 *Columbia Law Review* 1167 p. 1171 (1965).

requirement of three previous convictions for an indictable offence for which the offender could have been sentenced to imprisonment for five years or more. The present legislation does not protect society against the offenders from whom society requires maximum protection.

In recommending the repeal of the present provisions of the Criminal Code relating to dangerous sexual offenders, the Committee has been influenced by the following considerations:

- (a) It is capable of being applied against, and has in fact been applied against, sexual offenders who are not dangerous.
- (b) The present basis upon which a person may be found to be a dangerous sexual offender is inadequate.
- (c) The dangerous sexual offender is only one class of dangerous offender and the present legislation obscures this fact.

Proposed Dangerous Offender Legislation

The Committee is of the opinion that dangerous offender legislation should not only define with as much precision as possible the criteria of dangerousness, but that such legislation should provide an appropriate clinical procedure for identifying a particular offender as dangerous.

The definition must be wide enough to encompass, for example, the emotionally disturbed person who has a compulsion to set fire to dwelling houses, the kidnapper, the person who is likely to sexually molest children by acts which, while not causing serious physical injury, may cause serious psychological damage. At the same time, it must be sufficiently restrictive to exclude persons who are likely to commit crimes which do not seriously endanger the person. Such a definition must also exclude the situational offender who does not represent a continuing danger.

The Committee proposes the following definition:

Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others.

Since a *conviction* for one of the enumerated offences is a condition precedent to the application of the proposed legislation, it follows that those persons who suffer from a mental disorder or defect of such a nature as to exempt from criminal responsibility and who would, accordingly, be found not guilty by reason of insanity, do not fall within the proposed legislation. Such persons would continue to be dealt with under the existing provisions of the Code relating to persons found not guilty by reason of insanity.

The Committee considers that the proposed legislation should give effect to the following principles:

- (a) That legislation be enacted to empower the court where an offender has been convicted of any one of certain specified offences, and where from the circumstances under which the offence was committed, the evidence, if any, as to character disorder, emotional disorder, mental disorder or defect, and the criminal record of the offender the court is of the opinion that the offender may be a dangerous offender, to remand the offender in custody to a diagnostic institution for a period not exceeding six months for diagnosis and assessment before imposing sentence.
- (b) If the offender is diagnosed as a dangerous offender, the offender shall be given suitable notice that it is alleged that he is a dangerous offender, whereupon the issue as to whether the offender is a dangerous offender shall be determined by the court.
- (c) A person who is alleged to be a dangerous offender shall have the right to make full answer and defence to the allegation that he is a dangerous offender, and shall be provided with counsel if he lacks the means to employ counsel himself.
- (d) Where the diagnostic facility does not diagnose or assess the offender as a dangerous offender, or where there is a diagnosis of dangerousness but the court does not find the offender to be a dangerous offender, the court shall deal with the accused as an ordinary offender having due regard to all the relevant circumstances.
- (e) If the court finds that the offender is a dangerous offender, the court shall sentence the accused in accordance with the provisions of the Act relating to dangerous offenders.
- (f) The legislation should provide for a right of appeal on any ground of law or fact, or mixed law and fact, by a person found to be a dangerous offender.

A tentative list of offences, or offences when accompanied by certain circumstances, a conviction for which would enable the dangerous offender provisions to be invoked, is set out below:

- (a) Manslaughter (punishable by life imprisonment) when caused by deliberate violence.
- (b) Attempted murder (punishable by life imprisonment).¹⁷
- (c) Causing bodily harm with intent or shooting with intent under section 216 of the Code (punishable by fourteen years imprisonment).
- (d) Robbery (punishable by life imprisonment).
- (e) Arson committed under such circumstances as to endanger human life (punishable by fourteen years imprisonment).

¹⁷ The offence of murder is discussed later in this chapter.

- (f) Doing anything with intent to cause an explosion with an intent to cause death or serious bodily injury or which is likely to endanger life (punishable by life imprisonment).
- (g) Kidnapping or forcible confinement under s. 233 (1) of the Criminal Code (punishable by life imprisonment).
- (h) Rape (punishable by imprisonment for life).
- (i) Attempted Rape (punishable by imprisonment for ten years).
- (j) Carnal knowledge of a girl under the age of fourteen (punishable by life imprisonment).
- (k) Indecent assault on a female (punishable by five years imprisonment).
- (l) Buggery (punishable by fourteen years imprisonment) when committed against a person under a stated age.
- (m) Indecent assault on a male person (punishable by ten years imprisonment) when committed against a person under a stated age.
- (n) Gross indecency (punishable by five years imprisonment) when committed with or against a person under a stated age.
- (o) Breaking and entering a dwelling house (punishable by life imprisonment) when accompanied by violence against any person therein.

The above is not intended to be a complete list of offences, but is sufficient to indicate the thinking of the Committee.

It will be noted that, with few exceptions, the maximum sentences which may be imposed under the present provisions of the Criminal Code upon a person convicted of any of the enumerated offences are lengthy and range up to life imprisonment. The question naturally arises as to the necessity for specific legislation dealing with the dangerous offender.

However, the majority of those who commit the offences which would permit the proposed dangerous offender legislation to be invoked are not dangerous in the sense that they are likely to continue to commit violent crimes. The sentences that are normally imposed are, therefore, well below the maximum limits and rightly so. In some situations probation might even be an appropriate disposition. A small percentage of those convicted of such offences are, however, a source of continuing danger. While this group is small in terms of percentage of total offenders, it is this small group which poses the most serious threat to public safety.

It is the purpose of the proposed dangerous offender legislation to identify this chronically dangerous group so that they may be dealt with in the most effective way, both from the point of view of the protection of the public and from the point of view of their treatment. Moreover, it is considered that although a finding of dangerousness is not made, the assessment will be of great assistance to the court in making an appropriate disposition and to correctional personnel.

The Committee has not included the offence of murder in the list of offences contemplated by the proposed dangerous offender legislation for obvious reasons. Section 656 (3) of the Criminal Code provides:—

656. (3) Notwithstanding any other law or authority, a person in respect of whom a sentence of death has been commuted to imprisonment for life or a term of imprisonment or a person upon whom a sentence of imprisonment for life has been imposed as a minimum punishment, shall not be released during his life or such term, as the case may be, without the prior approval of the Governor in Council. 1960-61, c. 44, s. 15; 1967-68, c. 15, s. 2.

Some persons convicted of murder would undoubtedly constitute a source of continuing danger if at large.

However, in view of the fact that the Criminal Code contains special provisions restricting the release of persons convicted of murder, we do not consider that it is either necessary or appropriate to include this class of offence within the proposed dangerous offender legislation.

The Type of Sentence to Be Imposed upon a Person Found to Be a Dangerous Offender

If legislation is enacted specifically related to the dangerous offender, one of the questions that will require to be resolved is the nature of the sentence which should be imposed by the court on a finding of dangerousness.

The choices are:

- (i) An indeterminate sentence, or
- (ii) A long definite sentence.

In either case, the sentence should be subject to provisions for release on parole if the offender is suitable for parole and eventual discharge from the sentence if justified.

The objection to an indeterminate sentence has been clearly stated by Professor Mewett:

The present indeterminate sentence by preventive detention means that the habitual criminal is either in prison or on parole for life. Any hope of reform may well be defeated if the prisoner is confronted with the fact that he is never to be a completely free person again. The depressing realization that he will either live and die in prison, or that he will live with the threat of prison, hanging over him if he violates his parole, without necessarily committing any further criminal offence, must militate against genuine reform.²⁸

A similar point of view is reflected in *The Model Sentencing Act*.

²⁸ Mewett, Alan W. "Habitual Criminal Legislation Under the Criminal Code". 39 *Can. Bar Rev.* 42 pp. 55-56 (1961).

The objection to an indeterminate sentence from a correctional standpoint, can, however, be obviated by empowering the court to discharge a person, upon whom an indeterminate sentence has been passed, from such sentence after a certain period of time, in suitable cases.

The advantage of an indeterminate sentence is that a person who has received a very long definite sentence, say 20 years, may in fact be more dangerous at the expiration of his sentence and return to freedom than when he was sentenced. An indeterminate sentence permits the offender's release when, and only when, he is safe. Moreover, the indeterminate sentence has the merit that it emphasizes that the sentence is not imposed as a punishment, but to protect society by segregating the offender until it is safe to release him. The test for release should be whether it is safe to release the offender, rather than he has been suitably punished.

The Committee, therefore, recommends the passing of an indeterminate sentence upon persons found to be dangerous offenders, subject to the safeguards hereinafter discussed.

Safeguards: The Right to Review

Under the legislation proposed by the Committee, a longer sentence may be imposed on persons found to be dangerous than could otherwise be imposed. Consequently, those against whom it is invoked must be protected by adequate safeguards.

It is to be noted that the legislation proposed by the Committee can not be invoked against an offender, unless he has been convicted of one of the serious offences enumerated. Furthermore, such legislation is not automatically invoked by a conviction for one of the enumerated offences.

The effect of the proposed legislation would be to empower the court to remand a person convicted of one of the enumerated offences to a diagnostic facility for an assessment as to continuing dangerousness where the circumstances of the offence, evidence of character disorder, emotional disorder, mental disorder or defect, or the previous criminal record of the offender are indicative of a condition of continuing dangerousness in terms of the physical safety of the public.

The responsibility for adjudging an offender to be a dangerous offender would continue to remain with the court. Such an adjudication could only be made after the issue of dangerousness has been tried upon proper notice to the accused, who would be entitled to make full answer and defence.

The Committee has recommended, in an earlier part of this report, that an accused be provided with counsel in such proceedings as a jurisdictional requirement if he is unable to employ counsel for himself.

The Committee recommends that the proposed dangerous offender legislation, if enacted, provide in addition to an automatic yearly assessment and review by the Parole Board, that a person sentenced to preventive detention as a dangerous offender be entitled to have a hearing every three years before a superior, county or district court judge or judge of the court of sessions

of the peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole.

The report and recommendation of the Parole Board should be available to the court.

On such hearing, the offender should have the right to be present, to present evidence, to cross-examine witnesses, and to be represented by counsel, to be provided for him if necessary.

The court on any such hearing should be empowered to:

- (a) Terminate the sentence, when the offender has prior to such hearing for a suitable period been released on parole.
- (b) Remand the applicant to a diagnostic facility for further assessment and make such further order as he deems appropriate.
- (c) Refuse to make any order at that time.

Diagnostic, Custodial and Treatment Facilities

The ten year plan of the Federal Penitentiary Service contemplates a medical-psychiatric centre within each regional complex. The Commissioner of Penitentiaries has informed the Committee that three major centres will be located at Ste. Anne des Plaines, Quebec, Millhaven, Ontario, and in Saskatoon, Saskatchewan. Present plans call for the completion of the centres at Ste. Anne des Plaines and Millhaven by 1972 and completion of the centre in Saskatoon by 1973. Smaller centres are to be established at Mission, British Columbia, and Dorchester, New Brunswick by 1974.

Such medical-psychiatric centres might be used not only for custody and treatment, but for diagnosis and assessment. Mental hospitals, and psychiatric institutes with secure wings such as the Ontario Hospital at Penetanguishene, the Clarke Institute of Psychiatry, and l'Institut Phillippe Pinel might also be used as diagnostic facilities.

The Committee wishes to emphasize that the dangerous offender legislation which we have proposed is predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender.

The greatest hope for effective treatment of the dangerous disturbed offender lies in the creation of a distinctive type of correctional institution, one which is therapeutically oriented and employs specialized methods. . . . At present, only the beginnings of such efforts to rehabilitate this type of offender have been made. Intensive experimentation and fundamental research are needed. The dangerous offender group comprises the most difficult treatment cases. Without treatment, the vast majority of them would continue their criminal activity. Salvaging even only 30 to 40 percent would be a triumph and would prevent an incalculable amount of pain and misery to society.³⁹

³⁹ Guttmacher, Manfred S., M.D. "Dangerous Offenders". 9 *Crime and Delinquency* 381 at p. 390 (1963).

Such facilities are, of course, required and should be available for the treatment of offenders other than those classified as dangerous within the meaning of this chapter.

Research

The Committee is of the view that in the foreseeable future the criminal law will be able to draw upon the resources not only of the behavioural sciences, but on those of other sciences such as biology and chemistry in the development of methods for identifying and treating the dangerous offender.

The Committee recommends that Government grants be made for research devoted to the development of new and improved methods for identifying and treating the dangerous offender.

The Persistent Non-Dangerous Offender

Although preventive detention in England for habitual offenders was abolished by s. 37 of The Criminal Justice Act, 1967, the principle that a persistent recidivist should be detained for a longer period than his most recent crime would justify is retained.

The court is empowered by section 37 of The Criminal Justice Act 1967 to pass a sentence of imprisonment in excess of the statutory maximum for the particular offences, provided that the offender satisfied certain conditions.

Given these conditions, the court may pass an extended sentence on the offender if it is satisfied that by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time.

Where the offence committed is punishable with a maximum sentence of less than five years imprisonment, the extended term may be up to five years imprisonment; where the maximum sentence for the offence is five years, but less than ten, the extended term may be up to ten years.²⁰

The necessity for the provision for an extended sentence has been questioned by Dr. Radzinowicz in a recent lecture on the dangerous offender given at the Police College, Bramshill.²¹

It is the view of the Committee that the maximum penalties under the Criminal Code are such that no special provisions are required to deal with the habitual recidivist; for example, theft is punishable by ten years imprisonment if the value of the thing stolen exceeds \$50. (s. 280).

Everyone who obtains anything by a false pretence, where the value of the thing obtained by the false pretence exceeds \$50, is liable to imprisonment for five years. (s. 304 (2)).

Fraud is punishable by ten years imprisonment. (s. 323).

Possession of stolen property, knowing the same to have been stolen where the value of the thing stolen exceeds \$50 is punishable by ten years imprisonment (s. 297).

²⁰ Thomas, D. A. "New Issues in Sentencing Policy". [1967] *Crim. Law Rev.* 277.

²¹ Radzinowicz, Leon. "The Dangerous Offender". 41 *The Police J.* 411 (1968).

Forgery is punishable by 14 years imprisonment. (s. 310).

Breaking and entering a place other than a dwelling house is punishable by 14 years imprisonment; breaking and entering a dwelling house is punishable by life imprisonment (s. 292); being in possession of burglar's tools is punishable by 14 years imprisonment (s. 295).

Within this group of offenders are a number of sub-groups, one of which is the persistent petty offender.

The Committee recommends that further research be undertaken to determine the most appropriate way in which to deal with the persistent petty offender.

Organized Crime: Professional Criminals

The Model Sentencing Act, previously referred to, includes within the category of dangerous offenders not only the defendant who is suffering from "a severe personality disorder indicating a propensity toward criminal activity," but also the defendant "sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as a part of a continuing criminal activity in concert with one or more persons."

It is the view of the Committee that the offender who is suffering from a severe personality disorder which causes him to be dangerous in terms of the physical safety of others, falls into an entirely different category to the professional criminal who is engaged in a continuing course of criminal conduct as a business for profit.

The punitive or deterrent aspect of sentencing is absent in the case of the offender who is dangerous because of a character or personality disorder.

The emphasis is on the protection of the public by segregation and treatment.

On the other hand, there is the case of the person convicted of participating in organized crime, which pre-supposes a rationally motivated crime carried out with a degree of organization and discipline, as distinct from an irrational and impulsive crime related to character disorder. It would appear to the Committee that in this case the deterrent aspects of sentencing become paramount, although the protection of the public is also achieved by the removal of the offender from society by the imposition of long terms of imprisonment. Rehabilitation is, of course, not to be ignored or considered unimportant.

No special statutory provisions are required to deal with the offender who has committed an offence involving organized crime.

For example, a person convicted of being in possession of narcotics for the purpose of trafficking can be sentenced to life imprisonment under existing legislation, and the extortionist to 14 years. Robbery is punishable by life imprisonment.

Procuring or living on the avails of prostitution is punishable by 10 years imprisonment.

Fines may be imposed *in addition* to maximum sentences.

Annex

All offences committed by the Eighty Detainees under the Habitual Offender
Legislation in Canadian penitentiaries on February 26, 1968

OFFENCES—NOT AGAINST THE PERSON

	All Offences including Juvenile Offences	Adult Offences Only
<i>Theft, B. & E., and Related Offences</i>		
Theft.....	542	512
Theft and receiving.....	4	4
Theft from the person.....	2	2
Possession of stolen goods.....	152	151
—receive stolen goods		
—possess property obtained by crime		
—retain stolen goods		
—bring stolen goods into Canada		
Take auto without consent.....	15	15
B. & E. and theft.....	343	341
—theft from dwelling house		
—shopbreaking and theft		
—housebreaking and theft		
Conspiracy to commit B. & E. and theft.....	1	1
B. & E. with intent.....	132	132
—B. & E. and commit		
B. & E.....	31	22
Petty larceny*.....	1	1
Simple Larceny.....	1	1
Grand larceny.....	2	2
Burglary.....	3	3
Burglary 2nd degree.....	1	1
Burglary 3rd degree.....	2	2
Burglary 4th degree.....	1	1
Possess burglar's tools.....	31	31
—possess housebreaking instruments		
—possess safebreaking instruments		
Possess explosives.....	7	7
	1,271	1,229
<i>Fraud and Related Offences</i>		
False pretences.....	101	101
—obtain money or property by f.p.		
Defraud.....	9	9
Conspiracy to defraud.....	2	2
Accommodation fraud.....	7	7
Obtain food by false pretences.....	2	2
Forgery.....	32	32
Conspiracy to forge.....	1	1
Possess materials to commit forgery.....	1	1
Transport forged cheque across state lines.....	1	1
Uttering.....	114	114
	270	270

*Offences committed in the United States have been included and all offences are listed by the description of the offence in the finger-print serial record.

Annex—Continued

OFFENCES—NOT AGAINST THE PERSON (Continued)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Vagrancy and Related Offences</i>		
Vagrancy.....	124	124
Steal ride on C.N.R. train.....	1	1
Breach of Railway Act.....	8	8
Trespass.....	5	5
Begging.....	1	1
	<hr/> 139	<hr/> 139
<i>Narcotics</i>		
Illegal possession of narcotics.....	84	84
Conspire to possess narcotics illegally.....	1	1
Traffic in narcotics.....	18	18
—illegal possession of narcotics for purpose of trafficking		
Conspire to traffick.....	4	4
—conspire to possess for the purpose of trafficking		
	<hr/> 107	<hr/> 107
<i>Liquor Offences</i>		
Drunk.....	28	28
Drunk and disorderly.....	7	7
Possession in a place other than his own residence.....	5	5
Sell.....	4	4
Give to minor.....	2	2
Consume under age.....	1	1
Unclassified breach of Liquor Act.....	14	14
	<hr/> 61	<hr/> 61
<i>Escapes</i>		
Escape lawful custody.....	41	40
Unlawfully at large.....	4	4
Attempt to break prison.....	3	3
Break prison with force.....	4	4
Conspiracy to escape.....	1	1
Aid and abet Juvenile to escape custody.....	1	1
	<hr/> 54	<hr/> 53
<i>Driving Offences</i>		
No operator's licence.....	6	6
Failure to carry licence.....	2	2
Driving while suspended or disqualified.....	3	3
Drive without licence plates.....	1	1
Litter highway.....	1	1
Careless driving—city bylaw.....	1	1
Drive to the common danger.....	1	1
Careless driving.....	2	2
Speeding.....	2	2

Annex—Continued

OFFENCES—NOT AGAINST THE PERSON (Continued)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Driving Offences (Concluded)</i>		
Impaired driving.....	3	3
Drunk driving.....	1	1
Reckless driving.....	1	1
Dangerous driving.....	1	1
Failure to remain.....	4	4
Unclassified breaches of highway legislation.....	7	7
	<hr/> 36	<hr/> 36
<i>Bail-Jumping</i>		
Jump bail.....	8	8
	<hr/> 8	<hr/> 8
<i>Weapons</i>		
Firearm without permit.....	13	13
Carry revolver illegally.....	1	1
Firearm in motor vehicle without permit.....	1	1
Concealed weapon.....	3	3
Weapon for purpose dangerous to public peace.....	15	15
	<hr/> 33	<hr/> 33
<i>Disturbance</i>		
Cause disturbance.....	19	19
	<hr/> 19	<hr/> 19
<i>Damage</i>		
Damage to property.....	17	17
B. & E. and damage.....	2	2
	<hr/> 19	<hr/> 19
<i>Immigration Offences</i>		
Breach of U.S. Immigration laws—deported..... —(includes those deported for other offences)	13	13
	<hr/> 13	<hr/> 13
<i>Offences of a Regulatory Nature</i>		
Breach of National Selective Service Act.....	1	1
Breach city bylaw—unclassified.....	2	2
Standard Hotel Guest Register Act.....	1	1
Fail to produce registration card.....	1	1
False statement in registration of birth.....	1	1
Possess gasoline coupons.....	1	1
Defence of Canada Regulations s. 39.....	1	1
	<hr/> 8	<hr/> 8

Annex—Continued

OFFENCES—NOT AGAINST THE PERSON (Continued)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Conspiracies, Counselling, etc.</i>		
Unclassified conspiracies.....	10	10
Counsel other person to commit offence.....	1	1
Accessory after the fact.....	1	1
	<hr/> 12	<hr/> 12
<i>Counterfeiting and Revenue Offences</i>		
Excise Act.....	2	2
Customs Act.....	1	1
Possession of Revenue Papers.....	1	1
Possess goods unlawfully imported.....	1	1
Possess counterfeit moulds.....	1	1
Make counterfeit coins.....	1	1
Possess counterfeit.....	1	1
	<hr/> 8	<hr/> 8
<i>Interference with Police</i>		
Obstruct peace officer.....	6	6
Resist arrest.....	1	1
Impersonate peace officer.....	1	1
	<hr/> 8	<hr/> 8
<i>Offences Against the Administration of Justice</i>		
Contempt of court.....	2	2
Mischief.....	2	2
Perjury.....	2	2
	<hr/> 6	<hr/> 6
<i>Miscellaneous</i>		
Bookmaking.....	1	1
Being in disguise with intent.....	1	1
Being in disguise at night.....	1	1
Unlawfully wear army uniform.....	1	1
"Breach of Nat. Stolen Property" (U.S.A.).....	1	1
Arson.....	1	1
Keep bawdy house.....	1	1
Keep disorderly house.....	1	1
Canada Shipping Act.....	1	1
Bigamy.....	1	1
Gross indecency.....	1	1
Extortion.....	1	1
Threatening.....	1	1
Bribery.....	1	1
Attempted suicide.....	1	1
Negligently cause fire.....	1	1
Loiter by night.....	1	1
Attempt to procure woman to become a prostitute.....	1	1

Annex—Continued

OFFENCES—NOT AGAINST THE PERSON (Concluded)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Miscellaneous (Concluded)</i>		
Breach Juvenile Delinquent Act.....	1	1
Contribute to juvenile delinquency.....	1	1
"Prison breach".....	1	1
"Incorrigible".....	1	1
	<u>22</u>	<u>22</u>
GRAND TOTAL.....	2,094	2,051

OFFENCES AGAINST THE PERSON

<i>Assault and Related Offences</i>		
Affray.....	3	3
Assault.....	28	28
Assault police officer.....	14	14
Assault bodily harm.....	27	27
Assault and beat.....	1	1
Cause grievous bodily harm.....	2	2
Point firearm.....	1	1
Break prison with violence.....	1	1
	<u>77</u>	<u>77</u>
<i>Robberies</i>		
Robbery.....	14	14
Armed robbery.....	34	34
Conspiracy to commit armed robbery.....	1	1
Robbery with violence.....	18	18
Attempted robbery with violence.....	1	1
Robbery from person.....	1	1
Robbery by assault with intent to steal.....	1	1
Assault with intent to rob.....	4	4
Theft with intent to violently steal.....	3	3
Assault with intent to violently steal.....	1	1
Armed assault with intent to rob.....	1	1
	<u>79</u>	<u>79</u>
<i>Wounding</i>		
Wounding with intent.....	1	1
Assault and wounding.....	1	1
Cause bodily harm with intent to wound.....	1	1
Discharge firearm with intent to wound.....	2	2
	<u>5</u>	<u>5</u>

Annex—Concluded

OFFENCES AGAINST THE PERSON (Concluded)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Indecent Assault</i>		
Indecent assault female.....	7	7
Indecent assault.....	3	2
	<hr/> 10	<hr/> 9
<i>Rape</i>		
Rape.....	3	3
Attempted rape.....	1	1
	<hr/> 4	<hr/> 4
<i>Kidnapping</i>		
Kidnap.....	1	1
Abduction.....	1	1
	<hr/> 2	<hr/> 2
<i>Homicide</i>		
Manslaughter.....	1	1
	<hr/> 1	<hr/> 1
GRAND TOTAL.....	178	177
GRAND TOTAL OF ALL OFFENCES.....	2,272	2,228

14

PURPOSES AND ORGANIZATION OF THE ADULT CORRECTIONAL SERVICES

Definition

In this chapter, the term “adult correctional service” is limited to mean jails, probation, prisons, parole, after-care and such directly-related services as forensic clinics, as they apply to adult offenders.

Those aspects of police work and those court functions, such as sentencing, that directly affect the offender’s rehabilitation are excluded. Services for juvenile delinquents and those family court cases that are dealt with by separate staff after conviction are also excluded because they are beyond the scope of our terms of reference. This arbitrarily limits the scope of some of the recommendations in this chapter.

Consideration of the special needs of the female offender is limited in this chapter because the subject is dealt with in Chapter 22.

There are difficulties in defining “adult” as it is used in the classification of offenders in Canada. Section 2 of the Juvenile Delinquents Act defines a child as “any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2)”. Subsection (2) provides that the Governor in Council may direct that in any province the expression ‘child’ “means boy or girl apparently or actually under the age of eighteen years, and any such proclamation may apply either to boys only or to girls only or to both boys and girls”. In British Columbia, Manitoba and Quebec the age has been set at 18; in Alberta at 18 for girls but 16 for boys; in Saskatchewan, Ontario, New Brunswick, Prince Edward Island and Nova Scotia at 16. It has been set at 16 in the Yukon and Northwest Territories.

The Juvenile Delinquents Act does not apply in Newfoundland. Provincial legislation sets the age at 17.

Under Section 9 of the Juvenile Delinquents Act, juveniles of 14 or older may be transferred for trial to adult court, under certain circumstances.

In that event, they are subject to the same laws and procedures as adults and, if convicted, become the responsibility of the adult correctional services.

In September 1967, following the report of the Departmental Committee on Juvenile Delinquency, the Government of Canada released a Discussion Draft of new legislation entitled The Children and Young Persons Act which would replace the Juvenile Delinquents Act. This Discussion Draft contains proposals regarding new age definitions of "juvenile delinquent".

The lack of uniformity in defining "adult" offenders makes it difficult to maintain accurate, comprehensive and comparable statistics. The Dominion Bureau of Statistics uses 16 as the dividing age in some of its statistics. This means that an offender may be included in juvenile statistics in his own province but in adult statistics by the Bureau.

The Present Situation: Aims and Purposes

One of the problems facing the corrections field in Canada today is the conflict as to the aims in dealing with convicted offenders. This is paralleled by a disagreement over the purpose of the criminal law itself.

To a large extent the functioning of the correctional services is determined by the provisions of the law. Who becomes liable to correctional treatment depends largely on the law since the offender is the person who breaks the provisions of the criminal law. If the law contains unwise provisions it can identify as criminals people who are in no sense dangerous or anti-social. This not only runs the risk of starting the individual on a real criminal career but unwise identification of some groups as criminals burdens the correctional services with a task they are not designed to handle. The result is failure with these individuals and the withholding of services from those who require them.

The law also establishes the limits of discretion allowed the correctional services in the development of treatment plans. For instance, the Penitentiaries Act sets out the extent of the warden's authority to release an inmate for a temporary period. The Act does not give the warden authority to permit the inmate to attend classes in the community or take employment in a work-release program; that requires a day-parole granted by the National Parole Board. The Prisons and Reformatories Act and the appropriate legislation in the provinces sets out what discretion rests with the provincial services.

The sentencing practices of the courts are another vital element affecting the correctional services. If sentences are unrelated to treatment the correctional services are seriously handicapped in rehabilitation, unless they have wide discretion.

There is no plan for corrections in Canada that embraces all the services, nor can there be one until there is agreement with respect to its aim and function, in the Committee's opinion.

The situation is aggravated by geography. Services are spread over such vast distances that extensive communication of ideas is difficult. The isolated

location of so many of Canada's penal institutions, including some of the newest, further insulates the staff from ready access to modern developments and thinking.

Staff shortages, particularly in professional categories, are another handicap faced by the corrections field. Staff development is dealt with in Chapter 24 of this report.

There is also a great deal to learn about most effective ways of dealing with certain kinds of offenders, although practice is still largely behind knowledge. Only greater application of present knowledge and further research will ensure progress. Research is discussed in detail in Chapter 25 of this report.

The corrections field is further fragmented by the division of responsibility¹ between federal and provincial governments and by different administrative patterns in various jurisdictions.

Nor is the field left entirely to government. Canada has a long tradition of citizen participation in welfare services of all kinds. This tradition is manifested in the major correctional services under private auspices, which form an important part of the total picture.

The Present Situation: Key Services

Adult Detention

Most police departments have local lock-ups for holding prisoners for short periods. Prisoners awaiting trial for longer periods are usually transferred to a jail. Ontario is the only province with a jail system specifically for accused awaiting first appearance in court, committed for trial, or pending the hearing of an appeal when bail has not been granted, and those serving very short sentences. Quebec recently made a beginning with the opening of such an institution in Montreal. In all other provinces those awaiting trial and those serving very short sentences are held in the same institutions as those serving sentences up to two years. The extent of segregation of those awaiting trial varies.

Probation

All provinces now maintain adult probation services, supplemented in some provinces by private agencies. In seven provinces the Department of the Attorney General or the Department of Justice is responsible for adult probation; in Saskatchewan, Manitoba and Newfoundland, it is the responsibility of the Department of Welfare or Health and Social Services.

Prisons

In general, the federal government is responsible for adults sentenced to two years or more, the provinces for adults sentenced to less than two years. However, there are exceptions to that rule. If an offender is given consecutive sentences, each under two years but which total more than two years, he is a

¹ In the Yukon and Northwest Territories the federal government exercises the responsibilities, including probation, that apply to the provinces, through the Department of Indian Affairs and Northern Development.

provincial responsibility. Mentally ill prisoners and those suffering from tuberculosis are a provincial responsibility regardless of the length of sentence and “the officer in charge of a penitentiary” may refuse to accept them. Federal penitentiary inmates who become mentally ill may be transferred to the custody of the provincial authorities.² Inmates awaiting disposition of appeals from sentences longer than two years remain in provincial institutions. Those arrested for violation of parole from the federal penitentiaries are held in provincial institutions until the National Board decides the matter. Escapees from provincial institutions may be transferred to federal penitentiaries even if their sentences are less than two years. Inmates awaiting execution are a provincial responsibility. Two private institutions for selected women offenders in the Maritimes—at Coverdale, New Brunswick, for Protestants, and at Halifax, Nova Scotia, for Roman Catholics—operate under special provisions permitting them to hold inmates up to four years.

The type and quality of provincial prisons vary considerably. Within some provinces there is a wide diversity of institutions, in others there is relatively little.

The government department responsible for prisons also varies from province to province; in Saskatchewan the Department of Welfare, in Ontario the Department of Correctional Services, and in Manitoba the Department of Health and Social Service; in the other provinces the Department of the Attorney-General or the Minister of Justice. In Nova Scotia male prisoners sentenced to less than two years are held in municipal institutions. Under a recent agreement with the federal government, however, some of them will be held in the new federal institution at Springhill, Nova Scotia.

Parole

The parole of inmates sentenced for offences against the Criminal Code and other federal legislation is a federal matter, whether the inmates are in federal or provincial custody. The five member National Parole Board in Ottawa grants or rejects parole on the basis of written documentation, not personal appearances by inmates.

Parole applications are processed in regional offices of the National Parole Service and submitted to the Board.

Private after-care agencies, provincial probation or rehabilitation services, or National Parole Service personnel supervise inmates paroled by the Board.

Five provinces, British Columbia, New Brunswick, Ontario, Prince Edward Island and Saskatchewan, have provisions for their own parole boards to deal with parole applications from inmates sentenced for offences against provincial legislation. Courts in Ontario and British Columbia are authorized to impose indeterminate sentences for offences against federal or provincial legislation. Under this system the maximum indeterminate sentence may be up to two years less a day, which can be added to a definite sentence of up to two years less a day. Parole boards in the two provinces decide whether inmates serve

²R.S. c.53 sections 18 and 19 (Penitentiary Act)

all or part of their indeterminate sentences in the community or in institutions. The National Parole Board deals with the definite portion of a sentence, if it resulted from an offence under federal statutes. Those provinces that have their own parole boards maintain parole services to supervise inmates released by the boards.

After-Care

In most of Canada services are available to adults who have completed prison terms and who want help in getting established in the community. This may take the form of casework assistance with personal or family problems, assistance in finding employment, or financial help. Living facilities for newly-released prisoners, although still relatively scarce, are increasing.

Most after-care is undertaken by private agencies. However, the Department of Correctional Services in Ontario maintains an after-care service for inmates released from provincial institutions.

Correctional Principles

The correctional services must be seen as an integral part of the total system of criminal justice and their aims should be consistent with and supportive of the aims of the law enforcement agencies and courts. Obviously, the role is different since the correctional services apply to a different phase of the total process, but the aims of all phases should be complementary.

The aim of the correctional services is twofold:

1. To carry out the sentence of the court.
2. To take whatever course of action, within the scope permitted by the sentence of the court, the discretion allowed by law, and the demands of good professional practice is calculated to return the individual offender permanently to the normal community as a contributing member of society. In the Committee's view, the following guides should apply:
 - (a) Unless there are valid reasons to the contrary, the correction of the offender should take place in the community,⁸ where the acceptance of a treatment relationship is more natural, where family and social relationship can be maintained, where resources can be most effectively marshalled, and where the offender can productively discharge his responsibilities as a citizen. These responsibilities include supporting himself and family, as well as making reasonable reparation to the victim of his crime.

⁸ See, for instance, Klare, Hugh J. and Haxby, David. *Frontiers of Criminology*. London: Pergamon Press, 1967.

Correction in the community avoids the danger inherent in prolonged exposure to the criminal value system of the prison. The expulsion from society implied by imprisonment is also avoided.

There is a lesser stigma attached to correction in the community and therefore a lesser barrier to reacceptance into the normal community.

Treatment in the community is also much less expensive than in prison, representing a substantial saving of public funds.

- (b) Nevertheless, the Committee fully recognizes that for the purposes of correction, a prison sentence is warranted where the safety and security of the community is seriously threatened by the presence of the offender, where the offender himself needs help to control dangerous impulses, or where sanctions are needed to support the community treatment services such as probation or parole.

The knowledge gained from social and behavioural sciences as well as accumulated correctional experience should be fully utilized in attempting to rehabilitate offenders. This requires a team approach allowing all disciplines to make their most effective contributions. It also requires a grasp of correctional practices in Canada and abroad. Moreover, all correctional programs should be under constant study and review to assess effectiveness and seek improvement. A spirit of adventure and a readiness to try new things should always accompany the findings of research. An organized search for better ways of discharging its responsibilities should be recognized as one of the priorities of every correctional service.

Furthermore, the public has an important role to play in developing treatment services. Public involvement in corrections also increases understanding of crime and those who commit crimes and readies the community for the return of offenders. The final step in rehabilitation is the assimilation of offenders back into the community. Without that step everything that has gone before is lost. The professional cannot substitute for the community, although he has the responsibility of preparing both offender and community for the offender's return.

Perhaps most significantly, the offender himself should be encouraged to participate in the development of a treatment plan. Unless he can learn to take responsibility for his own decisions, he will never be ready to take his place in society. Practice in self-determination should begin immediately with this participation in developing the treatment process itself.

A consideration that is growing in importance is the development of new treatment processes that do not require the patient's consent. In the past, it was a requirement of most treatment processes that the cooperation of the patient was necessary. Exceptions to that rule existed in surgical techniques and in the use of electric shock. However, in recent years several forms of

treatment have been developed that do not require the cooperation of the patient. Among them are narcotherapy, conditioning and behaviour therapy. These techniques may be justified in dealing with some types of offender but where are lines to be drawn and what protections are need for the individual against unwarranted use of these devices? This problem will increase rapidly in the future since most of these therapies are just reaching a stage of development that permits their wide-spread application and experiments in their use are in progress.

Federal-Provincial Responsibility

The major administrative problem underlying all others in the corrections field in Canada is the appropriate division of responsibility between the federal and provincial governments for prisons, parole and after-care. The core of the issue seems to be the division of responsibility for prisons. Presumably, a solution for prisons will apply equally to parole and after-care.

The present situation is that the federal government is responsible for prisoners sentenced to a period of incarceration of two years or more, while the provinces are responsible for those receiving a sentence of less than two years. There are exceptions to that rule and they are set out above.

The British North America Act places responsibility for all services that have a treatment connotation with the provinces. Involved are medical services (including mental health), welfare and education. This may explain what prompted the present division of responsibility between the levels of government. Those prisoners who received a sentence of less than two years were probably regarded as ordinary people who needed a lesson while those who received longer sentences were seen as criminals whom it was necessary to separate from ordinary people. This assumption is supported by the terminology used in the British North America Act where the federal institutions are called "penitentiaries" while the provincial institutions are called "reformatory prisons".

Correctional officials have frequently expressed reasons for doubt about the efficiency of this divided responsibility. The court should have open to it as many choices as possible in determining the sentence given any offender. When the length of sentence restricts the choices available to the court, it raises an artificial barrier to good sentencing. Under the situation prevailing in Canada, the court may think in a particular case that the seriousness of an offence demands a sentence longer than two years, but the personality of the offender suggests that he be grouped with minor offenders at the provincial level. The court faces this dilemma—either to ignore the potential deterrent effect of the longer sentence and give the shorter sentence the personality of the offender suggests, or risk the future of the offender by sending him to penitentiary where his fellow-inmates will include more difficult criminals. Furthermore, the chance of moving a pris-

oner to another institution as he responds to treatment is limited. The foregoing suggests that length of sentence should not be the only basis for classifying prisoners, nor is it the best one.

It may be psychologically harmful to send a young or first offender sentenced to two years or more to an institution where he feels identified with the worst criminals. If all prisoners went to the same prison system the importance of length of sentence in terms of self-image might lessen.

In October 1958 the federal government offered to assume responsibility for a greater proportion of prisoners. The offer was made at a federal-provincial conference held to consider recommendations in the Fauteux Report, formally titled the Report of A Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada. That offer has not been implemented. But the anticipated shift in responsibility has made many provincial governments reluctant to build expensive prisons that might soon come under federal control. This has delayed not only the building of additional institutional facilities but the kind of reassessment of programs that might accompany major building plans.

There appear to be three possible choices in the search for a solution to this problem.

The *first* is to leave the present arrangement unchanged except for minor adjustments. Arguments *in favour* of this choice are these:

- There are practical difficulties accompanying any major shift of federal-provincial responsibility in the light of tradition and such heavy commitments in buildings and personnel. Any suggested major realignment in responsibility might result in another long delay similar to the one following the Fauteux Report.
- There is no uniformity of opinion among correctional officials and others across Canada with whom the Committee has discussed this problem. Such a wide difference of opinion would tend to foster delay before action is taken.
- Despite the objection to it, the present arrangement has strengths as well as weaknesses. On the whole, the provinces are relieved of responsibility for the more difficult inmates and are freer to adapt some concepts of prison treatment, making the institutions community-centred in the real sense of the term.
- No matter where the dividing line is drawn, some division of responsibility is necessary, unless the provinces assume responsibility for all prisoners. Any other dividing line presents as many difficulties as the one now in effect.
- Federal-provincial agreements could provide for regional services to meet the requirements of the smaller provinces and for the sharing of services.

The *second* choice is for the federal government to assume greater responsibility. The specific offer made by the federal government some ten years ago but not implemented was for the federal government to assume responsibility for prisoners who receive a sentence of one year or more. Sentences between six months and a year would be abolished, leaving the provinces with responsibility only for those who receive a sentence of six months or less. Some variation on this is presumably possible but this seems the most likely formula if the federal government is to increase its responsibility in this matter.

There are several arguments *in favour* of this choice:

- The provinces would be relieved of the need for such long-term prison programs as trades training. At present, many such programs are duplicated in federal and provincial prisons.
- The provinces would be freed to concentrate on finding more effective ways of dealing with short-term prisoners, a group who are numerically very large. Among them are some beginning criminals whose careers in crime should be stopped early.
- Placing more responsibility with the federal government would tend to greater uniformity in prison services across the country, in particular lessening the gap between the richer and the poorer provinces.
- A federal system would recognize the mobility of criminals and provide equal treatment for them across the country.
- Regional administration within the federal Penitentiary Service permits the grouping of the smaller provinces into regions for prison services.

Arguments against:

- If the Penitentiary Service becomes responsible for those sentenced to one year which, with remission means about eight months actually spent in the institution, the federal institution would have to duplicate short-term services offered by the provinces.
- The suggestion that prison services should be uniform across the country may not be viable when police services, court services, welfare services and health services are not.

The *third* possible choice is to eliminate the federal Penitentiary Service and turn responsibility for all prisoners over to the provinces. There are several arguments that *favour* this possibility:

- Once all prisoners are seen as fit subjects for treatment, the logic of grouping all prisons at the provincial level with the other treatment services become stronger. It may be, too, that prisons need the stimulation towards treatment that comes from these other provincial services. Practical administrative relationships between prisons and these other services might be simpler if all prisons were provincial. Scholastic education and trade training, for instance, must meet pro-

vincial requirements. A provincial institution can call on the appropriate provincial department directly for help. The same kind of consideration arises in relation to provincial mental health services and their usefulness to the prisons.

- Two parallel prison systems within a province sometimes mean that neither is large enough to provide a sufficiently wide range of institutional services. A more viable service might result if all prisoners were a provincial responsibility.
- The need to make prisons community-centred is becoming increasingly recognized. This may be easier to accomplish in a provincial system in which closer relationships with community health and welfare services are implied.
- There are language and cultural differences between the various provinces that must be recognized in prison services as well as in other things. These differences are more readily accommodated in a provincial system.

Arguments against:

- There may be a constitutional difficulty in the federal government's completely abdicating responsibility with respect to a matter which has been assigned to it by the British North America Act without a constitutional amendment.
- This possibility of placing responsibility for all prisoners with the provinces would apply best in the case of the larger provinces. The federal government would probably have to assist the smaller provinces by operating regional institutions.

The Fauteux Report contains this recommendation:

The provincial governments should be responsible for the care and treatment in penal institutions of persons sentenced to imprisonment for maximum terms of six months or less, and persons sentenced to imprisonment for periods longer than six months should be confined in penal institutions operated by the federal government.

However, considerable time has elapsed since the Fauteux Committee completed its work and there has been considerable growth in provincial correctional services, including prisons. These developments, along with those in the federal system, have increased the problems associated with a major transfer of responsibility.

These difficulties have impressed the Committee as has the lack of consensus among the many people across the country with whom the Committee has discussed this problem. The Committee has therefore concluded that insufficient reasons exist to recommend any major transfer of responsibility for prisons.

The Committee recommends that the federal government retain responsibility for prisoners sentenced to incarceration for a period of two years or

longer and that the provinces retain responsibility for those receiving a sentence of less than two years; that anomalies that run counter to this provision be removed; and that there be provision for the federal government to contract for prison service from a province and for a province to contract for prison service from the federal government.

These anomalies that run counter to this recommendation and which the Committee thinks should be removed include individuals who receive a number of consecutive sentences each of which is under two years but which total more than two years, insane prisoners and those suffering from tuberculosis who receive a sentence of two years or more and those who are awaiting an appeal from a sentence of two years or longer.

Parole should be seen as an integral part of the correctional process. Treatment demands continuity and flexibility, including flexibility in determining whether a particular individual should spend all or part of his sentence in the community or in an institution. Treatment also demands a coordination of knowledge about the individual offender. It is inefficient for an inmate to be the responsibility of one government until the question of parole arises and for him then to pass under the control of another level of government.

The Committee recommends that the federal government retain responsibility for parole as it affects all inmates of federal penitentiaries and that the provinces assume responsibility for parole as it affects all inmates of provincial institutions.

The Provinces of Ontario and British Columbia have a system of indeterminate sentences which can involve a sentence of up to two years less a day indeterminate added to a sentence of two years less a day definite—a total of four years less two days all of which could be spent in a provincial institution.

This system provides a means of introducing provincial control over parole for at least a portion of those sentenced for offences against federal statutes. If the recommendation set out above, which would place control over parole of all inmates of provincial institutions with the province, is adopted, this alternative device will no longer be required.

Furthermore, these provisions, which make it possible for an inmate to spend almost four years in a provincial institution, are contrary to our recommendation set out above that the province should be responsible only for those inmates sentenced to two years less a day, and that anomalies that run counter to that principle should be abolished.

The Committee recommends that the system of indeterminate sentences now in effect in Ontario and British Columbia be abolished.

A Coordinating and Leadership Role

However, although the Committee recommends a continuing division of responsibility for corrections between the federal and provincial governments, it recognizes the need for basic standards across the country. To promote

high-level standards, the federal government should assume a leadership and stimulation role. Such a role might include:

- Offering an incentive-grants program related to standards.
- Co-ordinating and developing research. What this would involve is set out in Chapter 25 of this report.
- Supporting experimental programs initiated by provincial governments, private agencies or universities.
- Developing staff on a Canada-wide scale, including promotion and financial support of developments within the universities and the operation of a Canadian correctional staff college.
- Offering technical consultation to the provincial and private services on the operation of programs and on research.
- Serving as a national information centre and clearing house on all matters connected with corrections. This would include maintaining contacts with international centres.

The Committee recommends that the federal government assume a leadership, stimulation and coordinating role in relation to the adult correctional services along the lines set out above.

Comprehensive Legislation

The correctional responsibilities carried by the Government of Canada are very wide and are set out in several pieces of legislation. To ensure these responsibilities are carried out in a coordinated way through services based on common principles, it is suggested a Canadian Corrections Act is required.

Consideration might be given to still more comprehensive legislation in the form of a Canadian Criminal Justice Act which would include the provisions now set out in such legislation as the Criminal Code as well as the legislation relating to the correctional services. This would ensure that common principles apply throughout the whole process of criminal justice.

The Committee recommends that consideration be given to comprehensive legislation to ensure that common principles guide all aspects of the correctional responsibilities carried by the Government of Canada.

Administrative Organization

The need for a coordinated service from the admission of the offender to penitentiary to final release from parole or statutory conditional release should also be expressed in the administrative organization of the correctional services that are the responsibility of the Government of Canada. At present, the Canadian Penitentiary Service and the National Parole Service are administratively distinct, although both come within the Department of the Solicitor General.

Many aspects of these two services could be coordinated. Staff training could be carried on jointly. The pre-release hostels being opened by the Penitentiary Service might also serve parolees. Joint plans for citizen participation are indicated.

It is suggested that a Director of Corrections within the Department of the Solicitor General should be appointed to administer both these services.

The Committee recommends that the Canadian Penitentiary Service and the National Parole Service be drawn together administratively under a Director of Corrections.

15

PRE-TRIAL, REMAND AND SHORT-TERM DETENTION CENTRES

These services are generally a provincial responsibility and are, in one sense, outside the terms of reference of a committee established by the federal government. However, it is impossible to give adequate coverage to corrections in Canada without including some comments on provincial services. It is hoped that suggestions contained in this chapter and elsewhere in this report will be useful to the provincial authorities.

Definitions

For the purposes of this report, the following definitions apply:

A "lockup" is defined as an institution intended to hold adult prisoners on a temporary basis for a few hours. If a longer period of detention is required, the prisoner is transferred to a jail.

A "jail" (sometimes spelled "gaol") is defined as an institution intended to hold adult prisoners awaiting trial, on remand, or awaiting hearing of an appeal and those sentenced to only a few days' imprisonment, not long enough to warrant transfer to an institution serving sentenced offenders.

Because of the repressive connotation which has become associated with the term "jail", some name such as Remand and Assessment Centres or Detention Centres should be used for the area jails recommended in this chapter, to emphasize their changed function. The term Detention Centres is preferred in this report.

Importance of the Jail

The jail is the traditional facility through which many offenders go into the correctional system and it thus forms an important link between community law enforcement and the correctional services. It is important that the accommodation and program offered should enhance respect for the law

and its enforcement and should prevent further identification with the criminal element, particularly on the part of young and first offenders and those subsequently acquitted and discharged.

Situation in Canada

The jail system varies greatly from province to province. Ontario has a separate jail system, apart from institutions that serve inmates who are sentenced to a period of imprisonment longer than a few days, and Quebec has made a beginning with the opening of such an institution in Montreal. In all other provinces the same institution serves both functions. In some provinces, certain institutions are set aside to serve longer-term prisoners exclusively so that only some institutions serve both functions.

In Nova Scotia the jails are administered by the municipalities, with supervision by the provincial authorities. In all other provinces they are administered by the provincial government. The federal government administers jails only in the Yukon and Northwest Territories.

TABLE 8
Number of Jails in Canada, by Jurisdiction

Jurisdiction	Number of Jails
Newfoundland.....	1
Prince Edward Island.....	3
Nova Scotia.....	19
New Brunswick.....	13
Quebec.....	32
Ontario.....	46
Manitoba.....	6
Saskatchewan.....	3
Alberta.....	5
British Columbia.....	4
Yukon.....	3
Northwest Territories.....	4
Total.....	139

SOURCE: Canada. Dominion Bureau of Statistics. *Correctional Institution Statistics, 1967.*

Some of these institutions are very small. It must be kept in mind that many of them also hold prisoners sentenced up to two years imprisonment; these sentenced prisoners are included in the following statistics.

TABLE 9
Number of Prisoners Held in Canadian Jails as of March 31, 1967

Number of Prisoners	Number of Jails
None.....	9
1 to 5.....	18
6 to 10.....	20
11 to 15.....	24
16 to 20.....	13
21 to 30.....	17
31 to 40.....	5
41 to 50.....	9
Over 50.....	24
Total.....	139

SOURCE: Canada, Dominion Bureau of Statistics. *Correctional Institution Statistics, 1967.*

During 1966-67 there was a total of 162,438 admissions into these institutions. However, this figure in many cases includes more than one admission for the same person. The number of different individuals involved is not known but it is undoubtedly considerably less than this figure. Nevertheless, it is obvious that a great many people pass through our jails during a year.

If the recommendations made earlier in this report intended to reduce the number of people held in custody while awaiting trial are followed, the population of our jails would decline considerably.

Although the jails vary from province to province, many of them are old buildings that cannot be effectively modernized. Some are crowded, others almost, if not completely, empty. Within these old buildings it is difficult to separate those awaiting trial from those who have been convicted, and desirable segregation on other criteria is almost impossible. There is often no philosophy guiding the operation of the institution, no facilities for diagnosis, no treatment or training program, no employment or recreation. There is no general program of research, despite the large number of citizens whose lives are affected by these institutions. Custodial precautions and custodial costs are usually set to meet the requirements of the most dangerous inmates and are out of proportion to the varying degree of security and costs in institutions holding long-term prisoners. This costly and ineffective system has gained a poor public reputation which can be corrected only if major changes are made.

Recommended Detention Centre System

The importance of the detention centre system is obvious. At the same time, it is also clear that the system in Canada is haphazard. The following recommendations suggest essential steps if Canada is to develop a modern detention centre service.

The functions performed by a detention centre and by an institution housing longer-term prisoners are quite distinct. The prisoner awaiting trial has not been found guilty. He cannot be made to work or participate in training programs. He must be available to the court, to the police, to his own lawyer, to clinical personnel if the court has ordered an examination, and to his relatives.

Little consideration has been given in Canada to the problems faced by the individual in a detention centre awaiting legal process—to his personality reactions to arrest and trial, to his family and social relationships, to his education, employment and economic responsibilities. The danger of his identification with the criminal world, even if he is eventually proved innocent or if he is only a beginner in crime, has not been of sufficient concern, and measures have not been studied that might help prevent such identification. These problems call for concentrated study and this can be done best in institutions that specialize in serving this group of prisoners.

When one institution performs both functions the development of a proper program for the sentenced prisoners is also handicapped. The constant flow in and out of the institution of newly-arrested people, some of whom may be extremely dangerous, and their attendance at court, and visits by lawyers and family present a security and program problem to the administration that is not matched in an institution caring only for sentenced prisoners.

The Committee recommends that the same institution should not perform the functions of both detention and institution for longer-term prisoners.

The principle that adult correction services should be administered by one authority so that the work of one service can complement the work of the other services should extend to detention centres.

The detention centres could serve as forensic clinics to the courts, providing diagnostic assessment of individual offenders. The same diagnostic assessment could be used by the provincial prison classification board to help determine in which provincial institution a person sentenced to a term of imprisonment should serve his sentence.

Provision could be more readily made in larger institutions to separate those awaiting trial from convicted offenders serving a sentence of a few days, and to separate special groups such as women, young offenders, the mentally ill, suicide risks, drug addicts, alcoholics and sex deviates. Graded security could be provided to meet the varying security requirements of the different individuals. These arrangements are impossible in a small institution holding only a few prisoners.

The present, very small, local jails that exist in some provinces are uneconomical from both the financial and service views. Larger area detention centres each probably replacing a number of local jails would be cheaper to build and cheaper to operate.

Modern transportation removes the need for detention centre facilities in the immediate locality, as long as reasonable geographical considerations

are observed. A holding unit for day occupancy in connection with the court could care for prisoners awaiting their turn in court.

The Committee recommends for the consideration of the provinces that the present local jails existing in some provinces be replaced by area detention centres, and that these area detention centres serve as forensic clinics to the courts and as classification centres for the provincial prison system.

Functions of Area Detention Centres

These area detention centres would perform three main functions:

- (a) to hold prisoners awaiting trial, on remand, or awaiting hearing of an appeal, in dignified and decent quarters, and to provide visiting facilities for attorneys, social agency staff and family members.
- (b) to provide clinical services to the courts when a personality assessment is requested, and to supply the provincial classification board with information on a convicted prisoner to help determine in which prison he should serve his sentence. A central provincial repository of files would help in dealing with repeaters.
- (c) to hold prisoners sentenced to a term of imprisonment of only a few days (perhaps 30) in proper surroundings, and to provide them with a suitable activity program.

Location of Area Detention Centres

These institutions should be placed geographically in relation to the area they will serve. Although transportation is not much of a problem in most circumstances, it is obvious that judicious location can make transportation, as well as visiting, easier.

At the same time, the detention centre is better located in proximity to a population centre rather than in an isolated spot. Also, since clinical services will be part of its responsibilities, it should be sited in relation to provincial mental health services. Proximity to a university is also desirable where this is possible, and also the development of live-in, work-out programs.

Design

The design of the area detention centre should recognize the need to provide for several different groups of inmates, with different security and program requirements. Only a minority of the jail population require maximum security, but for some strong security is essential.

The most effective design provides for one security unit to hold security risks and to serve as a reception centre. Separate from it there should be one or more units with medium or minimum security. It is to be hoped that the need for minimum security will decrease and that more of the inmates who might use this facility will be left in the community while awaiting trial.

Interviewing rooms for lawyers, agency personnel, and clinical personnel should be provided, and visiting facilities for members of the family.

Program

Too often correctional concepts conflict with welfare concepts in dealing with charged or convicted offenders. In our welfare programs we try, in working with the individual, to help him maintain a normal life and to maintain his personal, family and community contacts and responsibilities. Our correctional programs too often ignore these efforts and tear the individual away from his normal life, jeopardizing his personal, family and community commitments. These conflicts are unavoidable in some cases, but the dangers involved should be kept in mind as detention centre programs are developed, since these institutions are the ones where the newly-arrested, the beginner in crime, and the social misfit comes up against legal authority.

The different requirements of those awaiting court disposition and those serving short sentences should also be considered. With both groups the need for research should be emphasized, since very little thinking has been done in Canada on programs for either the newly-arrested or for those incarcerated for a short period.

Work programs, recreation, religious counselling and worship, education facilities and social services should be provided.

Inmates awaiting the hearing of an appeal sometimes present special difficulties, because they often spend many months in the detention centre awaiting the outcome of proceedings. They are in particular need of a progressive program in the centre. It is recommended elsewhere in this report that those awaiting appeal from a sentence of two years or more imprisonment should be held in penitentiary, not in a detention centre.

Programs that permit the sentenced prisoner to either attend an educational institution in the regular community or to work in the regular community, while spending his evenings and other non-working periods in the detention centre have much to recommend them.

Staffing

Such developments will require a correctional, rather than a merely custodial staff. In addition to clinical personnel, staff for work and program supervision will be required. If the institutions are operated on a regional basis, the number of inmates in each institution should make practical the assignment of specialist personnel. A provincial program of staff recruitment, training and transfer should make possible the implementation of the changing philosophy and new objectives that will mark these centres.

The fact that so many beginning criminals make their first contact with correctional personnel in the detention centres emphasizes the need for high quality staff.