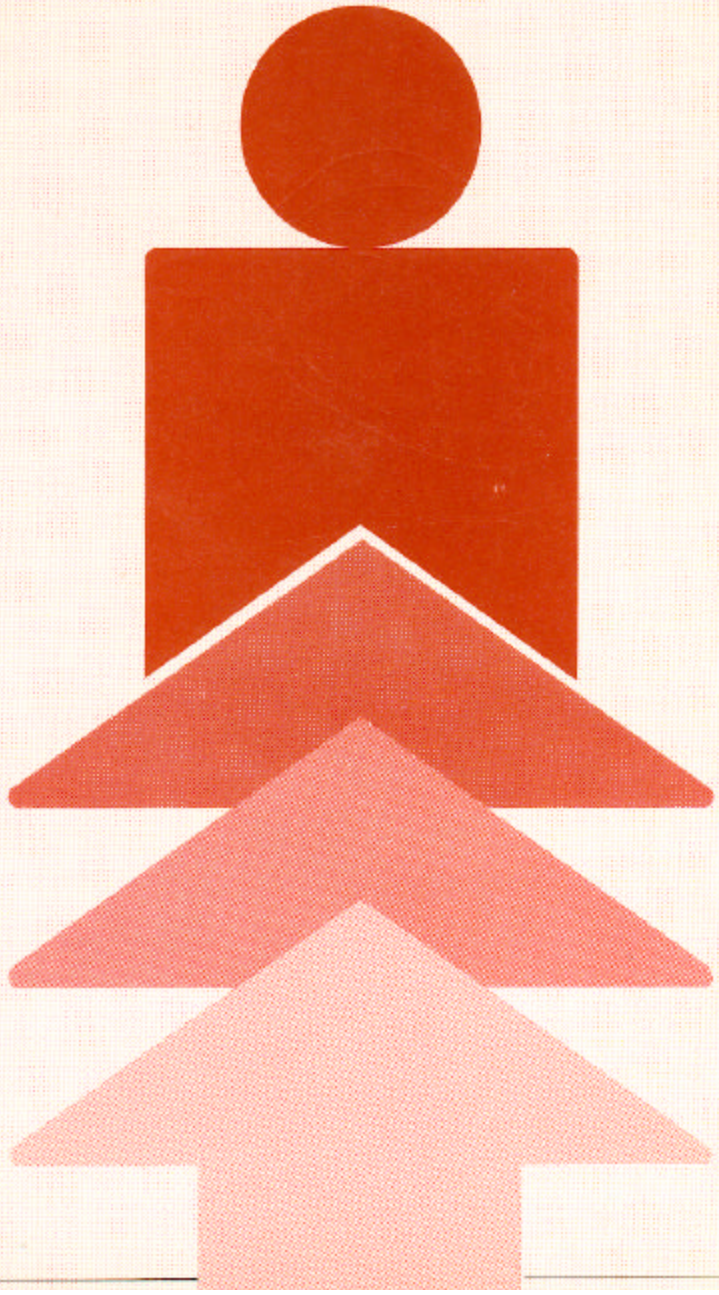
Law Reform Commission of Canada
Commission de réforme du droit du Canada

Community Participation in Sentencing



Law Reform Commission of Canada

COMMUNITY PARTICIPATION IN SENTENCING

Available by mail from

Printing and Publishing
Supply and Services Canada,
Ottawa, Canada K1A 0S9

and at Canadian Government Bookstores:

HALIFAX
1683 Barrington Street

MONTREAL
640 St. Catherine Street West

OTTAWA
171 Slater Street

TORONTO
221 Yonge Street

WINNIPEG
393 Portage Avenue

VANCOUVER
800 Granville Street

or through your bookseller

Catalogue No. J32-4/11-1976 Price: Canada: $5.75
Other countries: $6.90

Price subject to change without notice

Commission

Honourable E. Patrick Hartt, Chairman
Honourable Antonio Lamer, Vice-Chairman
Dr. J. W. Mohr, Commissioner
Dr. Gérard V. La Forest, Q.C., Commissioner

Secretary

Jean Côté, B.A., B.Phil., LL.B.

Research Personnel

Keith B. Jobson, B.A., B.Ed., LL.B., LL.M., J.S.D.,
director
Pierre Landreville, B.Sc., M.Crim., Ph.D.
Mark Krasnick, B.A., LL.B.
W. F. McCabe, Diploma S.W.
Rosann Greenspan, B.A., M.A.
Carol Tennenhouse, B.A.

Research Assistants

Susan Altschul, B.A., B.J., B.C.L.
Kathryn Barnard, B.A.
Douglas Betts, B.A.
Graham Reynolds, B.A., LL.B.

Table of Contents

Page

Introduction vii

Research Papers

Restitution, Compensation for Victims of Crime and Canadian Criminal Law by Allen M. Linden 3

The Law of Probation by Graham Parker 51

A Report on Community Service Treatment and Work Programs in British Columbia by Patricia Groves 119

Community Service Orders: The View of the Court 151

Working Papers

Restitution and Compensation ..... Blue section

Fines ..... Apricot section

Introduction

Traditionally, the sentencing options available to a judge were limited. The standard sentence consisted of the fine or the term in the local jail. For more serious offences, the penitentiary sentence, a time spent in hard work or silent penance was considered appropriate. Community based sanctions began with probation. It was premised on a belief that the offender should not be removed from his home and placed in an institution for there, his chances of rehabilitation would be lessenned in the foreign and hostile surrounding.

Probation meant that the individual was placed in the control of an officer of the state, a person to whom he would report at regular intervals to account for his activities while under sentence. The role of probation is changing and Professor Parker, in his paper entitled *The Law of Probation* deals with the history of probation and discusses future innovations and changes.

Working in the community under the order of the state is now possible in some jurisdictions under a device called the community service order. A description of these orders, and how they are working, is found in paper by Patricia Groves entitled *A Report on Community Service Treatment and Work Programs in British Columbia.*

Finally, compensating victims of crime is considered in the paper by Professor Allan Linden entitled, Restitution, Compensation for Victims of Crime and Canadian Criminal Law. It talks about the victims of the criminal process and the attempts that have been made to compensate them for their hardship and loss.

RESEARCH

PAPERS

Restitution, Compensation for Victims of Crime and Canadian Criminal Law

by

Allen M. Linden
Professor of Law
Osgoode Hall Law School of
York University
Toronto

Table of Contents

Page

A. Introduction 7

B. Remedies Presently Available to Crime Victims 9

C. Reasons for State Compensation for Crime Victims 15

D. Existing Canadian Compensation Plans 21

E. Approaches to Reform 31

F. Summary and Conclusion 47

A. Introduction

The victim of crime has been described as the Cinderella of the criminal law. The victim has been largely neglected while attention has focussed primarily on the offender. One concomitant of this has been the decline of the role of restitution in the criminal process. Although it was the dominant feature of the early criminal law, restitution has fallen largely into disuse as the state has undertaken the primary task of prosecuting criminal cases.

In recent years our focus has begun to revert to the victim and his problems. This shift has, among other things, spawned a movement to provide compensation for victims of crime. Starting in New Zealand and then in the United Kingdom in 1964, some two dozen jurisdictions have now established schemes that provide financial assistance to crime victims.

Victims of violent crime in eight Canadian provinces are now entitled to receive compensation. Since 1967, the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick and Newfoundland have established government schemes to provide reparation for persons hurt as a result of violent crime. The remaining two jurisdictions, Nova Scotia and Prince Edward Island, are likely to follow suit. The federal government, through agreements with individual provinces, has made financial support available to provinces who compensate crime victims to the extent of the lesser of 90% of the cost of the program or 5 cents per capita.

Unfortunately, little analysis has been done of these crime victim compensation plans, their purpose and their social effects. They are operated independently of the criminal process. There seems to be almost no coordination between the courts, the correctional institutions and the compensation agencies. The offender is rarely even aware of the activity of the state on behalf of his victims. Many eligible crime victims are totally unaware of the existence of these compensation schemes.

The purpose of this paper is to examine these victims of crime schemes in Canada and to relate them to the use of restitution by Canadian criminal courts. Alternative modes of compensation will also be analyzed. At the end, various reform proposals will be made in an effort to rationalize and integrate these various measures.

B. Remedies Presently Available to Crime Victims

1. Tort Law

All victims of crime were and are theoretically entitled to bring a civil action in tort against anyone who intentionally attacks and injures them. Unfortunately, however, this legal right is usually only an empty shell. The civil law *appears* to provide assistance, but it rarely does so in real life. An empirical study done at the Osgoode Hall Law School in 1966 demonstrated that only 1.8% of the criminally injured respondents collected anything from their attackers by tort suits. In other words, only 3 individuals out of 167 people interviewed received any financial reimbursement through tort law. Not only was tort recovery rare, but very few victims even considered suing, fewer consulted a lawyer about their legal rights and still fewer actually commenced legal action against their assailants. Only 14.9% of the respondents considered suing, only 5.4% consulted a lawyer and only 4.8% actually tried to collect something from their attackers. A study done in British Columbia by Burns and Ross closely resembled these data.

The reasons for this dreadful recovery pattern were varied. Most commonly, victims expressed the view that it was not worth bothering to sue because the amount of their financial loss was small. Frequently, the identity of the attacker was unknown or, if known to the victim, the offender would be unable to pay any court judgment against him. Some respondents were worried about the expense of launching a civil action. Others were concerned that the offender might attack them again, if they commenced litigation against them. Many of the respondents were totally unaware that they had any private legal rights. A few believed (wrongly) that their private legal rights were extinguished when the criminal action was begun. As a result, the tort system was of little avail in providing reparation to those injured by criminal conduct. It was primarily a paper right without much actual efficacy.

2. Restitution

The criminal courts in Canada are empowered, in certain circum-

stances, to order restitution by the offender to the victim. Section 653 of the Criminal Code permits a court that convicts someone of an indictable offence, upon the application of the person aggrieved, to order that person to pay an "amount by way of satisfaction or compensation for loss or damage to property suffered by the applicant as a result of the commission of the offence". One should note that this applies only to cases of property loss, not to personal injury, and that an application by the person aggrieved is required.

In another section of the Criminal Code (663(*e*)), the courts are given the power to impose conditions on an accused person if he is placed on probation. One of the permissible conditions is that the offender "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof". This provision is both wider and narrower than section 653. It is wider in that it allows for restitution in bodily injury cases as well as in property loss cases. It is narrower in that it can only be invoked where there is a probation order. It cannot be required on its own. Further, being limited only to "actual" losses, it is doubtful whether compensation for pain and suffering may be permitted in these restitution cases.

This power to order restitution is seldom utilized by our courts. It is utilized mainly in fraud, forgery, malicious damage and theft cases, where the accused seems capable of repaying the loss. Many of the same reasons that thwart the effectiveness of tort law prevent restitution from being widely used. Most offenders are, of course, never brought before the courts because they are never apprehended. Moreover, the basic fact is that offenders that are caught rarely have much money to pay to their victims. Consequently, an order that they make restitution is seldom worthwhile.

Sometimes restitution is made voluntarily by the offenders. They do so in order to demonstrate that they are sorry for what they have done and wish to make up the loss they have inflicted. When this is done, leniency is often shown to the offender because repentance and rehabilitation has been evinced. The charges may be withdrawn altogether. The gravity of the offence with which the accused is charged may be reduced. The sentence imposed may be less severe than it would otherwise be. Consequently, there is an incentive to make restitution built into the criminal law system, which works informally, but sometimes effectively.

3. Social Insurance

Merely because the tort remedy and restitution are unavailable does not mean that no assistance at all is forthcoming to crime victims. Happily, all of the Canadian provinces have rather elaborate social welfare schemes that look after many of the expenses incurred as a result of injuries of all kinds, including those caused by criminal conduct.

(a) *Hospital and Medical Care*

Hospital insurance and medical care plans now cover virtually all the hospital and medical costs of everyone in Canada. Consequently, these expenses rarely create serious problems any more for Canadians.

(b) *Unemployment Insurance*

Members of the work force who become unemployed because of sickness, quarantine, or injury may now qualify for unemployment insurance benefits. Consequently, a victim of crime, if he is employed and covered by U.I.C., may receive weekly benefits for the period he is unable to work, up to a maximum of 15 weeks. There is, however, a waiting period of two weeks without benefits. The amount of the payment is two-thirds of the average weekly insured earnings, to a maximum of $113 per week. It is more for those with dependants. Needless to say, this is a considerable help to crime victims as it is to other Canadians.

(c) *Canada Pension Plan*

If a victim of crime is disabled for a lengthy period, he may qualify for a disability pension under the Canada (or Quebec) Pension Plan. Disability benefits begin four months after the month in which the disability begins and they continue until recovery, age 65 or death, whichever comes first. The amount of the pension is $28.15 per month plus 75% of the monthly retirement benefits, which would normally total over $100 per month. More is available to those with dependants. If the victim has been killed, a widow's pension is available, as well as a lump sum payment of six times the normal pension to a maximum of $540. There is a cost of living adjustment annually.

(d) *Workmen's Compensation*

All provinces have workmen's compensation plans that compensate workmen for personal injuries suffered in accidents arising out of and in the course of their employment. Occasionally, victims of crime are injured while they are on the job. For example, policemen, watchmen and bank employees are entitled to benefits that include the cost of hospital, medical and nursing care, necessary equipment, rehabilitation services, and income support of up to 75% of their weekly earnings (in Ontario). Death benefits under the Ontario Act allow for a lump sum payment of $500, plus $400 funeral costs.

(e) *General Welfare*

If someone is rendered destitute as a result of a crime of violence, general welfare benefits are available. General welfare is usually administered by individual local municipalities, but it is financed predominantly by provincial and federal funds. Eligibility rests upon financial need. The amount of benefits is calculated according to a fixed scale. Components in the total are rent, food and clothing, household supplies, and utilities such as oil, gas and hydro. The maximum benefit for a single person in Ontario is $130 per month. The recipient may earn or receive up to $24 per month income with no decrease in his assistance. Families may receive more.

4. Other Sources of Aid

There are other possible sources of compensation for crime victims in addition to tort action, restitution and social welfare.

(a) *Private Insurance*

Private insurance schemes cannot be ignored. For a premium, an individual can insure himself and his property against any mishaps, including certain losses resulting from criminal activity. Where someone buys life insurance and he is murdered, his company pays his beneficiaries. Where a building insured against fire loss is burned down by arson, the owner is normally paid. Burglary and robbery can be insured against. Consequently, private arrangements often supply reparation to crime victims, but it is doubtful if this is adequate. One of the problems is that those who need insurance most are the most unlikely to have it.

(b) *Charity*

Another source of compensation that cannot be ignored either is private charity. When someone is murdered or injured, a community sometimes comes to the aid of his family. A wealthy person or a charitable organization may make a grant to the victim or his survivors. Recently, when a policeman was killed in Toronto, a citizen opened a trust account for him, deposited some money and urged others to follow suit. Some years ago, when a citizen was shot trying to stop a bank robber, the Canadian Bankers' Association gave him an award of $5,000. Relatives and friends often assist victims of crime. Again, although it cannot be ignored, charity is by no means a sufficient source of reparation for victims of crime.

5. Conclusion

At the time the Osgoode Hall Study was done (1966), the vast majority of crime victims in Ontario received compensation for their hospital and medical costs. Most, however, did not secure any help in the area of income losses. With the advent of the U.I.C. and C.P.P. disability benefits, this picture has undoubtedly improved, but gaps still remain.

The Osgoode Hall Study demonstrated that only 44% of the crime victims were not out-of-pocket as a result of their victimization. In other words, 56% of the respondents failed to receive full reimbursement for the expenses they incurred as a result of being raped, robbed or wounded. The average amount of loss, however, was only $251 and only 8.4% of the victims were out-of-pocket more than $500. Of course, these figures did not take into account general damages that would have been forthcoming under tort law. An amazingly similar pattern was observed by Burns and Ross in British Columbia in 1973.

Consequently, although the financial losses were not large in most crime victim cases, they were significant in a great many. If full compensation for victims of crime was desired, the existing programs were deficient. Let us now consider the reasons advanced in favour of state compensation schemes.

C. Reasons for State Compensation for Crime Victims

There is no one reason which prompted the creation of crime victim compensation schemes. Several varied and sometimes conflicting reasons have been advanced by proponents of criminal injuries compensation.

1. Welfare

The most frequently advanced rationale is based on considerations of social welfare. Just as other victims of adversity, such as the aged, the disabled, the unemployed, are assisted by the state, so too ought the modern welfare state provide aid to the victims of crime. True, these individuals are not really very different than those who contract cancer, but society is not yet ready to compensate *all* victims of adversity. We are moving in that direction, having provided aid to groups like workmen and auto accident victims. A crime victim scheme is just another step along that road.

This rationale was articulated by Mr. Justice McRuer in his Royal Commission on Civil Rights (1968):

> As government becomes more and more committed to the concept of a welfare state with programs for state education, health services, and unemployment relief, no great philosophical revolution is required for the acceptance of the principle that, within limits, the innocent victim of crime should also be compensated or given relief by the state.

Senator Yarborough, who has championed crime victim compensation in the United States, has written that it is "preferable to think of his proposal in terms of a social welfare program rather than as one establishing a true legal right".

It is because of this strong social welfare base that several of the schemes (California, New York, Newfoundland, Saskatchewan) require evidence of need or "financial hardship" by the victim as a pre-condition to an award. This social welfare rationale has also tainted these programs with the flavour of charity, something which may well have inhibited some victims from making application for compensation.

2. State Obligation

Another reason advanced for adopting crime victim compensation schemes is that the state has an obligation to protect its citizens from criminal attacks. If it fails in its duty to prevent such an attack, it must compensate the victim of that breakdown in security. Mr. Justice McRuer discussed this rationale in these terms:

> The State has undertaken to protect the individual from his aggressive neighbour, and when it fails to do so the victim of the aggressor should be compensated. It is suggested that by paying taxes to support police forces and other agencies of law enforcement, the public in a sense is financing an insurance scheme against crime, and consequently the individual member of the public deserves reimbursement for losses due to crime.

The report of the United Kingdom Longford Committee in *Justice* (1962) echoed this view:

> The State has accepted an obligation to compensate the citizen who is injured by the State's failure to maintain peace and order in society, even in cases where the injury could not have been prevented by the State. Provision has been made for compensating citizens who suffer injury caused by enemy action; the same principle should apply to acts of internal aggression.

Paradoxically, the United Kingdom Command Paper of 1961, upon which the British scheme was based, expressly denied that the state had any "duty to protect its members from unlawful violence". This argument was considered "both fallacious and dangerous". It was fallacious because there was a distinction between a civil riot, which should be prevented, and an individual act of violence, which cannot always be prevented. The argument was dangerous because it would lead to state compensation for property damage as well as for bodily injury, something the Committee was opposed to. The Committee chose to rest its recommendation on the "more practical ground" of "sympathy for the innocent victim", the social welfare argument discussed above. In other words, the United Kingdom scheme is founded on a moral, not a legal, obligation to the victims. Consequently, the British Government did not accept that the state was liable for criminal injuries and insisted that payments under its scheme were *ex gratia*. This did not, however, inhibit the United Kingdom courts from transforming these *ex gratia* payments into compensation as a matter of legal right soon afterwards. (See *Ex parte Lain*.)

Another reason that is sometimes given for holding the state responsible for criminal acts is that citizens may be lured into a false sense of

security by the establishment of police protection by the state. They cease to carry weapons to protect themselves and are, therefore, helpless in the face of a criminal attack. The state, because it has invited reliance upon it for protection, should bear the cost of failure of the system.

Indeed, Luis Kutner, writing in the *Notre Dame Law Review,* has suggested that a tort suit against a state for failure to protect a citizen from criminal conduct might succeed in the United States. It is doubtful that this would be so in Canada, although it may be possible one day.

3. Better Law Enforcement

It may be that we could improve crime detection by providing financial assistance for crime victims. Many crimes are never reported to the police. If a crime victim has the opportunity of receiving financial aid from the state if he reports a crime, he might be more willing to do so. In other words, the profit motive might operate here as it does elsewhere in society to stimulate better law enforcement. Most crime victim schemes, therefore, require that applicants for compensation report the crime to the police and co-operate with them in any investigation. This could well encourage more widespread disclosure of criminal activity.

Another purpose served by a crime victim scheme is the encouragement of citizen participation in law enforcement. If a citizen is injured while assisting the police to capture a criminal or to prevent a crime, he is entitled to compensation under these schemes. The original legislation in Ontario was entitled the "Law Enforcement Compensation Act" and it was limited to individuals injured while assisting the police in the apprehension of a criminal or in the prevention of crime. Such persons are still given special treatment in many of the crime victims compensation schemes, as a reward for their sacrifice for the public good.

There is a further value in compensating crime victims. It can counteract in a small way the alienation they feel and demonstrate the sympathy of society and its public officials for the victims. If the job of the police were not only to search for the offender in order to punish him, but also to help the victim receive compensation for his loss, closer police-community relations should be fostered. Citizens ought to feel more willing to aid in police work and should be more sympathetic to the police function in society. Hopefully, they will feel less hostile toward organized society and feel a greater commitment to its laws.

4. Prison Prevents Offender Reimbursement

Another rationale underlying state compensation schemes is that the state, by incarcerating the offender makes it virtually impossible for him to pay tort damages or to make restitution to his victim. Tort liability and restitution, although permissible under the law, are rarely used because the offender is usually impecunious. By placing the offender in prison, the state assures that personal restitution by him will be unlikely and that any civil action will be futile. In Ontario, for example, a prisoner earns from $3.05 per week to $5.15 per week in incentive allowances, most of which can be spent on personal purchases. With such a minuscule income, restitution is virtually impossible. Because the state is responsible for imprisoning the offender, it is felt by many commentators that it should fill the compensation gap by erecting a state compensation plan. Unfortunately, such a scheme eliminates any beneficial rehabilitative effects of personal repayment by the offender, but the compensation goal has been given greater weight than the rehabilitation aim in this area.

5. Consistency

Another reason to aid the crime victim has to do with consistency. It is inconsistent, and therefore unjust, that a convicted murderer be confined to a prison where he is looked after for the rest of his life, while the widow of that murderer's victim is left to fend for herself. This inconsistency and injustice is even more pronounced when one compares the plight of the widow of someone killed by an uninsured motorist, who may collect up to $50,000 in damages from an unsatisfied judgment fund, with the widow of the murder victim who can normally get nothing. Similarly, if a workman who is injured on the job is entitled to be compensated, so should a crime victim. By creating a crime victim scheme, some of these glaring anomalies can be rectified.

6. Politics

The last reason for adopting compensation plans is that they are politically popular. In democratic societies, politicians try to give the people what they want and most people seem to approve of providing compensation for victims of crime. Often measures such as these are justified publicly only on the ground that they seem "just" or that "the people favour them".

There is public clamour for law and order these days. In this atmosphere, humane penal policies may be unpopular. Much of the public wants retribution against offenders. By providing compensation for crime victims, it seems that this thirst for vengeance may be assuaged in part. One scholar, Gilbert Geis, has suggested that these compensation programmes are designed to placate public opinion which is worried about the increasing crime rate. The Canadian Member of Parliament, Ralph Cowan, who did most to dramatize the need for crime victim compensation was a stout supporter of capital punishment. It may be that such a scheme is a *quid pro quo* that must be paid by a state that wishes to continue to humanize its correctional system in these "law and order" times.

7. Negative Arguments

The reasons advanced in opposition to crime compensation plans are not as compelling as those in favour. In the first place, the special claim of crime victims over other victims of adversity is questioned. Opponents have argued that there is no reason to single out these unfortunate people for special treatment over victims of flood, fire or illness. In a way, this is the consistency argument in reverse. Although this argument has logic on its side, it has not won the day. The time of the crime victim has arrived, while the other victims of adversity will have to wait until another day.

A second argument is that by compensating victims of crime one is somehow condoning crime. It is suggested, that rather than surrendering to crime, we should strengthen our efforts in crime prevention. This argument is not sound. No one is condoning crime by compensating its victims. There is nothing inconsistent in compensating victims *and* renewing our efforts at crime reduction. The two programs can be complementary, not mutually exclusive.

A third contention is that crime may increase if we compensate crime victims. It is feared that citizens will take less care for their own safety if they know they will be compensated when they are victimized by crime. This is most unlikely. The desire to remain alive and healthy is a sufficient incentive for safety precautions by most people. It does not need to be bolstered by withholding all compensation to crime victims. Concern has also been expressed that criminals will be more likely to attack people if they know compensation will be forthcoming to their victims. To believe that violent criminals are motivated by the presence or absence of compensation seems preposterous. If they do not care about their victims' lives and

safety, how can one expect them to be concerned about whether they receive compensation for their injuries?

A fourth argument, one that is invoked whenever broader compensation is being considered, is that of fraudulent claims. Some critics feared that claimants may purposely beat themselves up or provoke an attack in order to collect compensation. A more realistic abuse is that victims may claim that they have been beaten up, when in fact they have merely been injured accidentally. Such fraud is, of course, always a possibility. Nevertheless, the usual requirements of proof should be able to distinguish between the legitimate and the phony claims. In any event, the fact that a program may be abused by a few individuals is no reason to scrap the entire concept if it is valuable.

The fifth concern with these plans is their cost. Crime is widespread and expensive. Taxpayers are rightly worried that too many of their tax dollars may be required to finance the plan. Although a legitimate concern, the experience has been that these programs, with proper limitations, are surprisingly inexpensive. Only about 5 cents per citizen has been spent annually in Canada to date. There are also a wide range of mechanisms whereby the cost of these schemes can be limited.

D. Existing Canadian Compensation Plans

Between 1967 and 1972, eight provinces have enacted crime victim compensation plans. Only Prince Edward Island and Nova Scotia have failed to do so to date. These schemes are rather broad and frequently quite generous in their provisions. There are marked similarities in them, but they are by no means identical. A brief description of these plans will now follow.

1. Who May Recover?

(a) *Eligibility*

Seven of the provinces, exclusive of Ontario, provide compensation for the victims of a specific list of crimes. Included in all lists are the major crimes of violence such as murder, manslaughter, rape, robbery and assault, as well as many other crimes. Ontario did not feel that a list of crimes was necessary. Instead, the legislation stipulates that compensation may be paid to any person injured or killed by an act of another person "occurring in or resulting from the commission of a crime of violence constituting an offence against the Criminal Code, including poisoning, arson, criminal negligence, [dangerous use of a firearm], but not including an offence involving the use or operation of a motor vehicle other than assault by means of a motor vehicle". This more general provision corresponds largely to the United Kingdom scheme, whereas the schedule method is based on the New Zealand scheme.

In addition, all the provinces provide compensation to persons who are injured while assisting in law enforcement. The legislation generally stipulates that persons injured while assisting the police in their duty, while attempting to arrest someone themselves, or while trying to prevent the commission of an offence, are eligible for benefits. These latter people are often favoured over the ordinary victims of crime in that payment ceilings may not be applied to them or they may be entitled to pain and suffering while the others are denied it.

The vast bulk of the claimants under the present schemes are ordinary victims of crime. Only a small percentage of applicants are hurt while engaged in law enforcement. Something like 98% of the claimants under the 1969 Ontario scheme were ordinary crime victims. Only 11 of 350 claimants, 5 of whom were police officers, qualified under the special provisions in that period.

Compensation may be paid to the victim or to a person who is responsible for the maintenance of the victim. Where the victim has died, reparation is payable to the victim's dependants, or to the person who was responsible for his maintenance immediately before his death. In some 85% of the cases heard by the Ontario Board, the claim has been made by the victim himself. Consequently, most applications raise no problem about the status of the applicant.

To recover compensation, a claimant must satisfy the Board, on the balance of probabilities, simply that a crime has occurred and that he was injured or killed as a result of that crime. If a conviction is registered, this is conclusive evidence in Ontario that an offence has been committed. However, in order to qualify, it is not necessary for a criminal conviction to be recorded, nor even for the perpetrator of the offence to be identified. Such a requirement would greatly diminish the effectiveness of this legislation and has been rightly rejected. Nevertheless, there have been convictions registered in approximately 55% of the cases that have been heard by the Ontario Board, almost half of which were for assault. In about 30% of the cases heard in Ontario, the offender has not been apprehended, but the Board still awarded damages.

There are some cases in which the "offender" is absolved of criminal responsibility, as for example, where no charge is laid or where an acquittal has been won. The Board is still amenable to make an award in these cases for several reasons. First of all, it employs a lower standard of proof—balance of probabilities as opposed to beyond a reasonable doubt. Hearsay evidence is admissible and technicalities are not as likely to impede the compensation hearing. Second, although the evidence may be weak against an accused, it may be absolutely certain that someone committed a crime against the claimant. Similarly, where someone is acquitted because the Crown is unable to prove *mens rea,* the Board may still grant compensation. This makes good sense because the compensation scheme has nothing to do with determining guilt or innocence, nor should it be concerned with the nice points of the criminal law.

In one Ontario case, *Burwell,* a victim was shot and killed by one of two men in a car that he was approaching. One of these men was prosecuted for murder, but when the fact of identity was not proved, there was an acquittal. This, however, did not prevent the Board from finding that a crime had occurred and from awarding compensation. A similar case is that of *Wigle,* where a victim was unaccountably shot in the leg. Although a woman was charged with the offence and acquitted, the Board found that an offence under section 86 was committed, whoever the culprit was, and that the victim could recover.

This does not mean, however, that the Board will always make an award; it is sometimes not satisfied that a crime was committed. In one Ontario case, *Wlasenko,* the applicant who was intoxicated at the time of the injury, claimed that he had been assaulted by the driver of the taxi in which he was taken home. The taxi driver denied this. His evidence was that the applicant had fallen on the sidewalk while getting out of the cab. Two other witnesses produced conflicting accounts of what occurred. The Board dismissed the application. Another case was *Jarvis,* where the claimant alleged that he was assaulted by a police officer, who was taking him into the station to be identified by a complainant. A police investigation did not reveal any such rough treatment. There were serious discrepancies between Jarvis's evidence with regard to his visit to a doctor. The doctor denied ever having seen Jarvis. The Board, in these circumstances, dismissed the claim.

(b) *Disqualification*

If a person refuses to notify the police or to co-operate with them, most schemes bar him from recovery. Obviously, the law enforcement aim of compensation is the reason behind this requirement. The Ontario Board denied compensation on this ground in two cases, *Charlesbois* and *McBride,* which rose out of the same occurrence. The police came to McBride's house and found him and Charlesbois severely injured as a result of what appeared to have been a knife fight. Both refused to tell the police what happened and their companions were equally tight-lipped. The Board believed that the claimants were protecting each other or covering up something else of a criminal nature. There was a suspicion that perhaps bootlegging was involved in the case. The Board concluded that they could not provide compensation for such unco-operative citizens.

In most jurisdictions, a person is disqualified if the criminal act was committed by a member of his family or someone living with him. The rationale behind this is both to prevent fraud and to deny the offender any indirect benefit from the award.

There is a one-year limitation period in all jurisdictions, except for Quebec where the period is six months. The boards, however, are given the discretion to extend the period within which a claim must be made. They exercised this discretion with substantial sympathy for the crime victim during the early years of their existence. They are now starting to be a little stricter in this regard.

Some plans prohibit police and individuals who are covered by workmen's compensation from claiming. The obvious reason behind this is to pay for losses to such people out of other programs rather than this one. In Ontario, police and recipients of workmen's compensation are not denied reparation, but payments from other schemes will be deducted from the award.

A few plans have required that claimants be residents of the province in which they are claiming, but these provisions are now being eliminated, because of the federal-provincial financing agreements that require reciprocity between provinces.

(c) *Victim Contribution*

All the statutes direct the boards to take into account any behaviour of the victim which may have contributed to his injury. They are empowered to reduce compensation or to deny it altogether where they deem it appropriate. This enables the boards to reduce or deny compensation to the "undeserving". This is done not only for moralistic reasons, but also for practical ones. The public would disapprove of rewards for "wrongdoers" and might try to abolish the compensation scheme if such persons were paid. This may be the reason why the Manitoba legislation went so far as to permit the Board to consider the character of the claimant as well as his conduct. Such a provision could be used to exclude a well-known gangster from claiming. It is not permissible, however, in the absence of such a provision, to preclude prisoners from receiving compensation as a result of a crime by a fellow inmate, unless it was provoked. (See Sheehan.)

One example of a case of victim contribution is the Ontario decision in *Emslie,* where the applicant went out for a few drinks, was picked up by a woman and was taken back to her apartment. He had something to drink at the apartment and then two men arrived, one of them claiming to be the woman's husband. The claimant was attacked and beaten up by the two men. The Board denied him compensation and indicated that he had pretty well asked for what he got. They said, "voluntarily associating with people encountered in the circumstances outlined was a most dangerous course to pursue and he must well have realized the risks involved".

Another such case is that of *Tutty,* where the 14-year-old boy applicant, along with a couple of friends, were stuffing fire-crackers into the mouths of frogs, causing them to explode. The offender's family intruded and objected to this cruel conduct. The boys taunted the intruder to such an extent that he struck the applicant in the eye. The intruder was convicted

of common assault in a criminal trial. The 14-year-old boy then sought compensation from the Ontario Board. The then Chairman of the Ontario Board, Mr. A. A. Wishart, dismissed the applicant's case, saying:

> . . . in the view of the members of the Board, his own conduct was most cruel, wanton and reprehensible and he might well himself have been prosecuted for cruelty to an animal. It is hoped that this young man will realize that cruel behaviour deserves and often brings retribution. It is not to be rewarded.

Another fascinating case is that of *Thrush*, where the victim, a Sudbury miner, was shot by the jealous husband of the woman with whom he had been living temporarily. The victim was paralyzed from the waist down as a result. The Board disapproved of his "completely irresponsible and morally disgraceful" conduct and reduced the award that he would otherwise have received. They explained:

> He was the author of his own misfortune, and was asking for retaliation.

2. What Compensation Can be Awarded?

(a) *Heads of Damages*

Compensation may be awarded for reasonable expenses and other pecuniary loss incurred by the victim, including maintenance of a child born as a result of rape. Pain and suffering is also allowable in all provinces, except Quebec and Manitoba. The awards may be composed of a lump sum or periodic payments or both. Expenses for such things as drugs, medication, dentures, destroyed clothing and the provision of domestic help are covered. Loss of income is, of course, compensable. Wages lost while attending the compensation hearing or the trial of the offender may also be recovered. Travel expenses spent in order to appear at the hearing are payable. Similarly, counsel fees can be awarded. Where the victim has to employ others to do his work as when he is self-employed, this expense is a compensable item. Compensation would also be awarded where a victim must keep his employees on the job even though he is not there to supervise them. This situation arose in the *Lindzon* case, where the victim was a dentist and had to continue paying his nurse's salary during the period of his convalescence.

(b) *Pain and Suffering*

Compensation for pain and suffering is recoverable in all provinces, except Quebec and Manitoba. This is, however, just *one* of several heads of damages that tort law permits. The other items of general damages, that is, loss of amenities of life and loss of expectation of life, are not allowed, except in British Columbia. When legislatures use the words "pain and suffering", the boards have concluded that they do not mean to grant full common law damages. If they did, they might easily have provided for common law damages to be awarded, as was done in the United Kingdom scheme.

Not very many problems have arisen in assessing damages for pain and suffering. The boards have tried to develop an informal tariff system for the more frequently encountered injuries. It will be noticed that the amounts awarded are considerably lower than would be awarded at common law. The over-all average or mean award in Ontario is somewhere in the neighbourhood of $1,500. There is, however, a relative consistency of awards in the following types of cases: a broken tooth yields about $100, facial bruising between $100-$200, facial lacerations between $200-$300, a broken nose between $200-$300, a skull fracture or broken jaw between $500-$600, loss of an eye approximately $4,000. All in all, the boards are not overly generous in the quantum of damages that they award. In fact, compared to tort law standards, they are a bit stingy in the amounts of their awards. It may be, however, that they have sound economic reasons for the frugality of their approach, for, if everyone entitled to claim were to receive full common law damage awards, the cost of the scheme might well be too onerous to continue.

Some bizarre results have been achieved. In some cases of very serious injuries, because they are limited to pain and suffering only, the boards may give nothing. When someone is rendered totally unconscious, for example, tort law would compensate to some extent but, because no pain and suffering is incurred, a compensation scheme would not. In the *Blair* case, the victim was beaten into insensibility and suffered severe and permanent damage to his brain and other parts of his body, which left him totally unable to speak or to perform the normal functions of daily life. He was also largely deprived of any mental capacity. In considering whether they would award something for pain and suffering, the Ontario Board pointed out that the claimant had been in a state of euphoria, not realizing what he had lost. He was not worried about his responsibilities nor about the future. He was by no means depressed, but was rather cheerful. He was not saddened at all by his mental and physical disability. The Board concluded that, because he was not suffering, they could not grant payment for pain and suffering. Although fundamentally sound, and in accordance

with the wording of the Act, the Board might have awarded the claimant at least something for the pain and suffering incurred prior to the time he entered this state of euphoria. Certainly, during the time of the beating and shortly thereafter, he was aware of his suffering. Except for this criticism, the reasoning is without reproach. The result, however, may seem rather heartless. Of course, the Board was able to provide Blair with compensation for expenses, both past and future, which mollifies the outcome of the case to some extent. In reality, the only use of any money given to Blair would have been to enlarge his estate for the benefit of his dependants.

Mental suffering is included in an award for pain and suffering. The Ontario legislation defines "injury" as follows: "actual bodily harm and includes pregnancy and mental or nervous shock and injured has a corresponding meaning". Thus, in a case called *Patton,* the applicant suffered nervous shock when part of an Ottawa building in which she was working was blown up by a terrorist. At the time of the crime, she was some 65 yards from the building and had heard, rather than directly saw, the explosion. A few days after the incident, in which she was not physically hurt, she fell into a severe depression. A psychiatrist diagnosed her condition as delayed nervous trauma. The Board awarded her compensation. In another case, *English,* the applicant suffered nervous shock as a result of the murder of her daughter. Chief Judge Colin E. Bennett, who was at that time the Chairman of the Ontario Board, granted her compensation. He explained:

> I am satisfied that the applicant suffered a genuine mental disorder brought about by the news of her daughter's murder, for which she is compensable as an injury which constitutes a mental or nervous shock under the definition of injury . . . her condition was distinguishable and much more serious than that of a parent simply grieving over the loss of a child. Compensation for mourning and sorrow, because of a loss of a loved one, should not be awarded under the present legislation and it may be that the Board in the future will be confronted with certain circumstances where it will be difficult to draw the line between, on the one hand, grief and sadness, and, on the other hand, nervous shock and neurosis caused by the death of a member of the claimant's family.

Unlike the position at common law, where a lump sum award stands unalterable for all time, these boards may review and vary their awards. Under their power, the Board is entitled to lower a periodic payment to a widow who remarries, for example. Further, if a victim suffers a relapse and is more incapacitated than expected, the Board may increase an award for monthly payments.

(c) *Deductions*

In assessing any pecuniary loss, the boards take into consideration any benefit, compensation or indemnity payable to the applicant from any source. Pursuant to this, the boards have consistently compensated only for net losses and no more. In contrast to the collateral benefits rule of tort law, double recovery is forbidden. In the words of the Ontario Board:

> . . . in the ordinary court action for damages . . . the amount of damages to which the plaintiff is entitled is not subject to deduction by reason of a sum received by the plaintiff from a third party under a policy of accident insurance. The reason for the rule is that neither the injury done by the wrongdoer as a result of his negligence nor his liability to pay damages for it is diminished by the fact that the injured party has received money from a third party under a contract of insurance for which he himself has paid the premium or other consideration. The wrongdoer is not entitled to the benefit of a policy of insurance for which he has paid nothing.
>
> It is a different situation here with the state compensating victims of crime. We believe it was the intent of the legislature . . . that moneys received by way of sickness or accident insurance should be taken into account to arrive at the "pecuniary loss", and it was not the intention of the legislature that the injured party be paid twice.

Thus, if a third person paid the medical expenses of a victim, the amount so paid was deducted. So, too, welfare payments and workmen's compensation benefits are discounted. When, as a result of contract, a salary is paid to someone who has been criminally injured, the Board takes this into account and reduces its award. Similarly, when someone provides rent and lodging to a criminal victim *ex gratia,* this is taken into account by the Board. One of the only exceptions to this rule is that a reward given to a heroic victim will not be deducted. In *Lindzon,* the dentist who tried to stop a bank robber was granted a reward of $5,000 by the Canadian Bankers' Association. The Ontario Board did not reduce his award by this amount, because his was an act of bravery performed by an ordinary citizen and not in his line of duty.

There was an interesting Ontario case on this point called *Yorke,* which involved a subrogation claim by the Workmen's Compensation Board of Ontario against the Criminal Injuries Compensation Board for expenses that had been incurred by it as a result of an injury to an employee who had been criminally assaulted. The Board denied the application on the ground that the statute required the *victim* to incur the expense for which he is liable. This application did not comply with that criterion because it was the Workmen's Compensation Board which was responsible, not the victim. The Board expressed its philosophy as follows:

> While we based our decision upon the actual wording of the Act, we consider that the philosophy which prompted the passing of the . . . Act . . . supports our interpretation. We believe that the thinking of the legislature which led to the Act, as amended, was that victims of crime ought to be compensated because of (1) the failure of the state to ensure the safety of its citizens, and (2) the state believes that a humane society, as an additional facet to the welfare program, should compensate victims of crime.
>
> With the exception of compensation for pain and suffering the basis for compensation under the Act is pecuniary loss to the victim . . .
>
> We do not think it was the intention of the legislature that the victim be paid twice nor that claims paid on his behalf by some corporate agency by reason of some contract with the victim should be reimbursable.

(d) *Minima and Maxima*

Most jurisdictions have provided for minima and maxima for their compensation plans. The reason for a minimum amount to be claimed is to avoid the high cost and wasted effort involved in looking after trivial claims. If a loss is only small and causes no hardship, it is felt that it is just not worth bothering with. The reason for a maximum is to avoid bankrupting the plan and to inhibit the criticism that victims are being treated too generously.

The minimum amount of loss required is $50 in Saskatchewan, $100 in Alberta, New Brunswick and British Columbia, and $150 in Manitoba. In Ontario, Quebec and Newfoundland, the plans have no minimum loss requirement and they are not swamped by trivial claims. It seems that most victims of crime do not want to bother with insignificant claims either.

The maxima also vary. In Ontario the maximum lump sum award is $15,000 per victim or $500 per month. The maximum per occurrence is $100,000 in lump or $175,000 in periodic payments. In British Columbia, the maximum lump is also $15,000 per person, but the periodic payment limit is the income from $50,000. The limit for each occurrence in British Columbia is also $100,000 lump, but for periodic payments it is the income from $350,000. In Saskatchewan, the limit, established by regulation, is $5,000, but amounts in excess of that may be allowed with the approval of the Lieutenant-Governor in Council. In Newfoundland, a complex formula permits up to $3,500 lump and $90 per month periodic. A few of the provinces, such as Quebec and Manitoba tie their maxima to the workmen's compensation schemes in those provinces.

The maxima do not apply to victims injured during law enforcement efforts in British Columbia and Ontario. In New Brunswick, the maximum is raised from $5,000 to $10,000 in such cases. In Alberta, where pain and suffering is not normally recoverable, it is permitted up to $10,000 in law enforcement cases.

Need is not normally considered under most Canadian plans although in Newfoundland and Saskatchewan need must be considered by the Board in making an award.

3. Administration

All of the provinces, except New Brunswick, have placed the administration of their schemes into the hands of administrative tribunals. Special criminal injuries compensation boards were established in Ontario, Alberta, Newfoundland, Manitoba and Saskatchewan. In British Columbia and Quebec, the workmen's compensation board administers this program. New Brunswick has chosen to utilize the county courts to operate their program, in much the same way as the Massachusetts and New South Wales schemes do.

These boards are usually composed of 3 to 5 people, normally legally trained. In most provinces, a hearing must be held. Usually, these are public hearings, with an option for *in camera* proceedings. Quebec provides for a written application. British Columbia and Manitoba have a system of officer investigation. The victims may be represented by counsel in most provinces. Written reasons are often given. Most of the schemes allow for appeals to the courts for any reason, but a few of them allow appeals only on questions of law. In all provinces, the commissions are subrogated to the victims' rights against their assailants. In two provinces, the boards have the power to order the offender to reimburse them.

On the whole, the Canadian boards have proved themselves to be capable, humane and efficient. The Ontario Board, for example, received 438 claims in 1971, and granted 196 awards. It disbursed a total of $395,-555. The administrative costs incurred were $58,611 or 15%. In 1972, in Ontario, 488 claims were made, $604,461 distributed, with an administrative cost of $162,879.24 (21% of the budget). It took the typical claim about three months to process. In Alberta, there were 77 applications received in 1971 and 82 awards made for a total spent of $71,477. In Saskatchewan, 69 applications were received in 1971 and 60 awards granted for a total of $59,691. In the latter two provinces, the administrative cost was higher than in Ontario because of the relative paucity of claims.

E. Approaches to Reform

1. How Can the Present Schemes be Improved?

One shortcoming of the existing Canadian plans is their insistence on viva voce hearings. This is costly and time-consuming. In the United Kingdom, a single member of the board may make an offer of award, after merely reading the papers. A hearing is held only if the applicant is dissatisfied with the award offer. The Canadian schemes could speed up their operation and reduce administrative costs if they adopted the British procedure of "hearings on the papers".

A second deficiency is the way in which damages are assessed. The ordinary rules of common law damages are not usually used in these schemes. Only the pain and suffering segment of common law damages are normally considered. The English principle of common law damages would be a preferable yardstick. Court decisions could then act as guidelines for the boards and forecasting would be facilitated. Consistency is a virtue, if it can be achieved.

The most glaring defect with the present system is that too few victims assert their rights. Insufficient effort has been expended to educate the public about its rights under these plans. In Ontario, all that has been done is the delivery of the awards to the press, which, strangely enough, often gives them decent coverage. No sustained publicity, however, has been done. The federal government has recognized this deficiency and has included in all its agreements with the provinces, this clause:

> The Attorney-General of the province shall take all reasonable steps to give publicity to the availability throughout the province of compensation coming within the scope of this agreement as is necessary to ensure that the public will be adequately informed in this regard.

Pursuant to this, some improvements are being undertaken in Ontario and elsewhere. This is desirable and necessary, because, in 1972, only 488 claims were made in Ontario, but there were probably 50 times this many crimes of violence committed in the province. This means that less than 2% of the eligible victims make claims.

Better liaison should be established between the victims, the police, the courts, health agencies and the present compensation boards. Policemen

should be taught about the availability of compensation and be urged to inform victims of their rights. Social service agencies, hospitals and doctors, should be told about the availability of compensation and be supplied with application forms. Groups such as the Rape Crisis Centre are advising the people they help of their right to claim compensation. Other such groups should also do this. A public education campaign could well heighten general awareness. The boards have expressed a willingness to inform the public but they seem to be short of the funds necessary to do this job adequately. They might consider some mechanism for informing every victim of a reported crime by letter of his rights. They might also station some of their employees at court houses to advise victims of the help they can obtain.

When an offender is brought before the court either for trial or for a guilty plea, there is no excuse for not dealing with the compensation question in some way at the end of the criminal hearing. The minimum that we can do here is to assure that every victim who appears in court knows his rights. Whether the informant is the police, the prosecutor, defence counsel or the judge, does not matter very much. The key thing is that someone informs the victim of his rights and helps him to apply for reparation.

One possible method of doing this would be a Victims' Duty Counsel, who would advise the victim of his right to restitution, compensation, and so on (see below). The historic and wise reticence of the legal profession to encourage litigation should not be applicable here. This is not a matter of litigation at all; it is merely the provision of information about legal rights to people who currently do not receive it and who are in need of it.

Consideration should also be given to formalizing the role of the criminal judge in this area. Criminal judges are generally not enthusiastic about handling the compensation or restitution questions. They might, however, be willing to refer the victim's case to the board to be dealt with. The board, on being notified about the case, could send out an application form to the victim with the instructions about the procedure. Perhaps even a personal interview might be arranged. Of course, the case could be referred by the clerk without the intervention of the judge, but it seems more desirable to have the judge do it personally because this would underscore the humane side of the criminal law. Another route we might consider is to permit the judge to go farther and make the determination, after conviction (or even acquittal), that the victim is entitled to compensation and refer only the question of quantum to the board. It is unlikely that we would want to have the entire compensation matter decided by the criminal courts in the cases that come before them, because it might take too much court

time. There are jurisdictions such as New South Wales, Massachussetts and New Brunswick, that utilize their criminal courts in this way, but there would be considerable resistance to this in most of Canada.

2. Should Property Losses be Compensable?

No compensation plan provides reparation for property losses inflicted by crime. The only compensable property loss today is for eyeglasses or dentures ruined during a criminal attack. Consequently, if someone's home is burgled or if someone is defrauded, he must bear his own loss under the present Canadian schemes.

There are several reasons for this. First, the need is not usually as great in a property loss case as it is in a personal injury case. The need is less because insurance often covers property loss by burglary, arson and the like. Moreover, stolen chattels, automobiles in particular, are often recovered by the police. Basically, it is felt that a citizen can better absorb a small financial loss than he can the losses resulting from a physical injury.

This rationale is not always appropriate. For example, if one gets slapped across the face he is compensated, but if his business is burned down or his life savings embezzled, he gets nothing. One should not make the facile assumption that personal injury is *always* serious and that property damage is *always* trivial. The facts may well dispute this.

Second, it is said that property claims would generate more fraud than personal injury claims. This may well be true. It is, perhaps, more tempting to burn down one's business to collect compensation than it is to break one's own arm. Nevertheless, both of these acts are, thankfully, very rare indeed. A more serious problem may be the exaggeration of the value of the property lost or the amount of money stolen. These problems are, however, no reason to deny all claims, including the legitimate ones. Insurance companies and civil courts seem to be able to keep fraud to a minimum by their investigations and evidentiary rules. There is no reason to believe that a compensation plan could not protect itself against undue abuse by fraud.

Third, the cost of compensation for all property loss would be prohibitive. In 1969, for example, there were 607,544 cases of robbery, theft and other property offences reported as well as 57,788 cases of fraud, false pretences and forgery. In less than one fifth of these cases were persons charged (113,313). The number of crimes against the person was only

85,056. In these cases, over one third led to a charge (30,485). There is no doubt that it would cost a great deal to compensate for these losses. However, rather than being a reason for refusing to provide reparation, the magnitude of the losses is an argument in favour of providing aid. One should recognize, nevertheless, that it is unlikely that the public would want to pay the bill for many of these losses. It is wise to encourage people to look after their own property and to buy insurance against loss.

One possible direction of reform in this area would be to adopt a compromise between total compensation for property loss and no compensation at all—partial compensation in cases of serious hardship. If one adopts the state duty rationale for these plans, one should logically provide compensation for losses in all property crimes. The rationales of law enforcement, inability to make restitution and consistency also point toward compensation. On the other hand, if one adopts the welfare theory, the only losses that should be covered are those where a person is left in need.

Initially, crime compensation programs had to be kept inexpensive in order to gain public acceptance. Compensation for property losses might have been too costly. These schemes have now proved themselves to be relatively cheap and popular. Perhaps we are ready now to expand them into the area of property loss in some cases. While the public might not be willing to compensate for all property loss, it might be willing to allow for partial compensation for property or monetary loss that causes serious financial hardship to the applicant. Thus, if someone was robbed of a few dollars, we might not wish to compensate him, but if his life's earnings have been stolen, leaving him impecunious, we might permit a contribution toward partial reimbursement. (This resembles a technique used by the Law Society of Upper Canada to compensate clients who are defrauded by their lawyers.) Consequently, if someone is insured against arson or burglary, he could not claim. Nor could his insurance company claim reimbursement. We certainly would not want to reimburse department stores for their losses to shoplifters or credit sellers for non-repayment by fraudulent customers.

Effective controls could be placed on the plan to avoid leaving it open to enormous funding problems. A minimum and a maximum limit could be set for an individual claim. In addition, the government might supply only a set amount each year for these types of losses. Claimants would have to share prorata if the total amount of the claims threatened to exceed the funds allowed.

3. Should Penal Fines be Used for Victim Compensation?

There is a great deal of money collected annually in Canada in the form of penal fines. In 1968, in Canada, 10,558 persons found guilty of their first indictable offences were given the option of paying a fine. Many more were so treated in summary conviction offences. In Ontario alone, in 1972, $31,-314,795.84 were collected by the provincial courts (criminal division). This would have more than covered the $767,340 required to run the Ontario crime victim plan in 1972.

Fines collected from offenders should not go to the state. They should go to the victims of the offenders. Preferably, individual offenders should be made to pay restitution to their own victims. (We shall discuss this at greater length later.) However, if there is no victim or if there has been no loss caused by the criminal conduct, the fine should preferably be placed into a fund for the benefit of other victims of crime. In this way, the criminal acts, the monetary penalties imposed for them and the victims' losses could be related to one another. Those who paid fines would learn that these funds were used to help other victims damaged by similar conduct. Those who received compensation would realize that some of the money came from fines paid by various offenders. Victims would be more impressed by the humanity of the criminal law if the money collected were not confiscated by the state, but rather was paid to those who suffered as a result of the conduct. In imposing fines, judges would consider the fact that amounts levied would be paid to victims and would act accordingly.

There is an economic rationale that could possibly be advanced in favour of this practice. It is called market deterrence by a scholar from Yale Law School, Guido Calabresi. It may not be apt to criminal activity at all, but it is worth mentioning. Calabresi argues, in the completely different context of tort liability, that an activity ought to bear the cost of mishaps that occur during its conduct. If this were required, the cost of that activity would rise to reflect more accurately the cost of the accidents it produces. Those who engage in that activity might then shift to other activities that are less costly. Eventually, the optimum cost of the activity would be reached. In this way, the public could make a better choice as to how it would allocate its economic resources. By requiring that all the losses incurred by crime victims be borne out of penal fines, the amount of the fines would more closely reflect the full costs of crime. If the amount of fines went up as a consequence, the quantity of criminal activity might be reduced accordingly, because its potential cost to the violators would increase. There is some doubt whether this market deterrence rationale would have much force in the area of criminal activity.

4. Would a Public Insurance Scheme be Preferable to Compensation and Restitution?

There are three directions in which criminal compensation can move: (1) toward social welfare; (2) toward a tort law solution; (3) toward restitution through the criminal law. Each alternative reflects a different philosophy of criminal victim compensation. The next three sections will consider these three approaches individually.

If the sole aim of a compensation plan is to aid people in need, that is, the social welfare rationale, we should move in the direction of a public insurance solution for victims of crime. Already, public insurance covers the losses of crime victims to a large extent. As pointed out above, the hospital and medical costs of the victims are borne by the provincial hospital and medical care schemes. These are financed through premiums paid by everyone. Similarly, if someone is unemployed because of a criminal injury he will be paid up to $117 per week for up to 15 weeks by the Unemployment Insurance Commission. This too is financed out of the U.I.C. premiums paid by the 94% of Canadians who are not self-employed. The Canada Pension Plan, which is a social insurance scheme, is also available if the injury is permanent and total and lasts beyond four months. If a person is on the job when he is criminally injured, workmen's compensation will cover him. And if he is rendered destitute as a result of crime, he may go on welfare, which is publicly financed.

Consequently, if public welfare is our only goal, we should move in the direction of abolishing special crime victim schemes and integrating them into the general social insurance structure of the land. We should be pressing for the elimination of the distinctions among those injured in car accidents, on the job, by defective products and by criminal acts. The welfare strategy would then be to enrich social insurance benefits for all victims of adversity—with crime victims merely being one of several groups being assisted.

Quebec and British Columbia have already begun to move in this direction by dealing with crime victims in the same way as injured workmen. All the criminal injury plans already deduct amounts received from the various social welfare schemes. Moreover, the social welfare schemes cannot secure reimbursement from the criminal injury plans (see *Yorke*). In other words, many of the basic costs of criminal injuries are already borne in the first instance by these various public insurance schemes. It is primarily the extra expenses and pain and suffering that are paid out of the crime victim schemes. As the public insurance scheme is broadened and improved, the amounts left to be paid by the criminal injury scheme is diminished. If we were to adopt a guaranteed annual income, the importance of criminal compensation would be further reduced.

If the welfare goal were pursued to its ultimate conclusion, there would be no need for a special crime victim compensation scheme at all, since everyone would be looked after whatever misfortune befell him. A broad compensation plan along these lines is coming into force this spring in New Zealand. All injury victims are to be compensated equally and their right to sue civilly is being abolished. In the United Kingdom a similar scheme is being studied by the Royal Commission on Bodily Injury, which is headed by Lord Pearson. It may be that Canadians will want to travel this route eventually.

If we do, however, there is little likelihood that compensation for pain and suffering will survive. This would be a serious loss, because it is the pain and suffering award that dramatizes the basic humanity of the act of compensation. Further, evidence of need may be required. If this were done, many victims of crime would be denied compensation, because they had no need of aid. Such a development would eliminate many of the advantages of the present scheme, which pays all crime victims, regardless of need. Even those who are not destitute appreciate the society's concern for them as expressed in a compensation award.

In sum, movement toward enriched social welfare benefits is desirable and probably inevitable. The farther we go in this direction the less need there is of a special compensation scheme for criminal victims. However, these social insurance schemes are costly and progress here is slow. Until the day comes when all losses from whatever source are looked after, we will need to retain the more limited victim of crime schemes. It would, therefore, be unwise at this time to integrate these schemes with the social insurance, because the crime victim would be treated less well under them alone.

5. Would a Strengthened Civil Law Remedy be Preferable?

Another direction in which we might move is to strengthen the private tort remedy. To date this avenue of redress has been most ineffectual, but it could be rendered more meaningful. To achieve this, legal advice must be made available and victims of crimes (intentional torts) would have to be informed of their rights. Legal aid is widely available now in Canada, but many people are still unaware of this fact. In addition, many people are just not aware that they have a right to sue an attacker for damages as well as press criminal charges.

A bigger problem than lack of legal advice, however, is the impecuniosity of the known defendants and the larger number of unknown assailants. This is why the tort right has been an empty illusion. An agency like the unsatisfied judgment fund could transform a useless tort right into a real source of compensation. These funds currently operate in each of our provinces and provide payment to the victims of uninsured auto drivers and to hit-and-run victims. The modus operandi of these funds resemble that of an insurance company. If someone who is without funds and without insurance is sued, the fund is notified, it defends the action and pays any judgment up to a certain maximum, now $50,000. The defendant motorist is obligated to reimburse the fund for any amount it expends on his behalf. In cases of hit-and-run, the victim sues the Registrar of Motor Vehicles, who acts as a sort of representative of the unknown driver. If a tort award is made, the Registrar pays it. These unsatisfied judgment funds could easily be expanded and made available to victims of crime in the same way that they are to car crash victims.

Such a step would identify the problem as one of the inefficiency of tort law. By providing a backstop in this way, tort law could be made to operate as it was meant to function. The concept of individual responsibility for one's conduct, the bedrock of tort law, would be preserved. By using civil law suits, the individual victim would retain control over his own affairs. We would avoid some of the welfare stigma that surrounds an application to the criminal injuries compensation boards, since damages would be awarded as a matter of right, not as a matter of "charity". Another benefit of the tort route is that damages would be assessed more fully on the common law basis, each victim receiving tailor-made awards. Moreover, the tort doctrines of consent and provocation would be available to police the claimants' conduct to a degree. Some of the Negligence Acts might have to be amended, however, so as to permit a reduction of the amounts recovered in all cases of victim contribution, not only where they are negligent or at fault.

Broadening the availability of the tort action might reduce our reliance on the criminal courts to handle such disputes. It may be that many victims would prefer to sue their attackers, if it is profitable, than to prosecute them. In this way many cases could be settled without the intervention of the police and without the invocation of the harshness of the criminal system.

This proposal is not without problems. First, tort suits are extremely costly, far more expensive than board hearings. Even if legal aid is provided, we may not choose to devote this much money to legal expenses in this type of claim. Second, the pace of tort litigation is slow, much more sluggish than that of administrative hearings. Third, the amounts to be paid under a tort standard would be much higher than the one presently used. Fourth,

is the problem of a victim becoming involved with someone who has already attacked him once. He would, for good reason, fear that he might be injured again if he chooses to sue his assailant.

There are some European jurisdictions that permit a tort claim to be added to a criminal prosecution. It seems to work quite well where it is permitted. This device has many advantages, and should be seriously considered for Canada. There are constitutional problems with it. Moreover, it would probably be violently opposed by criminal lawyers and judges, who are anxious to keep the question of tort compensation out of criminal trials.

6. Should We Expand the Use of Restitution?

(a) *Arguments in favour of restitution*

Many sociologists and penologists contend that it is good reformative therapy for the offender to be made to provide restitution to his victim so as to bring home to him the consequences of his conduct. An English White Paper entitled "Penal Practice in a Changing Society" (1959) stated:

> It may well be that our penal system would not only provide a more effective deterrent to crime, but would also find a greater moral value, if the concept of personal reparation to the victim were added to the concepts of deterrence by punishment and reform by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realization of the injury he had done to his victim as well as to the order of society, and the need to make personal reparation for that injury.

Restitution differs from civil liability. Civil liability can be agreed to by the parties, whereas restitution needs the imprimatur of the court. Restitution is available only if a criminal offence has been committed, but civil liability may be ordered for wrongful conduct that is not criminal.

Restitution should also be distinguished from compensation. Restitution is paid by the offender to the victim under the order of a criminal court. Compensation may be paid by a third person, usually the state.

The most consistent supporter of restitution as a rehabilitative technique is Professor Stephen Schafer, who has written a book (Compensation and Restitution to Victims of Crime, 2d ed., 1970) and several articles on the topic. Professor Schafer advocates the concept of "correctional

restitution" as a penal instrument through which "the criminal can feel and understand his social responsibility and thus alleviate his guilt feelings". He believes that it is better to require the offender to pay for the loss he has caused than to have the state pay for the loss.

Let us consider Professor Schafer's most alluring argument:

> To restore the injured victim to his pre-crime position is primarily the obligation of the offender. The offender should be required and permitted by the penal system to fulfill this obligation. Such an approach would further the interests of the victim, and also perform a rehabilitative function within the penal system. If the offender were permitted to be at liberty, either immediately following conviction or after a reduced sentence, on the condition that he use that opportunity to make restitution to the victim, penal rehabilitation goals would be furthered and society would be freed of the double burden of compensating the victim and providing penal shelter to the offender. . .
>
> Restitution is compensation made by the criminal himself, ordered by the criminal court and accomplished by the offender's efforts as part of his criminal sentence. The compensatory aspects of restitution are no less justified than is compensation itself. Correctional restitution, however, offers more to a solution of the crime problem. It does not allow the offender to terminate his relationship with his victim, but rather forces this relationship to be maintained until the victim's original position is restored. This is what our modern understanding of the criminal-victim relationship demands. Correctional restitution is the type of compensation that holds the promise of both restitution to victims of crime and implementation of the reformative and corrective goals of the criminal law.

Most people involved with corrections are sympathetic to these views. For example, the Canadian Criminology and Corrections Association recently included in their brief to the Law Reform Commission of Canada a call for greater use of restitution in criminal cases. Studies show that offenders generally seem to feel better when they have made restitution and that victims seem too be happier when they have received restitution from their assailant.

Widening the use of restitution might allow us to reduce the number of offenders we place in penal institutions. Not only would this foster rehabilitation, but it would also save taxpayers some money. For those offenders who must still be sent to prison, restitution might be used as an incentive for their earlier release. This too might aid in their rehabilitation and in reducing further the number of inmates in prisons.

(b) *Arguments against restitution*

There are opposing views. Some commentators are rather skeptical about the efficacy of restitution as a deterrent or as a reformative device. The fact is that we really do not know very much about how criminal sanctions actually function. Even if there were some value in *voluntary* restitution, they argue, that *compulsory* restitution might further alienate the offender from his society. This would be the case especially if the offender felt that his victim was unworthy of restitution.

Another possible drawback is that offenders required to pay restitution may choose to steal and burgle in order to raise the money needed to reimburse their victims. The result may therefore be more crime, instead of less.

There is also the danger that offenders will feel too harshly dealt with, if they are not only punished, but also made to pay restitution. This may look like double punishment to many offenders. In practice, restitution should supplant punishment in part, rather than be added to it, but offenders may not realize or even agree with this.

Another problem is that restitution may make rehabilitation more difficult than it now is. It is difficult to convince convicted people to reform and to lead law-abiding lives. The obstacles are already nearly insurmountable. To add another one—repayment of losses to the victim—may be the straw that breaks the camel's back. It may lead some offenders to give up altogether their hope of reformation.

Lastly, contact between the offender and his victim may not be wise. It would often lead to uneasiness and resentment. It may exacerbate relations between them and lead to further violence. Personal contact may be avoided by assuring that the amounts are paid, not directly to the victim, but to the court to be forwarded to the victim. In any event, continuing hostility is a shortcoming to be considered in evaluating a wider use of restitution.

(c) *Some practical problems*

There are so many practical problems with restitution that it could never replace altogether other forms of disposition. Most importantly, offenders very often escape and are never found. You cannot order restitution against a phantom, whose identity is unknown. Even if you capture and convict an offender, in most cases he will be impecunious. The basic reason why so many individuals turn to acquisitive crimes is their inability to make a living in a lawful way. Our correctional system provides very

little in the way of programs that enable prisoners to earn any income. The incentive allowance is woefully inadequate. In the rare program where an inmate makes arrangements to work for pay, he must repay the prison for room and board ($20 per week in Ontario institutions) and support his family. There will be little left for the victim. Consequently, to render restitution more effective, provision will have to be made either to provide gainful work or to pay decent salaries to inmates of prisons out of which the victim can be reimbursed. We are moving in this direction. An abattoir has recently been established in one Ontario correctional institution. A few inmates are gainfully employed there. Some prisoners are currently permitted to leave their institution during the day for regular employment on the outside. The more we do in this regard, the more we can use restitution as a tool for reformation. Without such reforms, however, restitution will remain an imperfect remedy.

There are also administrative problems with restitution. The Canadian Committee on Corrections (Ouimet Report, 1969) thought that the failure to invoke the restitution provisions was 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". They concluded that "criminal procedures are not readily adaptable to the trial of civil issues". Although this difficulty can be serious, especially in the case of provincial judges who do exclusively criminal work, it does not apply to superior, county and district judges who do both criminal and civil work. Furthermore, the methods of assessment of civil damages could be taught to criminal judges.

Another difficulty is that criminal lawyers are opposed to cluttering up the criminal trial with considerations of restitution. They fear that a jury (and a judge) will be more likely to convict an accused person if they know that compensation to the victim depends on their verdict. As a consequence, they fear that the accused will not be treated as fairly in that they will not receive the benefit of the doubt as much. This is a telling point. It might well prejudice the outcome of a criminal trial if the victim were to testify not only as to what occurred, but also as to his costs, his loss of job, his pain and suffering, etc. Sympathy for the victim might operate to the detriment of accused persons.

There are also dangers involved if the victim has a financial stake in the outcome of the proceedings. It is true that victims are already involved in the criminal proceedings as interested witnesses. There may already be some temptation to exaggerate or falsify. It might be unwise to increase the incentive to perjury by rewarding the victim financially upon conviction.

Thus, if the role of restitution is to be enlarged, it should probably never be considered prior to conviction, but only afterwards as part of the sentencing process.

(d) *Present use of restitution*

Restitution plays a minor role in Canadian criminal justice today. Primarily, it is used in theft, fraud and malicious damage cases, where the accused appears able to repay the owner of the property he has taken or damaged. The full potential of restitution has never been achieved nor even seriously studied. Corrections officials have almost nothing to do with the problem, because virtually no one presently in prison is under any obligation to make restitution. Many of these prison authorities support the idea of restitution but they have no control at all over the sentencing function of the courts. Judges, with rare exceptions, do not concern themselves very much with restitution. Crown counsel seldom seek restitution for they have little to do with the victims, who are merely the prosecutors' witnesses. The police rarely make requests for restitution. The victim is seldom aware of his rights. Occasionally, he may ask the police or the Crown for restitution or he may speak out in court. One Crown counsel told me of an incident where a complainant in an assault charge, during the sentencing, stood up in court waving his broken eyeglasses in the air. He took the hint, asked for restitution for the cost of the glasses and it was ordered by the court as a condition of probation.

The most important instigator of restitution today seems to be the defence counsel. One might expect that the interest of his client would be in conflict with that of the victim. This is wrong. When defence counsel seeks to arrange for restitution he is doing it in his client's interest alone. It is only coincidentally that it serves the victim as well in that he gets the benefit of a restitution order. Nevertheless, it is in the interest of the offender to demonstrate to the court that he has repented and that he wishes to make amends. If he repays the money or property taken or if he pays damages to his victim, his sentence will probably be reduced.

Sometimes, however, defence counsel's suggestions to their clients to make restitution fall on deaf ears. In one recent case of fraud, where the accused travel agent embezzled some $50,000, his lawyer tried to convince him to make restitution. If he had done so, his sentence would have been about six months. He refused. The sentence given was eighteen months. In substance, the accused chose to keep the $50,000 and spend an extra year in jail. It probably was not a bad idea for him, because he was unlikely to be able to earn $50,000 in a year. Yet the interest of the community and of rehabilitation might have been better served had he been required to give

back the stolen money. Yet the court did not consider restitution because defence counsel, on the instructions of his client, did not raise it. Consequently, offenders very often resist making restitution as not in their best interest and courts seldom force them to do so.

(e) *Reform possibilities*

It would be desirable to have restitution play a greater role in corrections. But restitution will never replace completely the present correctional methodology. Nor could restitution ever take the place of the present crime victim compensation schemes. There will always remain offenders who must be isolated from the rest of society. In addition, there will always be some offenders who cannot or will not be willing to make restitution. Expanded use of restitution, however, should be encouraged.

Even under the present law, more use of restitution is possible. Crown counsel should be sensitized to the potential for restitution. A few of them do seek restitution in appropriate cases, but most do not do so regularly. Criminal judges, particularly provincial judges, should be encouraged to make more use of restitution. Some of them do order restitution frequently, whereas most rarely do it unless it is suggested to them by counsel. A few education campaigns on the virtues of restitution directed at judges and prosecutors might make them more aware of its potential and increase reliance upon it.

One way of increasing the prevalence of restitution would be to have someone in court to advise the victims of their right to it. We could call him a "Victim Duty Counsel". Presently, the legal aid duty counsel represents only offenders, whose interests are in conflict with the victims'. The victim is often alone and without legal advice. Occasionally, a prosecutor or a policeman will inform him of his right to restitution or suggest that he file a claim with the criminal injuries compensation board. By providing a formal mechanism for advising victims, we could, without changing a line of the law, increase the use of restitution and also increase the incidence of crime compensation claims.

This much can be done without any legislation, but more is necessary. The present law of restitution should be amended to foster its use. Sections 653 and 663(*e*) are not flexible enough. A judge should have the power to order restitution on his own, without any need for an application by the person aggrieved, as required in section 653(1). Furthermore, a court should be empowered to grant restitution for all kinds of losses—not only property loss, not only "actual loss", but also for non-material loss.

Amounts in the nature of pain and suffering and punitive damages should be permissible in personal injury cases. In addition, the court should be permitted to order restitution by itself or in conjunction with any other type of disposition, without the necessity of a probation order.

But it is not enough merely to expand the powers of the court. Legislative changes should *require* consideration of the use of restitution at several levels. For example, section 662(1) could be amended to require the presentence report to contain a discussion of the feasability of restitution. Moreover, courts could be required to consider, during the course of sentencing, the matter of restitution. It may be that the Parole Board should take into account the possibility of restitution in their deliberations. We should do everything we can to encourage the consideration of restitution at every possible stage in the proceedings.

Increased use of restitution orders will not eliminate the need for the criminal injuries compensation boards. Because many of these restitution orders may not be paid immediately or at all, the boards will have to pay the money to the victims in the first instance. The offenders' obligation will then be assigned to the boards who will try to collect from them the amounts paid to the victims in their behalf. Of course, where there is no order for restitution, the boards will also be required to pay the victims.

One recent case depicts some of the problems we may encounter. A provincial judge, known to be a great believer in restitution, recently dealt with a case involving a miner who had beaten up a nightwatchman during a burglary. The offender pleaded guilty to the charge, was placed on probation and ordered to pay $5,000 in restitution. He returned to the northern mines and his work. Not receiving anything from the offender, the victim applied to the Ontario Criminal Injuries Compensation Board for help. They granted him an award of $2,000 according to their lesser scale of compensation. The offender, hearing of this, appeared before a local judge and had his restitution order reduced by $2,000. This is ludicrous, but it points up the difficulties and the need for closer liaison between the different agencies. By the way, the offender is now in prison serving time for some other charges.

In conclusion, therefore, we should expand the use of restitution. This would humanize the criminal process and serve correctional rehabilitation. We cannot, however, expect to transform the entire penal system to one of restitution. This is not a very dramatic conclusion, but this is the best we can do in the circumstances.

F. Summary and Conclusion

After a long period of neglect by the criminal law, our attention has begun to revert to the plight of the victims of crime. The ordinary remedies available to them were inadequate to repair the losses they incurred as a result of criminal activity. The tort suit and restitution were rarely utilized. Social welfare schemes, private insurance and charity reduced the financial hardship suffered, but it was not altogether eliminated. Because of this, a vigorous movement for compensation for victims of crime was launched and was largely successful in Canada.

Several arguments were advanced in favour of crime victim compensation schemes. The most influential was that demands of social welfare require financial aid to crime victims. The second most frequently used argument was that, because the state has assumed a responsibility for law and order, it should compensate the victims of crimes that result when the state's security system breaks down. Moreover, it was suggested that law enforcement would be improved by more crime reporting by victims. In addition, the state, having made it impossible for the offender to reimburse his victim by incarcerating him, ought to provide compensation to his victim. Further, there is a need for consistency among crime victims, auto accident victims, workmen, etc. Lastly, these are politically popular programs. The negative arguments were less convincing and gradually the provinces began to respond.

New crime victim schemes have been erected in eight provinces of Canada. They function efficiently and with humanity. They provide some monetary aid to the victims of crimes of violence who apply for it, including payment for pain and suffering. But they are by no means perfect.

The present compensation schemes could be improved in several ways. Hearings could be done on the papers and damages could be assessed on the full common law basis. Greater effort should be expended to publicize the schemes to the general public and to professionals who come into contact with crime victims such as police, doctors, etc. Better liaison between the courts, the police and the boards is vital. We should consider whether, after conviction in the criminal courts, the judge should refer the case to the crime victim compensation board or even make a determination that the victim is entitled to compensation from the board. A Victim's Duty Counsel might be appointed to perform the valuable function of providing advice to victims about their legal rights, something they now lack.

We should consider whether it is time to expand the present compensation schemes to cover property losses, something they currently fail to do.

It is suggested that we might permit partial compensation in cases when serious financial hardship has been caused by a property crime. Another reform that seems useful is to allocate criminal fines to a fund that would be available for crime victim compensation.

The major question to be decided, however, concerns whether we should move these schemes in the direction of social welfare, tort law or restitution. The three alternatives are not mutually exclusive. For the present it would not be wise to integrate criminal injuries compensation with social welfare programs, because crime victims would be less well off under them. These schemes already provide substantial aid to crime victims, which is deducted from their awards. We should support the enrichment of these general programs because all victims of adversity will be better off and there will be less need for special crime victim schemes. Some day, when these programs are ample enough, we may abolish the crime victim schemes, but we should not do so until that time.

Improving the efficacy of the tort remedy is also worthwhile. The more people that avail themselves of tort suits, the less need there is for social welfare, crime victim compensation and restitution. The difficulty, however, is that it would cost a great deal of money to render the tort action meaningful, since it is a much more expensive remedy than the other. We should consider broadening the operation of the unsatisfied judgment funds to cover crime victims in order to encourage more reliance on tort remedies and less on others. Perhaps some of the penal fine money could be used for this purpose.

Expanded use of restitution is desirable, because it fosters the rehabilitation of the offender as well as provides compensation to the victim. Judges and prosecutors should be sensitized to the utility of restitution. Various amendments to the Criminal Code should make the remedy more flexible. Presentence reports should be required to consider the advisability of restitution. A Victim's Duty Counsel could expand the use of restitution by advising victims of their rights to it. There are many problems with this, but they could be minimized. Correctional institutions would have to arrange for salaries for inmates before restitution could be made really effective. Wider use of restitution is worth pursuing, because we could reduce the prison population in this way. Restitution, however, will never replace the present victim compensation schemes completely, because restitution is too unreliable a source of reparation. Nor will it eliminate the need for other forms of disposition.

In short, there are no bold or simple solutions that will solve all the problems of restitution and crime victim compensation. We must continue improving each of the aspects of the different systems that impinge on this

area, for each of them serves a valuable function that the other mechanisms do not serve. We must conclude that, here like elsewhere, reform is an undramatic and incremental enterprise and that this is probably a necessary condition for its success.

The Law of Probation

by

Graham Parker
Osgoode Hall Law School
York University

Table of Contents

page

Introduction 55

A. The Climate of Opinion 59

B. A Survey of the Provinces 67

Alberta 68

British Columbia 71

Manitoba 73

New Brunswick 76

Northwest Territories 76

Ontario 77

Prince Edward Island 77

Quebec 79

Saskatchewan 80

Yukon Territory 85

C. The Law and Probation 87

Some Historical Background 87

Classical Criminological Theory and the "New Criminology" 87

The Concept of Probation and other Forms of Penal Software 88

Some Canadian Background 91

Suspended, Conditional and other Alternative Sentences 94

Binding Over and Preventive Justice 96

Pre-Sentence Reports 98

Eligibility for Probation 107

Absolute Discharge 108

Summary 113

Introduction

In retrospect (and introductions are no doubt always written in retrospect), this report concentrates too much on probation, and particularly probation in its present form.

This was inevitable because probation is one of the few dispositions (other than fine) which does not involve imprisonment. We now have absolute discharge, as well as the conditional discharge of the suspended sentence, but, as yet, we have very little experience of it. If we are to examine the past and future law of non-custodial dispositions we must look at the previous experience of the law in dealing with similar problems.

Furthermore, if we are to continue to have a process for dealing with those who do social harm, lack self-control or are otherwise deviant, then there must be a procedure, even if it is of a "diversionary" character. Probation is capable of great flexibility and even diversionary procedures may be implemented by means of probation (or its analogues) or by those skilled workers we now find in the probation service or social welfare departments.

The recurring themes of this study are few but they are difficult and elusive. How can we define discretion? How can we harness it—to protect individual freedom, to achieve the objects of the process which must grapple with the social phenomenon of crime, and to ensure that the ultimate consumers in the system, the citizens, feel protected, involved and concerned?

Probation has been a noble experiment; it does not deserve the denigration of being labelled a failure because no matter how inefficient or ineffectual it may appear, it has not involved fruitless expenditure on prison-building and has therefore kept offenders from being incarcerated. Probation shares with the juvenile court the distinction of having been, in its time, an avant-garde penal method—softening up the stereotyped thinking of those who believed all criminals were "bad" and should be behind bars. These repressive elements in the community included, unfortunately, many criminal court judges as well as the man-in-the-street.

Many of the ideas which were incorporated into the original juvenile court—diversion, a diminution of the influence of the adversary system, co-operation between the hitherto antagonistic forces of police and social work, having judges who were more humane and better informed rather than mere umpires in an eneven contest, and, of course, more enlightened dispositions—are now being recommended for the adult criminal process.

Within the rather narrow limits set for him, the probation officer has been an innovator and social pioneer. He (or she) created changes in public attitudes by being a strange mixture of policeman and old-fashioned "charity" worker. Yet this compromise position of the modern social worker has caused difficulties for anyone preoccupied with civil liberties or strict definitions of legal relations. Is the probation officer a social worker, friend of the probationer or an officer of the court who must uphold the strict letter of the law? Is probation a privilege or a right? Should probation officers have an active role in sentencing rather than being compliant servants of the court? Is probation punishment or treatment?

Perhaps, once again, the social worker can be the innovator—in forming a bridge between the legalistic view of punishment which encompasses the stylized "fact"-finding process of the adversary system and the demand for empowerment of the powerless—between the repression of the punishment system and the fostering of community concern and development. Or, in other words, the conflict model may be replaced by the cooperative process. Under such a scheme, members of the probation service may be given the flexibility to be something more than "officers of the court."

To achieve this they must break away from being mere functionaries who serve the product of the legal process and be given an opportunity to create, or help create, the product. Inevitably, these projects require legal definition. Until recently, the role of the police and the prosecutor, in processing those who are suspected, arrested, summonsed or charged with "crime," has been the *terra incognita* of the criminal process. Diversion is not new; it has been practised by police officers and Crown counsel within a very closed system. "Low-visibility" discretionary decisions by police not to arrest or charge a suspect have always been common but only recently documented. Plea-bargaining between Crown and defence counsel is a process which can be characterized as relative diversion. Until recently, this process was treated in a hypocritical fashion with lawyers discounting its importance or frequency and judges disavowing knowledge of such practices.

A more open approach is now needed. The probation service must be created, under a new name if necessary, but with a new resolve to break down old structures and old prejudices. For instance, "responsibility" can no longer be regarded as a merely technical legal concept. We must ensure that "responsibility" is viewed as a general social concept. The social deviant and the authority which attempts to control him must both be apprised of the need for a wider definition of "responsibility" which results in a common understanding that social harm must be controlled—the offender must learn self-control and the offended society must invent cooperative processes for creating a climate of self-control.

How can this be achieved? A diversion process is applied in some juvenile jurisdictions and the same must be implemented for those who are chronologically adult but have continued to show social irresponsibility. The dilemma facing any law-maker is that there must be built-in civil liberties guarantees and clear socio-legal definitions. The legal parameters are essential and yet the human element is the final and crucial ingredient. We must ensure that we do not so overburden the system with rules and administrative superstructure that the responsible citizen who wants protection and the citizen who has shown irresponsibility and needs help are not forgotten. This is where the past experiments of probation and the promise of new dimensions in creative social work make an understanding of probation important.

In the final analysis, any reforms suggested are examined within the framework of the law. While there are no doubt good arguments for redefining the problem so that crime and deviance are not synonymous and for imagining a system which does not have a legal basis, this view is not pursued in this paper. On the other hand, this should not be taken to mean that the stringent application of and blind adherence to the law is the only *modus operandi.* It is merely a framework.

A. The Climate of Opinion

A discussion of the law of probation and other conditional dispositions hardly calls for a long discourse on alternatives to imprisonment because the Law Reform Commission's Working Paper 3 has adequately laid the groundwork. Yet a short description of the climate of opinion seems in order.

In North America, those well-known public documents of the nineteen-sixties, the reports of the Canadian Committee on Corrections (the Ouimet Report) and the U.S. President's Commission on Crime describe the middle ground of reform—showing the failure of prison as a crime preventive, calling for more flexibility in correctional programs and urging a curb on "overcriminalization" and the unnecessary control of human behaviour by the criminal process.

These views have become the basis for reform programs in many jurisdictions in North America. Yet there are conservative commentators who seem to believe that we need more imprisonment despite the fact that prisons have obviously failed. The right-wing penologists use the imagery of war. They plan a crusade against crime in very much the same terms as our Victorian forbears. Both have placed great faith in "scientific" expertise and exactitude. Both seem preoccupied with "serious" crime. While the Victorian reformers showed compassion for the juvenile and first offender, the Bristish Conservative Party document, *The Conquest of Crime: A Proposed Programme for the Seventies* by W. R. Rees-Davies (London, 1970) makes no mention of probation or the problems encountered by "modern" correctional institutions. Instead, there is a proposal for an army-like national police force with all the "scientific" aids which can be mustered, although, with the exception of the use of computers and electronic communications equipment, there is little indication of how our treatment of wayward human beings can be made "scientific" and certain of success. Prison remains the norm of penal coercion although, under this program, deviants addicted to drugs (including alcohol) would no longer be jailed; instead they would be subjected to compulsory detention in "treatment centres".

Jeffery, the author of *Crime Prevention Through Environmental Design* (1971) is another conservative voice but at least he is prepared to admit

the failure of prison, except as a last resort for incorrigibles. He is almost a pure Classicist, with a considerable preoccupation with "scientific" methods which are, unfortunately, only tentatively formulated. He shares with Beccaria a belief that only certainty of detection, conviction and punishment will prevent crime. Official discretion and the uncertainty of dispositions have led to the proliferation of crime and the ineffectiveness of punishment. The helping professions, including social work, have not kept the promise of the rehabilitative ideal. Those who cannot be "cured" by threat or imprisonment should be subjected to Jeffery's scheme of social environmental engineering which relies heavily on Skinnerian methods.

Jeffery sees the community making a contribution—by making the neighbourhood safe and by co-operating with the local policeman in crime prevention.

Ironically, a more radical group shares Jeffery's distrust of official discretion, but with a vastly different emphasis. The team which wrote *Struggle for Justice* (American Friends' Service Committee, 1971) views penal "treatment" as a sham and would prefer to characterize "all penal coercion" as punishment and therefore limit it as much as possible. Punishment must only be regarded as society's "last resort" to be used "when no other less stringent measures of education and social control will suffice". (at 24) Treatment-oriented reformers who believe that "treatment somehow removes the sting of punishment from penal coercion" are self-deluding. (at 25) Admittedly, the group is talking mostly of indefinite and indeterminate sentences of imprisonment but the warning against unlimited discretion should be heeded.

Struggle for Justice also says of the evils of imprisonment:

> . . . it denies autonomy, degrades dignity, impairs or destroys self-reliance, inculcates authoritarian values, minimizes the likelihood of beneficial interaction with one's peers, fractures family ties, destroys the family's future prospects for any improvement in . . . economic and social status. (at 33)

The probation service would no doubt self-righteously feel that the concept of the conditional discharge or the suspended sentence has the singular virtue of not being named in that indictment. Could our present non-custodial treatment system feel as sanguine about the following statements from *Struggle for Justice?* The treatment model is described:

> At every level—from prosecutor to parole-board member—the concept of individualization has been used to justify secret procedures, unreviewable decision making, and an unwillingness to formulate anything other than the most general rules or policy. (at 40)

And (at 99):

> In social service agencies, especially those run by government, bureaucracy and red tape tend to pyramid. Human concern tends to be replaced by a detachment that grows eventually into contempt for those the agency is intended to serve. This is as destructive to those offering the supposed help as it is to those receiving it. Witness the coldness and inefficiency of most big-city welfare departments and medical clinics.

A theme which will recur in the following pages is the delineation of discretion in probation orders and probation supervision and in the choice of offenders to be taken outside the formal criminal process. That both conservatives and radicals take up the diminution or harnessing of discretion as a cause is some indication of the problems which will be encountered in creating a system consistent with the new attitudes toward non-institutional dispositions and diversion methods.

The legalists (not all of whom are found in the legal profession) believe that most of the difficulties can be overcome by legislative enactment—whether it is the abolition of the statutory limitations on eligibility for probation or the imposition of more specific conditions in the probation order or the more precise definition of the relationship between judge, probation officer and the probationer.

The authors of *Struggle for Justice* realize of course that there must be a legal basis to the recommendations they make but they believe that the real basis for change is to be found in "empowerment" of the "hitherto powerless". They claim they do not wish "to romanticize the efforts of abused peoples to get themselves together", but they believe that self-determination is the only solution—a bill of rights for prisoners, court-watching projects, public education projects and, or course, cooperative community efforts to "bring pressure on practices harmful to the community". (at 165) In summary, *Struggle for Justice* says:

> . . . the choice, planning, and implementation of projects can best be encouraged by the participation of the many and diverse groups concerned about criminal justice, with special emphasis on its victims and by their active involvement. (at 173)

This document asks us to think about people rather than systems, or at least to place them in that order of importance. Dr. J. W. Mohr has the same thought when he says that his basic concern is "the presumption that law is *the* standard, measure and regulator of human behaviour, an instrument of control rather than a mode of understanding when conflict arises". (15 Can. Jo. of Criminology and Corrections, No. 1)

Somewhat the same views are expressed by the Englist group "Radical Alternatives to Prison":

> Firstly, an alternative must encourage a balance between the offender's interests and those of people around him. He should be educated to understand the effects of his actions on others, but should not be manipulated to conform to the life style of others unless this is necessary for the protection of other human beings.
>
> Secondly, he should remain within the community unless he is a serious danger to others, or he agrees to temporary confinement for the cure of, for instance, drug addiction or alcoholism.
>
> Thirdly, he should be given the fullest opportunity to become a creative and influential member of society as far as his potential permits. The alternative environment should stimulate his latent talents.
>
> Lastly, he should pay back stolen articles and money, or in cases other than theft, make some contact with victims and repay by some sort of service.
>
> Setting up these alternatives may be expensive, both in cash terms and in terms of effort by offenders and staff. With the eventual abolition of prison, a far greater responsibility will be laid on the public and the teachers. This must be accepted; we must stop silently handing over social failures to impersonal and incompetent authorities.

They support these aims with some practical suggestions for "empowerment" and community involvement. There is hardly any mention of statutory enablement or legal authority. They are projects based on community effort and individual initiative which are, by their very nature, difficult to describe in words because in so doing their intrinsic worth is diluted or lost. For instance, R.A.P. mentions non-residential education and social supportive centres, foster families and cooperative houses for students and ex-offenders, community houses for alcoholics and probationers, social commando units, and victim-offender encounter groups. Finally, they describe a whole range of probation programs which are mostly found in the United States (such as the work of the VERA Foundation and court volunteer projects).

R.A.P. believes that

> . . . "crime" can no longer be treated as a separate kind of behaviour characteristic of certain people who are the "criminals" and thus different from everybody else. When "crime" is viewed as a symptom of the sorts of needs, stresses and inequalities inherent in a complex society; when "criminal" behaviour is seen as an expression of needs common to us all, then the labelling and isolation of "criminals" becomes dangerously misleading.

Proposed alternatives must consider the "individual in his personal and social situation, and help him or her to live constructively in that situation", and they place a greater responsibility on the public. The fulfilment of this reponsibility should not be seen as soft but as "vital to the development of a harmonious and civilized society"; this is in marked contrast to the "fortress philosophy" of those who see the problem as one of losing a war which could be won with stronger, harsher and more weapons.

Finally, R.A.P. stresses that these alternatives are rational in that they should

> (a) be suited to the sort of social and personal problem they set out to meet. This means they will probably be fairly small and diverse—untidy perhaps—but necessary;
>
> (b) be economic—often the amount spent in sending someone to prison is completely out of all proportion to the offence they have committed;
>
> (c) be based on research and experience of what is practical and useful rather than on opinions about punishment and deterrence.

In the same vein, R.A.P. states its community approach:

> . . . community programs . . . emphasize self-help—i.e. those involved determine what is important; they blur the distinction between offenders and non-offenders; they are concerned not just with individuals' problems of living in the community but also with changing some of that community's problems. At first, it may be necessary to start such community projects with considerable outside help, but as they gather momentum, such help should gradually be reduced and self-determination by those whom it affects take its place. This is important if the problems of dependency on external support, so prevalent in an institution, are to be avoided. They should also be mixed, so what follows applies to both sexes, although within the general scheme, there may be differences, depending on the need.
>
> The advantages of the community approach suggested here are that involvement of groups of people who share similar problems in the same area means both that more time over a period can be spent in providing help and dealing with difficulties, and that a wider approach to these difficulties is possible. Rather than "patch-up" each individual or family in isolation, ways of changing local social conditions and relationships can be found. When problems such as too many children, poor housing, lack of skills, etc., are being dealt with by those who share some of the same difficulties, with support from others with more knowledge and experience, a group can achieve what individuals can rarely do: significantly to change their environment and, in so doing, to gain status, self-respect, self-confidence and hope.

> Such programs offer a multitude of alternatives to imprisonment. Since the courts usually require some guarantee of supervision, control, etc. it is suggested that, at first at least, a probation officer be attached to the community centre. Supervision in these circumstances can be very flexible in form and in quantity—it is probably not a good idea that attendance at the centre or at any associated projects be a formal condition of probation. Such centres could be helped to develop in areas where there is already a movement in that direction. They need not be imposed from above, but helped to expand by provision of money and practical assistance—trained community workers, youth leaders, social workers and already-active local inhabitants could start to set up some of the projects, e.g. health centre, law centre, youth clubs, adventure playgrounds, and through active recruitment draw in some local support, which it is hoped would gain momentum and take over some or all aspects of the centre.

(*Note:* These quotations from R.A.P. are taken from *A Case for Radical Alternatives to Prison* (London, 1971). *Radical Alternatives to Prison; A Statement of Aims* (London, 1972) and *Alternatives to Holloway* (London, 1972).)

More formal and cautious bodies have added their criticisms of the iniquities of the prison system. An English group's study (*Why Prison? A Quaker View of Imprisonment and Some Alternatives,* London 1970) is much less radical than its United States counterpart but it does suggest that many more offenders must be treated in the community and that not only the offender must learn a sense of responsibility. The community itself has a responsibility to "meet the needs of those who have shown anti-social tendencies by understanding their deprivations and personal disabilities" (*id.*, at 33). There are very few practical suggestions about how this sense of responsibility could be put into practice. One of the exceptions is the recommendation that there be an intermediate form of treatment between probation and imprisonment such as the opening of a range of probation hostels for adults. (For use of such places for juveniles, see *Hostels for Probationers: A Home Office Research Unit Report,* H.M.S.O., 1971.)

A survey of prison officials (ranging from commissioners to chaplains) in the United States has shown some remarkable results. To the question whether the respondents favoured the extended use of probation as a substitute for prison, all categories of correctional staff overwhelmingly favoured both probation and "community-based residential houses or centres providing counselling and therapeutic services combined with work in the community under probation supervision as a substitute for imprisonment". (See *What Do Administrative and Professional Staffs Think About Their Correctional Systems?* Massachusetts Correctional Association, Boston, 1967, at 27-28).

None of this gets us very much closer to the problem of defining in legislative language the implementation of such programs.

Probation officers usually state their views in rather vague terms which suggests that probation could not be made more explicit. Gordon Jones, a senior probation officer in England, is strongly in favour of the present system of probation. He denies that it is a let-off and argues that the probationer enters into a contract with the court which involves "continuous obligations and accountability, an enforceable contract, available sanctions and limiting requirements throughout the contract".

On the other hand, he denies that probation work depends upon "the explicit use of authority". Such authority is, by implication, unavoidably present, when needed, and can make a positive contribution to the social re-education of the probationer but he seems to suggest in what is essentially an ambivalent argument that the probation officer can "represent the authority of the warm, loving and caring father".

Then again, Jones denies that probation is "soft" and that the well-being of the offender is its primary objective. Instead, the rationale of probation is to "prevent recidivism, although the interests and welfare of the probationer are still contained within the overall objectives of the system and are synonymous with the public interest".

To show the apparent inconsistencies of a thoughtful probation officer is not meant to denigrate his views. Rather they are the conventional wisdom of the lore of probation and point out the dilemma of all those who work in that no-man's land between law and social science or between "authority" and "helping".

In summary, Jones says:

> It is my simple belief that probation works; that it is based upon sound principles, established both by legislation and practice; that it serves to protect the interests of both the community and the offender; that the lines of accountability are clearly and properly defined; that its implementation must continue to be through the ministrations of a court-based service. Within the necessary limitations and restraints that operate, it provides opportunity for a flexible and infinitely variable approach to the needs of offenders, leaving the caseworker with ample professional freedom with which to meet the interests of both community and client, and using both social control and social support as appropriate.

(*Note:* All of these quotations come from Jones, "Myths of Training and Treatment: In the Community" in *Crime—Myths and Reality* (I.S.T.D. 1969 at 27-28.)

The American Bar Association agrees and calls probation an "affirmative correctional tool"—not because it is of maximum benefit to the offender but of maximum benefit to society. This breaks away from the idea that imprisonment is the usual (and expected) punishment and that mitigating circumstances might, in very limited instances, reduce the punishment to probation. This new positive approach to probation must depend on good probation services. Until now there have been too many instances of probation services being established in law but being administratively weak and conceptually bankrupt.

The "hope of probation" says the A.B.A. is "an approach to crime control that offers the hope of better results at less cost". The cost saved is not merely an economic one to the community, which will spend less on counter-productive penal institutions, or to the offender who can support himself and his family in a job which he would otherwise have lost. It also means that the community gains by making a contribution by rehabilitating the offender in his usual and, hopefully, supportive, environment. (Note: The quotations come from *American Bar Association Project on Standards for Criminal Justice: Standards Relating to Probation,* Approved Draft, 1970, at 1, 2 respectively).

This section can best be ended with two excerpts from one of the most exciting new books on criminology for many years. These excerpts should be the tests for the new approach to the problems (and solutions) discussed in this paper.

> The task is not merely to "penetrate these problems", not merely to question the stereotypes, or to act as carriers of "alternative phenomenological realities".
>
> The task is to create a society in which the facts of human diversity, whether personal, organic or social, are not subject to the power to criminalize.

(Taylor, Walton & Young, *The New Criminology,* London, 1973. The views of Taylor, particularly on the non-legal aspects of deviance, are also found in his *Deviance and Society,* London, 1971. For a discussion of deviance which limits itself to the legal definition of deviance, *i.e.* crime, but which is very critical of the administration of the criminal process, see Box, *Deviance, Reality and Society,* London, 1971.)

B. A Survey of the Provinces

Letters were sent to the relevant departments of all provinces and territories requesting information on the task at hand. The letter was in the following form:

Dear . . .

I am undertaking a study for the Canadian Law Reform Commission on dispositions in criminal cases where the sentence is non-institutional, e.g., probation, suspended sentence, conditional discharge, community involvement with convicted persons, etc.

I was hoping you can provide me with information on the following points:—

1) Have there been any changes in your province in this area in the last year or two? e.g., changes in the probation services, community police programs, etc. If so, could you please send the relevant legislation, regulations or other information?

2) Are there any pilot projects, experimental programs or plans for change? If so, could you send me details?

3) Have the magistrates, judges, police or social workers encountered any particular difficulties with the present state of the law? The Law Reform Commission would appreciate any suggestions.

4) Is your department undertaking any research in this area or aware of any taking place in your province?

Thank you for your cooperation.

Sincerely, . . .

I have had the following responses:—

ALBERTA

Alberta provided very comprehensive information, including the 1973 Annual Report of the Corrections Branch, a 1973 Adult Probation Research Study and an evaluation, for the same period, of the Volunteer Program.

The province of Alberta has a very active system of probation which is experiencing great expansion at the present time—20 *percent* in the fiscal year 1973-74. Not only are there many more offenders on probation, but the province is also making every effort to integrate probation into a network of community services. A probation officer is in attendance at all sittings in the criminal courts. In addition, the probation service is fulfilling an important counselling role for those convicted of impaired driving in a special program devised by the Alberta Alcoholism and Drug Abuse Commission. Similarly, three officers specialize in handling drug cases and work in liaison with the Edmonton City Police, the R.C.M.P. and the prosecution department; as the 1973 Annual Report states (at 29), this program was "designed to provide uniformity of service to the court."

Liaison does not stop at that point; probation officers and police are spending time observing and participating in each other's work so that these officers can gain a deeper understanding of their mutual and several problems.

There also seems to be a growing trust between the branches of government concerned with corrections. The "delayed probation" system is a good instance—the probation officer is in liaison with the inmate and the institution from which he will be released and prior to the release makes contact with the community where the delayed probationer will live. This program of imprisonment plus probation is an improvement over the parole system which existed in some provinces where the parole supervisor had no contact with his client until incarceration was ended. The traditional roles of police probation and prison officers are breaking down because of these efforts to create channels of communication and liaison. Perhaps the demonstration project which has been instituted in the domestic relations court will find an analogue in the correctional field; social and legal services are cooperating to conciliate informally in matrimonial problems although these problems originally reach public attention *via* legal channels. Perhaps the ideas put forward by R.A.P. (*supra*) will be tried if these experiments are successful in creating cooperation between legal and social work agencies in the family law field. Instead of an either/or situation of judicial pronouncements or ineffectual counselling, we might see the creation of informal but effective diversion.

The Volunteer Program

This program has existed for two years (since August 1972). The probation service sees the volunteer system as complementing, not usurping its usual service. Probationers still report monthly to a trained social worker at the Adult Probation Branch. The volunteers give more individualized attention but the "legal authority is retained by the probation officers as difficulties would arise if volunteers were fully responsible for a case" (as was experienced in an earlier (1970) volunteer experiment). [Quote from Evaluation and Year-end Report of Edmonton Adult Probation Branch, February 1973.]

Other points worth noting from the Evaluation Report:

(a) there is a four week training and screening program for volunteers;

(b) the Volunteer Program coordinator seems pleased by the efforts of the volunteers but would like to see more variety in personnel volunteering, e.g., "well-reformed ex-convicts or ex-probationers, people of the lower socio-economic bracket, people with lower education levels who are 'successful' in their endeavors, other nationalities or races than Canadian, bilingual people, and trained professionals in the helping field . . ."

(c) volunteers do not like working with volunteers. They prefer to have direct liaison with probation officers because otherwise they feel too far removed from the probation service if liaison work is also done by volunteers;

(d) recidivism rates among probationers who were assigned to volunteers were no worse than cases under ordinary probation supervision;

(e) there is a continuing concern throughout the report that the professional social workers in the Probation Service are not totally convinced of the efficacy of the volunteer program. The Evaluation Report sees the major problems of the program as the "lack of commitment on the part of the administrative and line staff and lack of time on the part of the coordinators." (at 15)

• • •

In summary, the 1973 Annual Report of the Corrections Branch (at 37-38) says:

> In order for our Probation and Family Court Services to be more effective, there are three essential factors which are indispensable:—
>
> (1) Proper screening and selection (Pre-sentence Investigation);

(2) Adequate and proper supervision in the community, adjusted to the needs of the individual;

(3) Counselling (when indicated) before litigation in domestic issues.

Probation may not involve punishment, but it does demand effort on the part of the probationer. The Probation Officer represents authority, but uses his authority to help the offender become independent of it . . .

The Probation Officer has a vantage point in view of his training, experience and concern, which provides him with the unique opportunity to stimulate citizen participation. Unless the community accepts its responsibility, successful rehabilitation of the offender will not likely take place.

• • •

The Adult Probation Branch has embarked on a study which is examining "the criminal justice system in Alberta." It is described as a "co-operative venture co-ordinated by our Branch in conjunction with the Edmonton City Police, the National Parole Board, the judiciary, and the correctional institutions in the province. The aim of this project is to develop a total unit of study on the criminal justice system in Alberta for integration into a senior high school level course. There are three researchers presently working in this area under the supervision of our Head Office."

The study is no doubt meant to have a much broader purpose than merely an educational one, although the Annual Report of the Branch suggests that the community relations and public relations in Alberta's correctional departments are considered a very important facet of criminal justice.

In answer to specific legal problems experienced by the province's Probation Service, the following points were listed:-

(1) The wide disparity in sentences handed down from city to city and province to province on the same charge and similar background circumstances;

(2) The lack of back-up work being done when a violation of the Probation Order is filed, pursuant to Sections 664 and 666 of the Canadian Criminal Code;

(3) The legality of delayed Probation Orders has been questioned in the situation in which an offender receives a Probation Order in conjunction with a term of imprisonment over two years in length. This practice is not uncommon with all levels of the judiciary in Alberta.

BRITISH COLUMBIA

Many of the ideas which are described in Part A have been expressed in recent months by British Columbia's Department of the Attorney-General: Corrections Branch. A five-year plan in corrections has been devised by a planning committee which reported in February 1974. There are many areas of discussion, such as prisons and juveniles which need not concern us here.

The overall theme, however, is certainly germane and can be summarized as "community responsibility" and "diversion" which are certainly interrelated.

The philosophy and purpose of the British Columbia correctional program has been stated as follows:

1. Justice must be done and must appear, both to the offender and the offended, to be done.

2. Legal sanctions imposed upon the offender must be designed to provide for the protection of society, while upholding the dignity and worth of both the offender and the offended.

3. The protection of society is seen as being best served through:

   (a) Holding in high regard the life and worth of all its members;

   (b) Holding all of its members responsible for the maintenance of social order and the prevention of victimization or wrongful hurt to or by any of its members;

   (c) Using every appropriate means to correct the relationship between the offender and the offended.

The Corrections Branch of the Department of the Attorney-General is the agency established by the Government of British Columbia to:

(1) Carry out the legal duties imposed upon it;

(2) Aid in the process of restoring the relationship between the offender and the offended;

(3) Develop correctional programs designed to protect the public from further victimization;

(4) Assist the community in developing programs for the prevention of crime and delinquency;

(5) Provide maximum opportunity and assistance to all persons in its care, in order that they may achieve successful personal and social adjustment in the community.

The underlying ideology is that custodial penalties have not deterred, are "non-productive as agents of positive change in behaviour," that the cost of prisons is not rationally defensive except in cases which pose an immediate threat to public safety and that penal institutions are schools of crime and are probably counter-productive.

In addition to preventive and pre-court services (which will be described below), the planned reforms which interest us because they are concerned with non-custodial treatment, are as follow:

(1) expanded probation services;

(2) community service programs for the imposition of non-custodial penalties;

(3) opportunity for citizens to participate in programs through community-based agencies, or as volunteers.

The most obvious diversion program is one which prevents persons coming before the courts, and this requires coordination of police, legal, court, private agency, and probation services. The British Columbia government places great emphasis and a high priority on such co-ordination.

"Court Service Programs" are planned which would mean more emphasis placed on the probation officer "working with the court system to assist in the administration of justice." This is explained as providing "a more satisfactory input related to the behavioural aspects of the court process, so that the offender's relationship with the court becomes a more complete learning experience for the offender in addition to satisfying legal requirements" (p. 5 of "A Five Year Plan in Corrections"). As in the case with R.A.P., the British Columbia reformers see these diversion activities as including probation officers seeking reconciliation between offender and offended. Another diversion method would be bail supervision to minimize the numbers remanded in custody.

Community Resources would be accentuated. For instance, "Work Service Programs" are envisaged, so that persons would spend a designated number of hours in community service work as an alternative penalty to fine or imprisonment. Attendance programs are planned so that the "client" could engage in intensive personal and social development activities "in lieu of prison." These would include daily attendance and full weekend attendance and full residential programs. The last (which is similar to the group home program for juveniles) would be for probationers who had no suitable home or did not fit into any available community resource.

Finally, prevention programs would be developed in the belief that "corrections is a total community problem and that emphasis or prevention is the best investment related to the goals and objectives of the Corrections Branch and the larger community" (p. 6 of the Five Year Plan Report).

MANITOBA

A reply was received from the Department of Health and Social Development.

As a preliminary point the Department points out the difficulties raised by the disparity in the age of full adult criminal responsibility (or rather the jurisdictional age limit of the juvenile court) between the provinces, with Manitoba being at the upper limit of eighteen. A federal-provincial task force is investigating this problem at the moment and it is not our immediate concern although it is a difficulty which must be overcome.

In answer to the specific questions, Manitoba reports:

(1) There have not been major changes in the adult probation program except for administrative changes and an increase in the probation staff. There were extensions in the volunteer probation program. *The Corrections Act, 1966* provided for a volunteer probation officer program. After an initial trial period, which ended on December 31, 1973, a probation volunteer program has become an ongoing one.

(2) A need is seen for greater uniformity between judges in the use of the pre-sentence reports. This would be alleviated if the recommendations of the Canadian Committee on Corrections were implemented.

(3) It was also stated that:

The criminal law should in my view place clear responsibility on the court to first consider a non-institutional sentence and to give clear reason, if used, why imprisonment was ordered.

(4) The Manitoba Probation Service instituted another program which is also continuing. This is the "Life Skills-Work Activity Program" which is described in the report on the completion of the first course:

Through employment of the Life Skills training approach and course content combined with trial work experiences, those with delinquent behaviour patterns and ill-equipped and poorly motivated for work can be motivated and trained to find and hold employment and live within the law.

The course catered for 17 students, most of whom were of juvenile age under Manitoba law, but a few adults were included, so the program is relevant to the present study. Except for its intensiveness and scope, it has had parallels in Boston's Citizenship Training Program and Toronto's Youth Training Program. It provides an alternative form of disposition and in that sense it is highly relevant. The legislative basis for this program is not spelt out exactly, but as "all the students were active probation clients," the probation order was obviously used. This shows the flexibility of the probation legal format and that the probation scheme of "punishment" or disposition is well suited to a very wide range of "treatment." This is the view of progressive probation officers who come from departments which are prepared to entertain new ideas and have heads of departments who will risk funds in new, imaginative, experimental projects.

(5) Manitoba has a "court communicators" program which is described in these terms in the Manual for Court Communicators:

Purpose

To assist persons of Indian extraction who are involved in the criminal court process, who have a lack of comprehension of the court proceedings, the judicial process, and who require guidance and direction in adopting the best course of action.

Function

1. To act as a liaison with the police in circumstances where a person has been accused of an offence, or otherwise taken into custody, or where

an investigation is in process, where it is apparent that a simple explanation will result in the abandonment of further proceedings.

2. To advise an accused person as to the court process, the meaning of relevant aspects of that process and alternative courses of action open to the accused.

3. To assist in contacting legal counsel, or in the case of indigency, the Legal Aid Society, to ensure that legal representation will be obtained, and after the appointment of counsel, to assist in communication between the accused person and his lawyer.

4. In cases where legal counsel is not obtained and legal aid cannot be provided, then the communicator may obtain advice from the Legal Aid Society in circumstances where such is deemed advisable in order to assist the accused.

5. In cases where the accused person is in custody, to assist in having such person released on bail or otherwise.

6. In the event of a plea of guilty and the accused is not represented by counsel in court, then the communicator may present mitigating circumstances or explanations to assist the accused in presenting beneficial information to the court.

7. To assist detained persons, as well as the police, in contacting relatives, social agencies and any person who might be of assistance, and contacting any specific agencies where assistance might be indicated through involvement of the accused in the court process.

8. To act as a liaison with the Probation Service—

   (a) contacting the Probation Service where a pre-sentence report is necessary;

   (b) assisting the probation officer in the preparation of a pre-sentence report;

   (c) assisting in explaining the terms of probation;

   (d) where probation supervision is ordered, to assist in providing the names of honorary or part-time probation workers;

   (e) where an accused is in custody and already on probation or on parole, to make an initial contact with the probation officer or probation liaison officer or parole officer.

9. Establish contact with various reservations and Indian and Metis organizations in their areas so that the communicator might be advised in the first instance as to when their services might be required.

NEW BRUNSWICK

In response to my enquiry, the Supervisor of Programs wrote:-

(1) There have been no major changes in legislation.

(2) On the second question:

> Judges are experiencing some difficulty with the intermittent sentence. There seems to be some variety. There appears to be some variety in the interpretation of the procedures for preparation of warrants and the follow-up in the event of violations of the term under which intermittent sentences are prescribed.

(3) More "formalized volunteer projects in probation" are being planned for the coming year.

(4) On the final point, New Brunswick reports that—

> We hope to undertake a thorough review of all our program activities this year and we further hope to be able to engage a statistician or a researcher who would assist in developing new procedures and techniques to collect data that would lend itself to more thorough analysis for future projections in the area of programs and budget.

NORTHWEST TERRITORIES

In April 1972, probation parole and after-care services were removed from the jurisdiction of the Correction Services and transferred to the control of the Department of Social Development.

The reply from Yellowknife states that community-based correctional centres and volunteer probation officers are just starting to be used in the North West Territory.

Paragraph 10 of the Corrections Ordinance, 1973, provides for the use of volunteer probation officers.

Paragraph 33 of the same Ordinance provides that correctional programs "may be operational within a correctional centre and may be extended into the community."

ONTARIO

The answer from the Ministry of Correctional Services limits itself to research activities but there are some of interest to this study, viz:

(a) a study of the relationship between probation officers and volunteers;

(b) research into community resource centres;

(c) a study of the differential efforts of incarceration and other forms of disposition.

Metropolitan Toronto Police have a very active community resources program which seems to be creating a good liaison situation with the social workers and other members of the helping profession.

The East York project also created a community-based diversion project and its results will be studied closely for the assessment of new disposition methods, including the problems, and advantages of liaison between police, social workers and the community.

Ontario's legal aid plan has done much to change the criminal process. The younger lawyers, who work as duty counsel, are less convinced of the conflict model and are more prepared to look outside the narrow ambit of guilt-determination and seek to extra-legal behavioural scientific answers to the problems of their clients. This attitude, of course, is not limited to Ontario but is almost universal throughout Canada.

PRINCE EDWARD ISLAND

A provincial *Probation Act* was passed in 1972 following on the report, in the previous year of the P.E.I. Corrections Committee. There are now four probation officers in the province who carry out the usual functions of probation officers, including the preparation of the pre-sentence reports which had not been used prior to the 1972 legal reforms. They also administer the Temporary Absence Program.

In addition, the R.C.M.P., acting as the provincial police force, has developed a Prevention Oriented Policing Service Program.

An interesting suggestion is found in 2(c) of the report of the P.E.I. Corrections Committee (at p. 4):

> We believe that legal changes should be made which would give the Probation Officer clear authority to use discretion to incarcerate for brief times for investigation, or refuge, or discipline any probationer without necessarily returning him to court for a formal review of each rule violation. Abuse of this authority can be prevented by court review of incident reports *in all cases* and even more effectively by administrative review and quality supervision. [emphasis in the original]

This was not followed explicitly. No doubt civil libertarian considerations were too persuasive as section 12(1) of the *Probation Act 1972* provides:

> An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence and is punishable on summary conviction to a fine not exceeding two hundred dollars and in default in payment thereof to imprisonment for a term not exceeding thirty days.

This provision hardly reflects the recommendation of the Correction Committee.

In addition, section 11(3) allows changes or additions to be made to the probation order, and Section 11(4) provides that when a probationer is convicted of an offence, including an offence under section 12, the judge may "make such changes in or additions to the conditions prescribed in the order as the Judge deems desirable . . ." This seems rather vague but would conceivably allow a sentence of imprisonment to be interjected in the probation period.

The Committee reiterated the Ouimet Report's view that institutional care should be sparingly and intelligently used. The Committee states (at 29-30):

> To justify incarceration of a person in a major correctional institution on the basis that he will be "helped" may be a misapplication of institution treatment objectives. The Committee believes that people should be sent to correctional

> institutions if . . . [they] need education, or various kinds of treatment . . . but no one should be sent to a correctional institution primarily for that reason alone. In the long run, it will prove to be essential in modern society that there evolve a clear-cut distinction between services based on individual needs, and services founded on social defence.

QUEBEC

The most important point to emerge from the very useful information sent by the Department of Justice is that the probation service has encountered difficulties with the law relating to probation.

The Annual Report 1973 of the Direction Générale de la Probation et des Établissements de Détention states (at 51):

> Les agents de probation rencontrent à ce niveau des difficultés assez peu ordinaires. Par exemple, le code criminel ne dit rien sur la confidentialité du rapport présententiel pas plus que sur son contenu. Il en résulte que les agents doivent souvent taire des informations qui autrement pourraient être d'une grande valeur pour le tribunal au chapitre de la sentence . . .
>
> Nous avons assisté à un phénomène à peu près semblable vis-à-vis les sentences discontinuées où l'action des agents de probation a permis de clarifier des points assez délicats.

Section 5 of the *Probation and Houses of Detention Act,* 1969, c. 21 provides that a court may "suspend the passing of the whole or part of the sentence" and place the person on probation for a period not exceeding two years if the court is of the opinion that "the nature of the offence, the circumstances in which it was committed and the antecedents, character and possibility of rehabilitation of such person so justify".

If a minimum sentence is prescribed, the court may impose such punishment but may suspend the passing of the rest of the sentence.

Section 12 provides that probation officers shall make enquiries, write reports of the enquiry and advise the court, upon its request, as to conditions of probation. Section 14 provides that a copy of every report so made shall be given to the offender or his attorney and to the prosecutor.

[See "Interprétation de la loi sur la probation" by Judge Albert Dumontier, April 1973.]

Attempts are being made to have better police-community liaison.

SASKATCHEWAN

In 1971, the Corrections Study Committee reported that the "present array of programs within the province for dealing with crime and criminals are fragmented and uncoordinated" (Report, 1971 at 10). Planning was lacking and this was partly due to a paucity of information. The Committee blamed the "lack of priorities, emphasis and direction in the government's efforts" *(ibid.)*.

The overriding recommendation was a systems model which would have the following advantages:

1. It develops an explicit description of the criminal justice system and its operating modes so that the system's underlying assumptions are revealed.

2. It provides a vehicle of simulated experimentation in those instances in which 'live' experimentation is not feasible.

3. It identifies the data that must be obtained if essential calculations are to be made of the consequences of proposed changes. (Report, at p. 18).

A Master Planning Council representing police, prosecutors, the courts and corrections would be established to superintend this system. The council's work is described as follows:

> The Master Planning Council would then relate the criminal justice system to its social and economic environment and make decisions concerning the overall system, provide guide-lines on general policy and objectives, as well as feedback to the sub-system in terms of their achievements. It would receive informational input from the environment as well as from systems in government and would be in a position to combine these with feedback from within the criminal justice system, thereby serving as a key decision-making centre. Its responsibility would be to plan comprehensive, coordinated programs, to improve police, courts, and corrections agencies in terms of their operational objectives. It would in no way be concerned with the legal-judicial decision-making within a particular court, but rather, the operational problems concerned with optimising the decision-making within the courts of the province. Its concerns would be with planning, training, and comprehensive treatment of the criminal justice system as a system instead of separate parts of a fragmented uncoordinated operation.

The probation service was singled out for special attention because it was understaffed, frequently untrained and with almost no liaison with the correctional centres, and no feeling of participation in the work of those institutions. The Committee also described the general maladies of the system:

> . . . corrections was plagued in various degrees by the "sacred cows" general to the whole profession of corrections. These are:
>
> 1. Security housing for all cases with an over-emphasis on security within large institutions.
> 2. Counselling by professionals only, with no involvement of correctional officer staff.
> 3. Emphasis on vocational training as a rehabilitative device with an avoidance of anything approaching prison industries, which involve a straight work effort.
> 4. Maximum security for all remand cases.
> 5. Large institutions.
> 6. No public works personnel in the correctional centres, as they would be unaware of security needs and dangers.
> 7. A social history approach to classification . . .
>
> In terms of objectives within corrections, there is no accountability for the achievement of objectives. There is a façade of official objectives as stated within the act and annual reports, but there is no measurement of the degree to which these objectives are being achieved, or to what extent the priorities are assigned in terms of the allocation of resources to these objectives. Further, the objectives are not clearly spelled out so the program areas operate on very vague goals, and are really unclear as to exactly what they are expected to achieve. This has resulted in the flow of funds into high cost institutional programs which yield a questionable return. (Report, at pp. 26-27).

Instead, a coordinated effort was needed with corrections integrated with the police and judiciary and services such as welfare, education, mental health, manpower and community volunteer groups.

Probation services needed to be dramatically expanded (and since 1972 when the Committee report was made public the staff has increased by

100%). The Committee recommended that support staff for probation should be provided, *e.g.:*

1. Volunteers in probation.

2. Assistant probation officers positions established to utilize the Indian-Metis and experienced correctional officers. The assistant probation officer concept can extend the reach of probation by conserving the time of the professionally trained officer for specialized tasks, interpretation, and reporting to the court. The more routine functions, certain aspects of investigation, and the gathering of information could be delegated to assistants. They must, however, be provided with adequate training and supervision, . . . The assistant probation officers could also be utilized effectively in the more remote regions with the probation officer providing the necessary supervision and direction. This position could then be used to extend probation services significantly throughout the province.

(*Note:* Report, at pp. 38-39. The Committee gave special consideration (at 58 *et seq*) to the Indian-Metis Offender.)

The Committee wished to avoid jail for non-payment of fines because of the deleterious effects of prison life. Instead, probation supervision with a condition that the fine be paid in instalments was recommended. Other alternatives, less attractive to the Committee but which might be necessary in some instances, were the Huber Law and weekend imprisonment.

Attendances centres and life skill courses were also recommended alternatives to prison. Similarly, the Committee recommended probation hostels.

Following the Ouimet Report's advice that imprisonment should always be a last resort, and obviously impressed by Californian experience, the Committee recommended the community correctional centre idea described (at p. 46) as containing three phases:-.

> In phase 1, the individual is confined to the centre and assigned various job tasks at the centre. After satisfactory progress through the requirements of this phase, he can then be advanced to phase 2. Phase 2 involves living at the centre, with access out for work and school, or placement in a sheltered workshop for the mentally and physically inadequate. Upon satisfactory completion of the requirements of phase 2, the individual moves into phase 3. In this phase, he lives in the community, but returns to the centre one or more times weekly for supervision, counselling, and direction.

Saskatchewan's Community Training Program (formerly known as the Work Training Program) now has five training residences in operation. This program, which is for inmates as well as parolees and probationers, started in 1968, and the pilot project proved so successful that it has continued to expand.

The program arose out of a belief that correctional centres alone could effectively rehabilitate inmates because "offenders are temporarily removed from the source of the problem rather than being helped to resolve the problem of living satisfactorily within the community" (from p. 6 of "An Outline of Saskatchewan's Community-Training Program"). The program provides a "structured living experience" for inmates during the latter part of their sentence or for probationers during the term of their probation. Each residence has no more than one-third probationers.

The residence staff have the following basic obligations:

(1) social casework and group work

(2) counselling and supervision

(3) helping the residents find employment

(4) social and legal control for the protection of society and the safe-keeping of the residents

(5) safeguarding the residents rights, privileges and human dignity

(6) helping the residents develop social awareness and ordinary standards of conduct as well adhering to legal forms of behaviour.

Special overnight leaves from the residence may be granted. On the other hand, if the resident appears to be "headed for trouble", or actually breaches the regulations of the Program or breaks the law, then the following action could be taken (Outline, at p. 13):

> In the event that a resident breaks a regulation regarding the operation of the program, disciplinary action may take various forms varying from a reprimand to a temporary reduction or cancellation of pass privileges or the cancellation of several days remission. Repeated rule infractions may result in the person's removal from the Community Training Residence. In the case of an inmate, he would be returned to the Provincial Correctional Centre in

which he was previously serving his sentence and in the case of a probationer this would constitute a breach of his probation order and he would have to re-appear before the Court for determination of whether or not he complied with his probation order. If he pleads guilty or is found guilty the Judge will impose a new sentence.

In the event that a participant of the Community Training Program commits a criminal offence he is automatically removed from the program.

In terms of the general development of programs in corrections, the Committee recommended the following steps (at p. 74):

1. Assemble best program ideas on how to prevent and intervene in delinquent careers.

2. Relate these ideas systematically to one another, and place them in priority order.

3. Provide demonstration tests of these program ideas in cooperation with the line divisions.

4. Plan with the line divisions how tested program components can be placed into ongoing operations.

The recommendations for the appointment of Indian probation officers and the Fine Option program have not been implemented yet. The Attorney General's Department has however established an Indian Court worker Program to train native people to assist Indian offenders who appear before the courts. In the last four months, the Department of Social Services still has produced "The Saskatchewan Corrections Plan" which is inspired by the 1971 Corrections Study Committee but "sets much more specific objectives for the division and establishes a phased long term plan for the development and implementation of programs needed to achieve the objectives". At present this document is not available for circulation outside the Department.

There are other new developments. The police and social workers are co-operating on a demonstration project, "The Mobile Family Service Unit". Both police and social workers work out of the police station on a 24 hour basis and respond to family crises and hope by so doing to divert many family disputes from the courts. This is similar to the program in the neighbouring province of Alberta.

YUKON TERRITORY

The Corrections Ordinance 1973 of the Yukon Territory is similar to that of N.W.T. in its general structure but it does not include provision for volunteer probation officer supervision. Instead the Department of Health Welfare and Rehabilitation described a program called "Leadership, Search and Rescue Training". This program is "aimed at reaching a recidivist group in our institutional population as well as being aimed at preventing people on probation from graduating to become an institutional statistic". He further explains:

> This program is based upon the theories and findings of the Outward Bound training but has been adapted to suit the physical situation of the Yukon Territory. The emphasis is on basic achievement and instilling feelings of self-worth in some of the more dissident and perhaps under privileged types of young person coming into conflict with the law. In this context I use under-privileged to refer to those who have not had the good fortune to be able to share in common experiences with their peers which tend to promote positive motivation.

C. The Law and Probation

Some Historical Background

In terms of penal history, probation (or, more accurately, conditional release) originated at a time rather similar to the present. In the middle of the nineteenth century, there was disillusion with the current penal methods. Romilly, and similar reformers, succeeded in drastically reducing the number of offences to which the death penalty applied. Transportation had ceased. New forms of reformatory discipline were being introduced. The first inspiration for change were the then revolutionary methods of Crofton and Maconochie who were convinced that less repression and more trust would effectively reform criminal offenders; the great contribution of these innovators was, specifically, the marks system and, in general, a new humanitarian approach to incarcerated criminal offenders.

Ironically, probation started out as a volunteer arrangement attributed to John Augustus of Boston but probably practised in England by such men as the country-squire Justice of the Peace Thomas Barwick Baker and Matthew Davenport Hill when Recorder of Birmingham. These men were community leaders and philanthropists (in the best sense) before they were conscious reformers. Today, there is a re-examination of the concerns of these men—for community concern, for treating offenders in the community or at the community level—in the form of local initiatives and diversion schemes.

Classical Criminological Theory and the "New Criminology"

The nineteenth century reformers were adherents of the Classical criminology of Beccaria and yet, at the same time, eroded the principles of that Enlightenment penal philosopher. They agreed with Beccaria's concern for fairness in criminal justice and a diminution of the inhumanity shown toward offenders. At the same time, they obviously did not share Beccaria's distrust of official discretion. Indeed, they succeeded in introducing reforms which individualized offenders by applying discretion.

Today, there are two seemingly contradictory movements abroad in penological and reform thought. On the one hand, there is a call for volunta-

rism and community involvement and diversion. Yet, some of the most persuasive critics of the criminal process, whether they are adherents of due process or calling for "power to the people", are harshly antipathetic to the evils of official discretion. At times, they seem to be purely Classical, preferring certainty of punishment to the vagueness and alleged repressiveness of the treatment model. On other occasions, they urge greater flexibility.

One answer is to try to move "crime" out of an exclusively legal sphere. The debate over the dichotomy of law and morals is only one facet of this problem of overcriminalization. The call for freedom suggests that the criminal law and its processes should be no more than *one* of many standards for the protection and betterment of modern, complicated post-industrial society. In its simplest form, there is a demand for a replacement, or at least a modification, of the conflict model with greater emphasis on the cooperative method of resolving and controlling community problems. The "new criminology" does not see the repression of the law and the stylized confidence-game of the adversary system of the criminal trial as solving society's problems. To call this a secularization of society is not much of a caricature. The law has been the instrument of temporal power with a dogma all its own but it is no longer believed with any great fervour. The mere labelling of citizens as "deviant", "criminals" *etc.* can not solve any of the deeper social ills.

The Concept of Probation and Other Forms of Penal Software

A short historical sketch and the passing reference to the "new criminology" is a necessary concomitant of any discussion of alternative forms of disposition, radical non-intervention, diversion tactics or benign neglect of criminal offenders and their problems. Probation is a natural place to start because it was one of the first areas of experimentation and therefore we have most evidence to study and evaluate. No matter how flexible, non-legalistic or unstructured we might care to be in the new penal enlightenment, our very lack of structure must, of necessity, be defined by law. The definitional question presents problems of how much discretion should reside in judicial or administrative officials or in the community-at-large. The same civil libertarians who objected to the tyranny of institutional treatment might also raise objections to invasions of privacy or restrictions on freedom of choice in diversion experiments or extended probation programs.

There may be ideological debate about how extensive non-custodial penal treatment should be but there are no definitional problems in deciding, for instance, that probation could apply to any criminal offence. We

do encounter difficulty in deciding upon the conditions of probation, the powers of a probation officer in supervision or revocation of probation orders. These problems will be as difficult, if not more so, in making decisions on which offences or offenders will be dealt with in diversion procedures or community-organised programs. Most commentators seem agreed that the decision-making process must be freed from the formality and structuring under which it presently suffers. In particular, social workers must be given a more active role.

One commentator has described the difficulties of the probation officer's present position in the legal and administrative milieu of the criminal process:

> Administrative decision-making depends on free, extensive and informal discussions with many interests and informed individuals or groups. Adjudication requires formalized procedures, the building of a record, and the presentation and cross-examination of evidence. In adjudication, the final judgement is based on the record alone. (Czajkoski, "Exposing the Quasi-Judicial Role of the Probation Officer", 37 *Federal Probation*, September 1973, at 9.)

This dilemma has serious ramifications. Plea bargaining, which has climbed from grimy obscurity into a common ingredient of the criminal process which is now openly acknowledged by prosecutors, defence lawyers and judges, offers an interesting illustration. Some commentators have suggested that it has emasculated the judicial function. *A fortiori,* it has robbed the probation officer of much of his quasi-judicial role of assessing the rehabilitation potential of the offender. Nowadays, the probation officer's pre-sentence report may frequently be merely a conduit for the results of a plea negotiation. This may not be such a tragedy if the skills of the probation officer had been used in the intake procedure. Until now, the injection of a suspect or accused into the criminal process has been pre-eminently the province of the police and prosecutor. If the probation officer is intruded into this stage of the process, we may be able to erode some of the exclusively conflict qualities of the criminal process, replacing them with a cooperative model.

The probation service has often suffered from complete lack of discretion in the imposition of conditions of probation because this has been considered an exclusively judicial function. On the other hand, many probation statutes have been interpreted to allow a blanket condition such as "the probationer shall heed the advice of the probation officer". This provision is not used frequently but on such occasions, this condition of probation supervision has been considered too vague and invalid as usurping the judicial function.

Czajkoski (*op. cit.*, at 11) explains: "Apart from conditions of probation serving as a means for controlling non-legally proscribed behaviour . . . which is morally undesirable but not unlawful, conditions of probation intrude upon or become substitutes for certain formal judicial processes".

We are all familiar with cases where a probation officer has recommended revocation of probation because he suspects (but cannot prove) that the probationer has committed another offence. Given the fact that, in these circumstances, the social workers' recommendation is usually accepted, we have a clear example of a *de facto* judicial function. Although this is strictly legal, it hardly fulfils the requirements of due process.

The problem is aggravated when the violation and revocation are based on behaviour of the probationer which falls short of further criminal behaviour but which was specifically included in the probation order. These conditions—such as attending school, staying in a specified job, living at home, or honouring a curfew—probably have little causal connection with the commission of past or future crime but infraction can result in a jail term.

Both these examples accentuate that probation is seen as a "privilege" rather than a "right".

The dilemma of probation—is it coercive law or is it therapeutic social work?—continues to plague those who give some thought to the problem of the theory of social work or the practice of social reform (and in particular, the minimization of prison as a form of penal coercion). For instance, a recent comment by an academic social worker (with, nevertheless, some years of practical experience) wants probation and parole officers to look more closely at their tasks "without concern for the extent of the professional or academic sanction they may have". There is no mention of the law of course and given that the whole article was about crisis intervention I suppose this was not surprising. The author continues:

> We may discover that our practice wisdom includes many accessible, effective and sophisticated techniques which can enrich or be enriched by other areas of knowledge or practice settings. In the process of this examination we should also separate ourselves from the expectations and claims that others make for us. We are not going to prevent delinquency or cure crime.
> (Cunningham, "Crisis Intervention in a Probation Setting", 37 *Fed. Prob.*, No. 4, 16 at 26, December 1973.)

Any time that we start talking about the legal rules relating to probation, we are very soon embroiled in a discussion of the boundaries of

coercion and non-directive creative treatment methods. The former is imposed upon social workers by statutes and the courts. The latter arises from the persuasiveness of the social activists and behavioural scientists.

The questions which immediately come to mind when we try to reconcile the certainty of the Classical School and the flexibility of the "New Criminology" are the following:

(a) Is probation a "privilege" or a "right"?
(b) Is a probation officer an "officer of the court"?
(c) If so, what does it mean in his dealings with the court and his client?
(d) What is the status of the "conditions" of probation?
(e) What are the implications of supervision and the responsibilities of a probation officer faced with the possible revocation of probation?
(f) In examining the respective (and possibly interlocking) roles of the judge, prosecutor, defence counsel and probation officer, what is a judicial function and what is an administrative act?
(g) In the context of probation supervision, what are the dividing lines between "effective casework" and a duty to uphold the tenets of justice and to act as that elusive functionary, an officer of the court?
(h) What are the evidential and ethical limits of confidentiality?
(i) How can the relationships between the judge and the probation officer be regulated while satisfying the current desire for certainty in the law with the effective control of discretion and yet, providing the opportunity for innovation and creative problem-solving?

These questions have not been answered very satisfactorily by the courts. Most of the reported decisions have been concerned with the mechanics of the legislation. When a ideological question has been raised, the judges have had great difficulty in dealing with problems in that border-line between legal interpretation and social policy. Even if deliberate and precisely expressed answers were possible, they would not satisfy anyone but legalists.

Some Canadian Background

Probation started in Canada in 1889 as conditional release for first offenders who had committed relatively minor offences. In the intervening eighty-five years, it has been refined and enlarged (with amendments in 1892, 1900, 1906, 1909 and 1921). The history of these developments clearly

shows a slow movement from legalism to a fairly successful attempt to incorporate the rehabilitative ideal.

The early reported cases were pre-occupied with interpretations of "court", "summary conviction", "magistrate", maximum punishment of two years' imprisonment *etc.* These mechanical problems have been solved. New ones will arise but their transitory and trivial qualities need not concern us here. Replies from the provincial departments which are responsible for probation show that there is general satisfaction with the laws relating to probation except for the confidentality question and the perennial (and, for present purposes, irrelevant) question of uniformity of sentencing.

Probation started with a very limited scope. Those released on the rather complicated and cumbersome recognizance were not truly on supervised probation (which did not in fact come into operation until 1921). This early system explains, in part, the uncertainty of the probation officer's legal position. Of course, in many provinces, the institution of a probation service is much younger than fifty years. Probation is now practised in every province and territory and the time is ripe for a national probation statute to delineate, as much as possible, the probation relationship.

The 1927 Code had, by section 1081(1), restricted probation to offenders who had committed crimes punished by no more than two years' imprisonment. This same sub-section had directed that the sentencing judge should consider the "trivial nature" of the offence. The spirit of this desideratum was extended by the 1954 Code which simply referred to the judge taking account of "the nature of the offence". The earlier provision had obviously proved no great obstacle because *Pettipas No. 2* (1911) 18 C.C.C. 74 had decided that a "trivial offence" would include unlawfully shooting with intent to do grievous bodily harm. The accused, who had been acquitted of attempted murder, had her sentence suspended.

The earlier (pre-1927) appellate decisions, no doubt made by judges unfamiliar with or suspicious of the new form of "leniency", had placed restrictions on the type of court (*e.g.* not a district court, *Herron,* (1922) 36 C.C.C. 398), forbad suspension of sentence on summary conviction (*e.g.* Hiebert, (1923) 33 Man. L.R. 375) or an offence punishable under a provincial statute (*e.g. Plested* v. *McLeod* (1910) 3 S.C.R. 374, Pollard, (1917) 29 C.C.C. 35). These cases show a restricted view of probation but the decisions of the courts are very disappointing because they give very little exposition on the rationale of probation, or judicial attitudes toward this correctional experiment.

Section 1081(2) of the 1927 Code allowed a further amelioration; if the offence was punishable by more than two years, sentence could be suspended if Crown counsel concurred. The 1954 Code revision widened the scope of probation by abolishing this need for Crown concurrence. This was important because it removed the unilateral flavour of probation—that the punishment of offenders was the preserve of the prosecution who advised the sentencing judge with the probation officer taking a subsidiary role.

The 1927 and 1954 Codes (by sections 1081(4) and 638(5) respectively) allowed suspended sentence even where the offence was not committed within five years or the previous offence was "not related in character" to the crime now before the court. This has now been deleted with the considerable widening of the probation alternatives. The rationale of the old rule was a fairly simple faith in deterrence and the notion that criminals specialize in particular kinds of illegal activity.

Both the 1954 and the present laws (found in section 663(2)(*a*)) provide that supervision can be carried out by any person designated by the court whereas the earlier enactment limited it to an officer of the court. This provides a flexibility allowing the use of volunteer probation officers and other community involvement.

The 1927, 1954 and current laws relating to suspended sentence and probation all make provision for unsupervised probation although, with probation services now being universally supplied in all provinces, there are few indications that this is often done. While the provision of social workers is to be applauded, there are occasions when the conditional discharge is a preferable disposition, either because supervision would be inappropriate due to the personality of the offender or his geographical location.

[Note: The American Bar Association recommends: "Upon a sentence to probation, the court should not be required to attach a condition of supervision by the probation department if in its judgement supervision is not appropriate for the particular case". *A.B.A. Standards Relating to Probation,* Approved Draft, 1970, § 1.1(c).]

Perhaps one of the reasons for the relatively infrequent use of unsupervised probation or suspended sentence is that the exact effect of suspension of sentence is misunderstood. Before the passage of the current section 662.1 which allows for *absolute* discharge (with provision in 662.3 for no recording of conviction), many courts adjourned cases *sine die* without adjudication of guilt which was illegal under the pre-1972 law. In the same period courts sometimes passed sentence and withheld the warrant of commit-

ment. (*E.g. Knight* (1922) 37 C.C.C. 223; *Pokitruski* (1931) 55 C.C.C. 152; *Cf. Litmay* (1922) 37 C.C.C. 26, *Fitzpatrick,* (1915) 22 C.C.C. 42 and *Re Thomas Lynch* (1906) 12 C.C.C. 141).

There was provision in section 637 of the 1954 Code for binding over with sureties in lieu of sentence (if a summary offence) or in addition to sentence (if an indictable offence). Under this provision, the offender was still convicted. This is a common law power (*e.g. Spratling* [1911] 1 K.B. 77), but it is only limited because it does not provide for suspension of guilt.

Suspended, Conditional and Other Alternative Sentences

Armour (Annotation, 46 C.C.C. 96 at 105) points out that "suspended sentence does not mean the suspension of the operation of a sentence after passing the same but the suspension of the passing of sentence" (*e.g. Switzki,* (1930) 54 C.C.C. 332, *Hirsch,* (1924) 42 C.C.C. 153 and *Knight* (1916) 27 C.C.C. 111).

The French introduced in 1891 the Bérenger law which was a conditional rather than a suspended sentence. The latter simply suspended the execution of the penalty or sentenced "under the suspensive condition of a relapse". While the "conditional sentence is a true sentence comprising a penalty whose execution is suspended and an admonition which is a moral punishment" (*Ancel: Suspended Sentence,* 1971, at 8). This provision was not seen as soft-headed philanthropy but a judicial warning aimed at protecting the safety of society; it showed a special regard for a man whose "moral character, despite his offence, has remained sufficiently intact for society to have nothing to fear from his liberty" (Ancel, at 18). The law was not meant to reduce the deterrent value of the law but to prevent recidivism. If the conditions of the sentence were fulfilled, the sentence was held to be null and void and the offender was legally reinstated. The court records were expunged and the offence which caused the conditional sentence was not taken into account for purposes of recidivism.

Ancel is critical of the suspended sentence because it is forced within the straitjacket of a legal concept that punishment was a necessary consequence of crime. Therefore, says Ancel, the conditional sentence, in contradistinction, had to "constitute a special legal institution, having its own particular characteristics, having its scope regulated by law, and being capable of a theoretical, and even dogmatic interpretation true to the neo-Classical doctrine" (Ancel, at 22).

[*Note:* This form of disposition tries to bridge the gap between the strict legal definition of crime and a "social" solution to the problem of deviancy. Where does the following fit in to the French attempt at compromise:- Shoham says:

> "The punitive element in the sanction of the legal norm makes the latter a 'unique' social norm which stands on an altogether different level than the norms sanctioned by ridicule, scorn, gossip or even social ostracism. The ritualistic element in the criminal procedure, the special setting, the courtroom, the necessity to plead guilty or not guilty, the formal conviction, the publicity that ensues, and the stigma of the conviction which usually brands him with a permanent 'mark of Cain' makes the criminal norm unique." "The Theoretical Boundaries of Criminology", 3 Brit. Jo. of Criminology, No. 1, July 1962]

While Ancel's remarks are perfectly valid, the difference between conditional sentence and suspended sentence means nothing if the offender does not live up to his agreement with the court. Whether an offender is "successful" and fulfills the conditions imposed by the court depends upon rather inexact standards derived from the application of the rehabilitative ideal and the exercise of administrative and judicial discretion. The fact of no criminal record is a welcome amelioration. Both conditional and suspended sentence are, however, threats based on primitive notions of deterrence and a supposed respect for the authoritative weight of judicial admonition.

Radzinowicz (Introduction to Ancel, at vi) is rather pessimistic of the use of suspended sentence:—

> By employing a suspended sentence rather than a fine, a court restricts its own future discretion. Where a suspended sentence has been imposed, a specific threat has been made, and in the event of a further offence, there is little option but to put that threat into execution

If Radzinowicz's strictures are valid, then perhaps we need to think about limiting suspended sentence to situations where the offender is high risk and most likely to recidivate.

Langlois J. in *Laplante v. Court of Sessions of the Peace* (1937), 69 C.C.C. 291 at 294 is more optimistic. He said, in one of the few judicial discussions of suspended sentence:

> It is to release any one who has committed a minor criminal offence so that he may avoid going to prison and the dishonour and to give him a salutary lesson and to reform him. It is . . . sound morality and renders great service.

Binding Over and Preventive Justice

Rex v. Mackenzie (1945) 85 C.C.C. 233, a decision of the Ontario Court of Appeal, is important because it reminds us of the common law power of a magistrate to bind over to keep the peace—so long as there has been an apprehended breach of the peace. There was also talk of justifying the entering into a recognizance on the basis of "preventive justice" but the Ontario Court of Appeal decided that there was no jurisdiction in that province for such an arrangement because the local legislation did not provide a commission for justices of the peace.

"Preventive justice" suggests a common law penology. Some authority for a common law rule to restrain "a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done" is described in Halliday [1917] A.C. 260 at 273. There is also authority in Blackstone's *Commentaries* Book IV, c. 18:

> This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

The Supreme Court also examined the MacKenzie problem in *MacKenzie v. Martin* (1954) 108 C.C.C. 305, an action for false imprisonment, which had been dismissed and the Ontario Court of Appeal and the Supreme Court of Canada affirmed this decision on varying grounds.

The majority, *per* Kerwin J. upheld the action of the Police Magistrate who had ordered MacKenzie to find two sureties who would be answerable for his good behaviour. MacKenzie's acts of making hundreds of harassing phone calls to his estranged wfe's place of work and residence, were "tending towards a breach of the public peace". Kerwin J. found authority in the statute 34 Edw. III c. 1 and 4 *Co Inst.* p. 181, and some cases which could be best summed up in Coke's words (*ibid.*):

> . . . an express authority given to Justices [of the Peace] for the prevention of such offences before they are done, *viz.*, to take of all them that be not of good fame (that is, that the defamed and justly suspected that they intend to break the peace) sufficient surety and mainprise of them for good behaviour towards the King and his people (which must concern the King's peace, as is also provided by the word subsequent), to the intent that the people be not by such rioters troubled or indamaged, nor the peace blemished, nor merchants nor

other passing by, the highways disturbed, nor put in the peril that may happen of such offenders.

Blackstone (*Comm.* IV, p. 196) said:

> This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

This conception of preventive justice and keeping the peace is hardly sympathetic to diversion, de-criminalization or radical non-intervention. Nevertheless, the fact that courts were prepared to recognize such a power to impose preventive justice shows the potential of discretion. The coercion imposed on MacKenzie in this case is not very different from the power of a social worker over the probationer.

According to Blackstone (*id.*, at 197), this power could be used to counteract behaviour which was *contra bonos mores* as well as *contra pacem.* Lord Goddard in *R. v County of London Quarter Sessions* [1948] 1 All E.R. 72 at 74, thought that these authorities clearly showed that "for several centuries justices have bound by recognizances persons whose conduct they consider mischievous or suspicious, but which could not, by any stretch of imagination, amount to a criminal offence for which they could have indicted".

In his dissent in *MacKenzie v Martin,* Rand J. took a narrower view of the recognizance; it could not be used for a mere future danger of a breach of the peace. There must be at least a danger of personal violence shown from previous acts (and he discounted rather flimsy allegations that MacKenzie had previously threatened his wife's life).

In concluding his dissent, Rand J. said: "The magistrate acted in good faith; but it is in the lower levels of the administration of justice that injustices too frequently abound; and the Courts when from time to time they are called upon to redress grievances must see to it that the arrogation of authority which routine dealing with petty delinquencies and conflicts may tend to produce shall be kept strictly within the limits of the law" ((1954) 108 C.C.C. 305 at 321).

If a person's liberty is endangered, then the Justice of the Peace (or any other member of the judiciary) should not exercise his discretion. Rand J. believed that the language of the information—"tending to a breach of the peace" had not "the slightest foundation" in acts or evidence. Instead,

all that could be said was that the acts annoyed "but annoyance of the nature and circumstances here is beyond any range of conduct touching peace, order or morality" (at 318). In other words, Rand J. was really complaining about denial of due process and a breach of the principle of legality.

The citation of old authorities may seem belaboured but the *MacKenzie* cases are important because they discuss, as few modern cases do, the legal implications of flexible dispositions and the dangers, at least as seen by dissenting Rand J., of such practices.

In a discussion of radical (or simply) different sentencing alternatives, it is very easy to become preoccupied with discretion. Writers, such as Kenneth Culp Davis, have shown us the dangers of administrative discretion which is more invisible and less accountable than judicial discretion. If a probation officer or some other administrator of a social program directs a person somewhere in the criminal process to keep the peace, obey instructions *etc.*, how can we control the exercise of this power? If these conditions are considered oppressive by a probationer or other recipient of social betterment, should he have redress along the lines of Rand J.'s dissent?

Some Specific Suggestions About the Provisions of the Code Sections 662 to 667

Some commentary on the present provisions is necessary because it helps to explain how past legislators have reacted to penal reform and the statutory interpretation by the courts of this social policy. Lawyers always have difficulty in defining social policy, particularly when unpredictable human behaviour is concerned, without the legal content becoming mechanistic and social content being diluted if not forgotten. It is necessary to define any form of disposition, no matter how unstructured and the treatment given to the Code provisions might prove indicative of how future courts might deal with the issues of discretion, diversion or non-intervention.

Pre-Sentence Reports (Section 662)

Should Pre-Sentences Reports be Mandatory?

Section 662 makes it optional for the sentencing judge to call for a pre-sentence report. Some organizations have suggested that a pre-sentence

report should be mandatory in every criminal case. Besides the physical and logistical impossibility of such a suggestion, it would be a waste of manpower in many routine cases and might well cause the pre-sentence report to become a meaningless formality. (To the contrary, see American Bar Association, *Sentencing Alternatives and Procedures,* (Approved Draft, 1968) § 4.1 and *Standards Relating to Probation* (Approved Draft, 1970) 2.1)

The Canadian Corrections Association (Proposals for Development of Probation in Canada, 1967 at 5) makes a suggestion which has more merit—that "in every case involving a person under 21, and any first offender over that age, convicted in a criminal court, who is liable to be imprisoned for two years or more", a pre-sentence report should be mandatory.

[In Michigan, pre-sentence investigations are required by law in felony cases. In Wisconsin, such investigations are mandatory for some sex offenders.]

An alternative suggestion is for a special court hearing about sentencing, in which the judge solicits recommendations, information and arguments from the prosecutor, defence attorney and defendant as to sentence and as to whether a pre-sentence report is advisable. The judge either sentences after this discussion or adjourns the case for a report and then hears further submissions about the report before sentencing the offender. In Michigan, this is described as a post-plea hearing. Dawson comments:

> The question whether pre-sentence investigations should be made mandatory is not easily answered. In addition to the considerations usually advanced, a number of factors must be taken into account: whether making pre-sentence investigations mandatory precludes, as a practical matter, the development of a post-plea of guilty hearing proceeding; whether the pre-sentence report can perform the plea verification function as well as the post-plea hearing and, if it can, what effect this has on its suitability as a sentencing aid; and whether some combination of post-plea hearing and pre-sentence investigation might be required.
> (Dawson: Sentencing: *The Decision as to Type, Length and Conditions of Sentence* (Boston, 1970) at 26.)

The Canadian Corrections Association recommendation may be the best practical suggestion at the present time. We should not, however, ignore Dawson's last point. There should be room for a variety of methods for arriving at the most suitable sentence. If we wish to experiment with alternatives to the conflict model, we might provide for a "duty social

worker", somewhat similar to the duty legal aid counsel operating in some provinces. Such an official could intervene and/or offer advice if he felt further investigations into the background and future requirements of an offender were necessary. This would be most obviously needed (and practical) in busy city courts and may offer something of a compromise between the probation officer being a mere servant of the court who is called upon at the discretion (or whim) of the sentencer and the more elaborate (and questionable) provisions of a sentencing board.

Should Pre-Sentence Reports be Uniform?

Should regulations be promulgated for a standard pre-sentence report which provided uniform data in each report? This would not be a useful innovation because it offends against the very individualization which the rehabilitative ideal tries to foster. On the contrary, research on the pre-sentence report shows that, already there is a tendency among over-worked, poorly supervised, unperceptive or lazy probation officers to include too much stereotype information in such reports. Probation officers should be encouraged to be discriminating in the data included in the report so that it provides the best possible assistance to the judge sentencing the offender who is the subject of the report.

These problems cannot be solved by legislation but only by high standards in the probation service, well-staffed and creative supervision, and by frank and friendly consultation between the judiciary and social workers.

The American Bar Association does not agree. Admittedly, that body was not exactly drafting legislation but only putting forward standards which might be followed by all those interested in improving sentencing procedures. Probation departments were to be encouraged to develop "gradations of reports". First, there would be "a short-form report for primary use in screening offenders in order to assist in a determination of when additional and more complete information is desirable. Short-form reports could also be useful in courts which do not have adequate probation services". Secondly, the A.B.A. recommends the items to be included in the pre-sentence report. They are the usual (criminal record, educational, employment, social and medical history) with one exception, *viz.*,:

> information about special resources which might be available to assist the offender, such as treatment centers, residential facilities, rehabilitative programs of various institutions to which the offender might be committed, spe-

cial programs in the probation department, and other similar programs which are particularly relevant to the offender's situation.
(A.B.A., *Standards Relating to Probation,* Approved Draft, 1970, § 2.3(ii)(I).)

Standards of Pre-Sentencing Reporting

There are several problems related to the pre-sentence report which call for minimum standards of pre-sentence reporting and a bill of rights for the subjects of the reports. For instance, precautions must be taken against probation officers delivering merely oral pre-sentence reports which are blatant infractions of the rule against hearsay, not to mention being offensive to basic notions of fairness. Similarly, a probation officer may save some of his most persuasive yet prejudicial remarks about the offender, his past record and his prospects for reform for the ears but not the eyes of the sentencing judge. There are too many instances where, upon delivering his formal written report, the probation officer is asked "off the record" for his candid opinion of the subject of the pre-sentence report. This practice is certainly much more pernicious than the situation in *Regina v. Dolbec,* [1963] 2 C.C.C. 87 and *R. v. Benson and Stevenson* (1951), 100 C.C.C. 247 where highly prejudicial and unsubstantiated remarks about the offender were incorporated in a pre-sentence report which he had no opportunity to rebut. The courts believed that the use of this data constituted a miscarriage of justice.

There have been endless debates about the advisability of probation officers making suggestions about dispositions. Once again, it would be better to have openness here so that the writer of the report could be cross-examined as to his reasons for, say, recommending a term of imprisonment rather than absolute or conditional discharge. The cases (as well as the folklore in some courts) have decided both ways but this might be one area where discretion could be minimized by legislating in favour of full disclosure—whether a recommendation were made or not.

Of course, an argument can be made that an eloquent recommendation as to sentence by a social worker usurps the role of the judge as sentencer. This is not as persuasive as first appears. The social worker's recommendation may be only an antidote to the remarks of the prosecutor who, in our conflict model, may have suggested a jail term. Or, if the offender is represented by counsel, the social worker may fulfill an informed but impartial mediator's role between the defence and prosecution arguments. In any event, as we have noted earlier, the judge's sentencing alternatives are nowadays often usurped by the plea-bargaining process, so that the sentencing options open, to both the judge and the social worker, have already been compromised.

In some smaller communities, local customs develop and a special relationship grows between sentencing judge and probation officer. This can be most salutary in fostering community cooperation and a true concern for the rehabilitation of offenders and the prevention of crime. On the other hand, such arrangements can cause difficulties either because the relationship becomes too mechanical or because either the judge or the probation officer (or both) lose his or their independence.

A problem also arises as to whether a probation officer should recommend probation or give his opinion, negative or positive, that the offender is a suitable subject for probation. The objection that such recommendations would usurp the function and the independence of the sentencing judge do not seem very persuasive and have already been discussed when suggestions were made for a broader, and less structured approach to sentencing was described. A second objection might be that the probation officer was only giving opinion evidence but surely it is expert opinion evidence and now that rules about the hypothetical nature of opinion evidence have been eroded, this criticism is not of great moment, particularly if the accused, or his counsel, is given the opportunity to challenge the opinion in the report on the basis of the data supporting it. Everyone realizes that social work and social psychology are inexact sciences but the probation officer must ensure that his opinions are based on the best available evidence.

An argument could be made that on all occasions the officer preparing the pre-sentence report should be present in court at the relevant time. This may be physically impossible or administratively inexpedient. Once again, the presence in court of a "duty social worker", familiar with the work of his department, to interpret or explain such reports may be an appropriate alternative. If there are controversial issues raised by the report, the "duty social worker" would be incompetent to answer them under our present rules of evidence.

Some commentators talk of the pre-sentence report becoming a "document of the court". The meaning of this probably depends on rather sophisticated administrative procedures. Such a procedure would have significance for purposes of confidentiality, public access and provability in court. The Canadian Corrections Association (*op. cit.*, at 3) has suggested that the pre-sentence report be a document of the court, but does not explain the rationale. Perhaps the Association meant to go no further than the A.B.A. (*Sentencing Alternatives,* § 4.3) which recommended that the pre-sentence report should not be a public record but should be made available to sentencing and appellate judges, "persons or agencies having a legitimate professional interest in the information likely to be contained therein" and, of course, the parties involved. The Canadian Corrections Association envi-

sages the report being used by classification and trades training officers and parole boards. At the present time, this type of disclosure is not spelled out in the legislation.

Confidentiality

Section 662(2) raises an old problem of confidentiality. Should there be occasions when some or all of the contents of a pre-sentence report should not be disclosed to an accused? For instance, there may be disturbing aspects of his background of which he is unaware or which are highly confidential and have no connection with the offence for which he is being sentenced (e.g. that he is an adopted child, that his wife is planning to leave him or that he is suffering from some physical or mental disease). The first line of defence would be the good sense, taste and probity of the social worker. If, however, the probation officer feels that such confidential data must be disclosed for sentencing purposes, then can we rely on the discretion of the clerk of the court (mentioned in s. 662(2)) or the accused's counsel?

While section 662(2) provides that copies of a pre-sentence report must be provided to the accused or his counsel and to the prosecutor, there are no directions about how the judge may use such report. Ordinary rules of evidence would suggest that he must not seek further data without doing so openly with the concurrence of the counsel and the accused. How should the judge handle the problem of the pre-sentence report in court? Should he read it aloud and ask questions about it in open court? This hardly seems necessary. Indeed, in contrast to the recommendations of the English Morrison Committee, which left it to the discretion of the judge and talked about public interest *etc.*, it is suggested that the judge should not air, in open court, any information from the pre-sentence report except at the explicit concurrence of the accused or his counsel. Any discussion of the pre-sentence report, and particularly relating to delicate matters should be in the more humane environment of closed court or in chambers. The informality of such a hearing should not preclude defence lawyer's right to challenge any part of the report or to seek verification or elucidation of ambiguous or highly prejudicial data.

Some problems of confidentiality can be obviated. Provision should be made for obtaining the permission of the offender before making investigations about his family, education or medical background from data which is not part of the public record.

Similarly, when a social worker, who is preparing a pre-sentence report, is interviewing the subject of the report, he should warn him that all divulgences may be used in the pre-sentence report.

Another problem is the source of the information obtained by the probation officer. Should those sources be divulged? Can any useful limitations be imposed by probation department regulations, rules of court or by legislation? There is no rule of professional privilege protecting the probation officer from divulging information. There are strong arguments for extending professional privilege beyond its present narrow limits.

On the other hand, even if there were professional privileges protecting, for instance, the divulgences of psychiatric patients, penitents and social work clients, there is an additional problem for the probation officer because he is described as an "officer of the court". Although this term is used in many probation statutes, its meaning is usually not further defined and there are very few appellate decisions shedding much light on the problem.

The cases of *Regina v. Dolbec* and *R. v. Benson and Stevenson,* cited earlier, give some answers to the problems. The appeal court in *Dolbec* decided that the non-disclosure of the sources of the information in the pre-sentence report and the lack of any opportunity afforded the appellant to rebut the contents of the pre-sentence report constituted a miscarriage of justice. This was an extreme case because Dolbec was unrepresented and the probation officer's remarks in the pre-sentence report may have been accurate but they were unsubstantiated and very clearly reflected the biased or, at least, hostile attitude of the probation officer.

Given heavy case-loads and the short time in which the probation officer must prepare the pre-sentence report, it is very difficult for the social worker to produce a report comprising of nothing but the "best" evidence. This does not mean that the probation officer should be excused when he includes very pertinent facts which he does not try to verify as much as time and circumstances allow.

The courts have always differentiated between the "quality" of pre-guilt and post-guilt evidence, the latter consisting of data produced in the pre-sentence report and orally by the probation officer in explanation of his report or in giving his opinion of the offender's character, or propensity for rehabilitation. An English court has stated that, after conviction, "any information which can be put before the court, can be put before it in any manner which the court will accept" (*Marquis,* (1915) 35 Cr. App. Rep. 33 at 35).

The United States Supreme Court has said:

> . . . most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation officer draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.
> (*Williams v. New York*, (1949) 337 U.S. 241, 249)

This gives remarkable latitude to the sentencing judge, particularly in the light of the protections by the U.S. Supreme Court of due process in other areas of the criminal procedure. The court in *R. v. Benson and Stevenson* was more solicitous of the offender's rights: "If the report contains prejudicial observations which the Court considers relevant and likely to influence his sentence and this material is denied by the prisoner then proof of it, if required, should be given in open Court when its accuracy may be tested by cross-examination. Alternatively, if the Court does not consider it of sufficient importance to justify formal proof then such matters should be ignored as factors influencing sentence" ((1951) 100 C.C.C 247 at 256).

This statement (along with the observation that the offender should be informed of the substance of the pre-sentence report "insofar as it is detrimental to him") brings out the dilemma which is always encountered in that no-man's-land between law and social science (or social work). The problem is to harness or delineate discretion. How can we assess which factors the sentencing judge thought crucial in his decision? The *R. v. Benson and Stevenson* solution seems to be analogous to a *voir dire* and the interrogations and alleged confessions which preceded it are unsatisfactory measures for assessing truth. The present procedures for the pre-sentence report are similarly unsatisfactory, and the stakes are as crucial as the admissibility of confessions.

Perhaps a solution is to have a system a little like an examining magistrate procedure applied to the reception and examination of the probation officer and the data he presents to the court. (Unfortunately, this would not be solved by having a "duty probation officer" because this would offend the hearsay rule—assuming that at least ordinary evidentiary rules would apply to this area.)

The lawyer, on the one hand, wants to ensure the full protection of his client's rights. We must, on the other hand, try to understand the viewpoint of the probation officer; he does not wish to be restricted by legal proof and does not appreciate the law's conception of "the freedom of the individual". The probation officer, as a social worker, looks beyond the trial

and sentence to the relationship that he hopes to establish with the offender who is placed on probation. The probation officer wants to avoid the image of police officer or prosecutor; he wants to be in a position to gain the confidence of the probationer when they meet in the more informal casework setting.

The Contents of the Report

This future relationship may well be affected by the data which is included in the pre-sentence report. If we take a narrow view of the report, we could say that the report should limit its scope to sentencing considerations along. We have seen earlier, however, that many see the report having wider ramifications and uses—for correctional personnel, *etc.*

What data then should be included in the report and in what format and from whose perspective? A description of what data should be included is hardly a suitable subject for legislation; the data will depend on the nature of the offence and the offender, the forum in which it is being heard *etc.* There are some types of data which might well be common to most reports. For instance, a pre-sentence report is presented to the judge at the post-guilt determination stage? Such a practice seems an attempt to inject some "real" facts into a fact-finding process which is severely circumscribed by exclusionary rules or evidence. Yet this practice of describing the "circumstances of the occurrence" is almost universal. It provides a chance for the dropping the veil of admissible evidence and is similar to the speech in mitigation of sentence presented by defence counsel.

This can create real difficulties. The accused may have more fully confided in the social worker because he is less of an authority figure or because legal guilt has already been determined. This description of the offence may complicate matters because it raises new (although legally irrelevant) "facts", because it may implicate other persons who may or may not be accomplices who are already convicted, charged or perhaps not even apprehended. The story of the offence may also give a version of the facts which may implicate the accomplice in hitherto unknown ways. The ordinary evidentiary rules about corroboration of accomplice evidence certainly does not cover the situation.

So much of the probation officer's role in preparing a pre-sentence report is predicated upon his stance as a social worker who may be asked to perform a casework function if the offender is released on probation. The probation officer includes much data in the report which is of marginal utility to the sentencing judge who has decided on guilt on a legal basis and

who may have difficulty assimilating sociological factors such as the antecedents and family background of the offender, the developmental history of the offender—early life, schooling, *etc.* Yet these factors are specifically mentioned in the legislation as decisive in choosing probation as a disposition.

Part of the agenda in *Dolbec* was the bias exhibited by the probation officer in the pre-sentence report. Yet there is an implicit invitation in the format of the pre-sentence report to report information which is not legally admissible. Indeed, the whole idea of the pre-sentence report is to broaden the scope of an enquiry which has hitherto been a narrowly proscribed legal one. For instance, the probation officer is invited to describe not only mitigating but also aggravating circumstances surrounding the crime. He is asked to describe the attitude of the offender and of the victim. What should a probation officer say about the previous criminal activity of the offender? Is he limited to a recital of the official police record or can he give information which shows that the offender was easily led and was unfortunate to have been victimized for his small contribution to the crime while more sophisticated confederates had gone unconvicted? On the other hand, should the probation officer give details which show that perhaps previous courts had treated the offender leniently and that he obviously had not learned from his previous convictions. This causes serious problems when the offender is young and, in strict law, his juvenile record is not a record and should be inadmissible. Frequently, the probation officer may give his opinion to the judge that "I have known the offender for many years and although he is only eighteen years old, I have always considered him an incorrigible and trouble-maker".

The probation officer may include many details in the pre-sentence report which invite or inspire the sentencing judge to impose conditions—e.g. in relation to abstaining from alcohol, driving or buying an automobile, attending school, getting a job, living at home (or at his present address), not associating with X, Y or Z or frequenting pool-rooms etc. Should these be included in the pre-sentence report? Should the judge impose these conditions or should a discretion reside solely or partly in the probation officer to impose his own conditions? Is it best left that the probationer should simply "obey the reasonable instructions of the probation officer"?

Eligibility for Probation — Re section 662.1(1)

On first impression, this provision is a most welcome innovation. Yet the critics would immediately suggest that there should be no limits at all on the types of offences which can be subject to the operation of the condi-

tional or absolute discharge. The defenders of the system would reply that the criteria of dangerousness and the need to protect society from the more serious offenders make this restriction proper and necessary. A cynic might add that public opinion also requires some limit to the types of offences which can attract lenient treatment.

On reflection, this provision is necessary so long as there is no better criterion of seriousness than a numerical maximum punishment, particularly as 662.1(1) refers to a maximum applicable to an offence for which he was originally charged rather than possible punishment for the convicted offence.

If there is to be a proper gradation of offences, and a system of dispositions, both formally and informally dealt with, then there must be a new formulation of dispositions.

The probation provision of section 663 covers *any* situation regardless of the seriousness of the offence. This form of conditional discharge which, unlike the absolute discharge, records a conviction and only suspends the imposition of sentence, can sometimes be too attractive to the sentencer as a safe compromise. This, at least, has been the experience in England and in other jurisdictions. An English commentator is worth quoting again:— "By employing a suspended sentence rather than a fine, a court restricts its own future discretion. Where a sentence has been imposed, a specific threat has been made, and in the event of a further offence, there is little option but to put that threat into execution" (Radzinowicz, *op. cit. supra.*). If this problem is accurately stated, then the courts (and prisons) would be faced with a situation which they had studiously tried to avoid, *i.e.* the crowding of institutions with short-term prisoners, obviously not being deterred and probably not being reformed. Of course, this reaction to suspended sentence, and its failure will depend on the role which the probation service plays. In England, there has been a history of understaffed probation services and unsupervised offenders whose sentences were suspended.

Absolute Discharge

Probation is, in effect, a conditional discharge but in trying to widen our options, the new section 662.1 of the Code wisely provides for what is called absolute discharge. (We shall see presently whether the *absolute* discharge is true to label.)

Absolute discharge (and probation) are limited somewhat by provisions that it can, first, only be used when the offence has no minimum punishment. This limitation is not as wide as would first be imagined as most of the sentences specified in the Code are maxima. The offences which have minima attached to them are importing narcotics (7 years, *Narcotic Control Act,* R.S.C. 1970 c. N-1, s. 5(2)); impaired driving for second or subsequent offences (14 days to 3 months, Code, s. 234(*b*) and (*c*)); non-capital murder (life imprisonment, Code, s. 218(2)); capital murder (mandatory death sentence); income tax fraud (2 months, *Income Tax Act,* R.S.C. 1970, c. I-5, s. 194(2)).

In the second part of s. 662.1(1), there is a provision that no accused can be absolutely discharged (or placed on probation) if the offence is punishable "in the proceedings commenced against him" by imprisonment for fourteen years or for life or by death. These offences are the very "serious" ones such as rape, armed robbery, arson, manslaughter and murder but we are faced with an anomaly. The accused in *Pettipas No. 2* (*supra*) could not be discharged absolutely or placed on probation because she had been charged with (although acquitted of) attempted murder. In the light of the remarks about the implication of plea-bargaining mentioned earlier, this provision has the effect of keeping control over leniency in the hands of the sentencing judge rather than allowing deals to be done between lawyers resulting in discharge "for considerations". This provision may have resulted from faulty draftsmanship but it is more likely to have been a conscious limitation.

The Concept of Absolute Discharge

The Canadian Committee on Correction ("The Ouimet Report", 1969), recommended that first offenders charged with minor offences should be able to avoid the "damaging consequences of the existence of a criminal record" (at 194) which can "continue long after rehabilitation is complete and risk to the community is no greater from this individual than from the average citizen" (*ibid.*). The Committee argued that the trial itself may have been such a deterrent that further punishment was "superfluous, costly and damaging to both the individual and the community" (*ibid.*). Consequently the Committee recommended that absolute discharge, with or without conditions, should be an alternative disposition.

Section 662.1(1) and (3) makes provision for this, as we have already noted. The section seems clear enough but it has created difficulties. These difficulties are all based on the meaning of the "discharge". It seems it is impossible for legislative language to say that a person is discharged and mean he is "not convicted", he has been "acquitted", he was not sentenced,

that he can appeal against discharge (and is this an appeal against sentence or an appeal against "conviction" for purposes of the appeal?). There are very few cases on the new provisions in section 662.1 and most of them concern these seemingly nit-picking legal points.

The cases decided in relation to section 662.1(1) and (3) have solved all but two of the problems. First, there must be a more satisfactory statutory definition of "conviction" and "guilty". Secondly, any further innovations in sentencing powers must be accompanied by adequate briefing sessions for the sentencers.

Conviction is now adequately defined for purposes of s. 662.1 by Martin J.A. of the Ontario Court of Appeal in *McInnis* (1974) 13 C.C.C. 471. He says (at 476-477) that section 662.1(1) of the Criminal Code means that "notwithstanding the plea of guilty or the finding of guilt, the Court may, instead of passing judgment, that is sentence, and recording a conviction, direct that he be discharged either absolutely or conditionally. Where the Court directs that the accused be discharged, the accused is by the section deemed not to have been convicted". Martin J.A., quite rightly, decided that the Ontario Court of Appeal in *Sanchez-Pino*, [1973] 2 O.R. 314 was wrong in deciding that there could be no appeal under s. 662.1(3) where the accused had been convicted by the lower court which had refused to grant absolute discharge. The only exception which the Court of Appeal would have recognized was where the trial judge had erred in law. Martin J.A. would extend that to any appeal where the discharge was denied. If this principle is to be maintained, it must be made much clearer in the wording of section 662.1(3), despite the fact that it is covered by section 601 (as so found by *McInnis, Christman*, (1973) 11 C.C.C. (2d.) 245 at 247, and *Fallofield*, (1973) 13 C.C.C. (2d.) 450).

Therefore, there must be a further consideration of the term "conviction", the method of recording "conviction" and a proper interpretation of the consequences of "conviction". The use of the words "guilt", "guilty", "conviction" and "acquitted" (the last word consciously(?) not used in section 662) might profitably be expunged from any provision in relation to absolute discharge. This assumes of course that there should be some differentiation between absolute and conditional discharge which is desirable as a form of crime control (although we are not in favour of specific gradations or qualifications for their respective use).

Another anomaly of section 662.1 is that it seems to create the classic conditional sentence and one wonders if this was intentional. S. 662.1(1) suggests that there can be a conditional probation "instead of *convicting* the accused". Section 663 states that an accused who is "convicted" may be placed on probation. The former has the same consequence as the

English *Criminal Justice Act* 1848 while the latter has the same operation as a suspended sentence which does result in a conviction, a criminal record (subject to the *Criminal Records Act*) and the usual civil disabilities. In the latter, in other words, a sentence is recorded and must be expunged by the *Criminal Records Act.* This act also provides that an offender may apply for a removal of his *discharge* after three years for an indictable offence and after one year for a summary conviction offence. This suggests that a discharge is not as absolute as one would imagine but this solution—of a discharge registry, which is expunged in due course—was suggested by the Ouimet Committee so that some check would be kept on those seemingly innocent persons who might have been absolutely discharged many times.

The sentencing judge in *Sanchez-Pino* had only a very vague idea of the uses planned for absolute discharge and, in any event, was obviously not enthusiastic about it. He suggested that it was only passed for cases of simple possession of marijuana. Much better understanding is given by the British Columbia Court of Appeal in *Fallofield* (*supra*). The court heard some nine cases on section 662.1 and listed the following conclusions (13 C.C.C. (2d) at 454-455):—

(1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.

(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.

(5) Generally, the first condition would presuppose that the accused is a person of good-character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

Arnup J.A. in *Sanchez-Pino supra* wisely suggests that the "policy" provisions of section 662.1(1) which simply refer to "in the best interests of the accused" and "not contrary to the public interest" should not be more specifically delineated and should be left to a wide judicial discretion. He does give his interpretation of the phrases; he suggests that the first is not related to deterrence or rehabilitation but to the protection of a person's reputation, while the second phrase refers to the trivial nature of the offence or the peculiar circumstances of the offender.

Summary

A survey shows that in some provinces, probation is a relatively recent innovation while, in others, this form of disposition has been in operation for many decades. Even when probation has not atrophied, these latter provinces are looking for alternatives and experimenting with new programs.

Some common themes emerge. Prison is seen as counter-productive although public opinion (and, to some extent, lack of apparently viable alternatives) are stopping any really drastic reduction in the use of imprisonment. There is an increasing use of volunteers. Although most of them are found in the probation field, this surge of voluntarism is a sign of a new community involvement. Closely allied to this new movement is the breaking down of the tightly structured roles of police and prosecutor on the one side and defence and social worker on the other. This new liaison is most encouraging although it would be unrealistic to suggest that it was a conscious effort to erode the conflict model or to modify the notion of guilt and blameworthiness in the criminal law.

One of the few negative factors in the rise of the volunteer is the veiled antagonism (or at least mistrust) of the professional social worker toward the amateurs in the helping profession.

The responses to questions about legal problems with the law (relating to probation and similar dispositions) elicited about as much insightful information as the reported decisions on the same subject. Probation law causes very few problems (except those relating to confidentiality) to which the courts have devoted much time. Except those rare areas where the law and social work theory and practice intersect, such as confidentiality, the two disciplines have respected each other's jurisdictions and responsibilities. The probation officer has played a subsidiary role and conventionally sees himself as a servant of the court. Once again, the conflict model has maintained its supremacy except in those indefinable areas where informal adjustments between particular judges and social workers have led to a cooperative, community atmosphere.

The following is a summary of the more important findings:

1. The most difficult problem is to convince public opinion that criminals are not really "different". Yet diversion is not new but has been an ongoing process since Maconochie invented his marks system and John Augustus started unofficial probation.

2. The crucial question is how to define and control official discretion, and this problem will not go away simply because we mouth platitudes about radical non-intervention or de-criminalization. Equally difficult is the definition of new projects or, more importantly, the format in which they can flourish.

3. The past history of probation shows us that the conflict *versus* cooperation dichotomy cannot be easily solved. Is the probation officer a mere functionary of the law court or a helping social worker who does not work beyond the law but who adds a dimension to the law? Is probation a privilege at the dictate (or whim) of the probation officer or is it a right to be enforced by application of due process and the principle of legality.

4. How can the probation officer function in the adversary system? Is it necessary to break down the conflict model, particularly if we want to expand the diversionary process? The probation officer must be given a greater role in the intake process so that the structured role of repression of the police and prosecutor is replaced by a conciliatory procedure. This will be achieved by the probation officer being one of a team which decides on charge, plea and disposition. Although it is far from a perfect solution, the presence, in court of a "duty probation officer", who is a fully recognized member of a social defence team, will be a good starting point.

5. Whatever can be achieved in expanding absolute discharge, flexible probation programs, and other forms of diversion, civil libertarian considerations must not be forgotten because bureaucratic interference, while not as pernicious as loss of personal liberty by imprisonment, can be offensive. The past problems of the pre-sentence report are illustrative.

6. The concept of probation itself shows the difficulties we face in broadening diversion experiments.

   (a) The standard of probation has varied considerably throughout the nation. The time is opportune for national legislation on pro-

bation to create consistently high standards while, simultaneously, building in well-planned flexibility in programming.

(b) For instance, there is no reason for supervision to be an inevitable concomitant of probation. If absolute discharge is not considered a desirable dispostion, unsupervised conditional discharge may be appropriate. This might be spelled out more clearly in the legislation.

(c) Alternatively, there is no reason why supervision of probationers should be limited to professional social workers. This has been achieved by the provision of volunteer probation officers in some jurisdictions but their exact legal status should be more explicitly stated. Police could also fulfil a role as "mechanical" probation supervisors in cases which require mere surveillance.

(d) Should the probation service have the right to refuse to take on cases which they consider inappropriate? This could be obviated if probation officers took a more active and recognized role in sentencing.

(e) The case law (and lore) is confused as to whether a probation officer should make recommendations as to sentence, suitability of an offender for probation, whether the offender is amenable to reform or likely to succeed on probation. The law should make clear that the probation officer should be able to state his opinion on these issues. No one is suggesting that a sentencing board should replace the sentencing judge but attempts should be made to erode the structured roles of prosecutor, judge and social worker, the last presently playing only an ancillary role.

7. Pre-sentence reports should not become mandatory in all instances, but a good argument can be made for always requiring them for all offenders under twenty-one years and all first offenders. Pre-sentence reports would be advisable for those who commit serious offences, particularly of a sexual nature. An equally strong case can be made for a mandatory pre-sentence report in any case where the sentencing judge is considering the possibility of absolute or conditional discharge. At least, pre-sentence reports should not be ordered in obvious or very trivial cases. They certainly should not be ordered simply for the purpose of giving the offender, on remand in custody, a taste of prison.

8. The pre-sentence report should not become a public document but

they should be made available to those who are likely to be responsible for the offender during the duration of his sentence.

9. The doctrine of professional privilege should be extended to the social worker-client relationship.

10. The social worker who prepares a pre-sentence report should seek the consent of the offender before preparing such report, before seeking information from sources other than public records and should warn the offender that anything he divulges may be used in the pre-sentence report.

11. The sentencing judge should not read the pre-sentence report in open court, at least not without the concurrence of the accused or his counsel. It would be a wise policy to discuss the contents of a pre-sentence report in closed court or in chambers with the opportunity for counsel (or the unrepresented accused) to challenge the contents of the report.

12. The probation officer should not be forced to divulge the sources of any information in the report but he must be prepared to defend the report against charges of inaccuracy or bias. A *voir dire*-type procedure would be acceptable until such time as the probation officer is allowed a more co-operative role in the criminal process.

13. There should be no fixed format for the pre-sentence report as this would make the report too stereotyped and would take too little regard of the individualized treatment needed in the probation relationship.

14. Rules should be laid down for the "quality" of information in the pre-sentence report. Subject to fairness and challenge, there seems little need for the report to be restricted to legally admissible evidence, at least as that term is defined at the pre-guilt stage. The probation officer's remarks in the pre-sentence report will be naturally regulated by consideration of his future relations, if any, with the probationer.

15. The sentencing judge should not impose specific conditions of probation, other than the fact of supervision or no supervision. Such conditions should be the responsibility of the probation officer under the present system and, in the future, the conditions should be arrived at by consultation between all parties.

16. The concept (and conditions, if any) of probation should be explained to the probationer in clear, non-technical language.

17. There should be no restrictions on who is eligible for absolute discharge or the conditional discharge of probation. Concepts of "dangerousness" or "protection of the public" can be left to the good sense of the sentencing judge and probation officer. Gradations based on some artificial notion of "seriousness" creates categories which may have little relationship to the true situation of the offender and hopes for his rehabilitation.

18. Suspended sentence is of limited use if the courts use it as a safety valve or a delaying mechanism so that probation can be revoked on the slight pretext. This results in an unfortunate situation we have been trying to avoid—*i.e.* many offenders serving short sentences which are not penologically useful.

19. Offenders who successfully complete probation should have their records expunged at the completion of the probation period.

20. The concept of absolute discharge has caused some confusion in the courts. There must be some re-definition. It must not depend on the *Criminal Records Act* and no records must be kept which can reflect, in the long term, on the dischargee or his prospects as a citizen. There must be a guarantee that any documentatioon on absolute discharge cases must be kept separate and must be destroyed after a reasonable time.

21. The conditions for violation of probation must be made more explicit. Due process must apply to revocation proceedings, at least to the extent that due process is applied to pre-sentence reports. This must not be interpreted to mean that the violation can only consist of commission of another offence but there must be an opportunity to answer charges of violation and the same burden of proof should be on the prosecution as applies at the guilt-determination stage.

22. The overall verdict is that the probation service must play a greater role—as a partner in the criminal process, as a creative referral service, as an intake-classification service, in crisis intervention and in offering ideas to the sentencer and other functionaries in the criminal process. It must break out of its service orientation.