I would like to thank Douglas Murray for his permission to reproduce his part of the brief.

François Lareau

Sentencing Reform

Douglas Murray

In 1990, the Ministry of Justice put out a Green Paper[230] on sentencing, corrections and conditional release. It found that the current sentencing system in Canada was in dire need of legislative guidance. The codified guidance would give judges a clearer idea of what objectives sentencing is to attain. It would act to reduce the use of incarceration and somehow to increase the use of intermediate sanctions. The stated objectives would carry over into the areas of corrections and conditional release. On their face, these changes would create a more rational, just, understandable sentencing process.

However, the particular objectives and principles which the Ministry's 1990 Green Paper has recommended invite the same kind of arbitrary justice that the Ministry is supposed to be addressing. The Green Paper backs away from the Canadian Sentencing Commission's focus on "just deserts". It instead allows for the same kind of "blending" of various objectives (rehabilitation, deterrence, incapacitation, just deserts and victim restitution) which has made the sentencing process so unpredictable and unjust for so many years. Not only do these traditional objectives often work at cross-purposes (i.e. a young offender without a job may be both a good candidate for rehabilitation as well as a high "risk" offender who should be incapacitated), but a number of them cannot be justified in and of themselves (deterrence and incapacitation in particular).

The objective that this paper will suggest be paramount is one of modified "just deserts". "Just deserts" is essentially the idea that the punishment be in proportion to the particular crime committed. Within the parameters of the sentence which is handed out however, this paper recommends that the secondary objective of rehabilitation be pursued wherever possible. A further modification will be the use of restitution to victims as another secondary objective.

Perhaps most importantly, this paper will reject the often referred-to objectives of general deterrence and incapacitation.

Outline

We will examine each of the traditional objectives of sentencing. This will allow us to see why this paper's choice of aims is the most just and the most congruent with collateral issues.

This paper will then make six recommendations which flow from the choice of the modified "just deserts" objective. Included in this are: factors to be considered in the course of sentencing, creation of a "Sentencing Supervision Board", abolition of the current concept of parole, and revocation of the *Criminal Code*'s "dangerous offender" provisions.

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230 Ministry of Justice and Solicitor General, Directions for Reform - A Framework for Sentencing, Corrections and Conditional Release; hereinafter "Green Paper" which refers to the separate volumes on Sentencing and Corrections and Conditional Release , at 17.

Examination of Traditional Objectives

Rehabilitation

It has been argued that rehabilitation in general is unworkable because even the "experts" (psychologists, psychiatrists, social workers, parole officers) are unable to properly predict future behaviour and/or how to rehabilitate past offenders[231]. It is then unreasonable to require a judge to make highly individualized offender assessments which may or may not have any rehabilitative effect[232].

The Canadian Sentencing Commission has taken its disenchantment with rehabilitation to the extreme. It has wholly rejected it as being a worthwhile rationale for sentencing.

> There are no comprehensive data that support the idea that courts can in general, or with specific identifiable groups, impose sanctions that have a reasonable likelihood of rehabilitating offenders[233].

However, common sense tells us that sentencing, with all the tools it has at its disposal, must have some influence upon criminals' attitudes. If we are spending the amount of resources that we are upon incarceration and other sanctions, why not make the effort to put offenders in programs that have a chance, however slight, of reforming them, however slightly.

> The future criminal conduct of offenders is amenable to influence! Far from supporting an escape to paramount reliance upon "just deserts," the extant literature provides a strong base for a sentencing policy that encourages rather than discourages rehabilitative efforts, and that encourages the expansion of basic knowledge of what works, with whom, under what conditions[234].

Further, if we reject the possibility of rehabilitation altogether and buy into the C.S.C.'s pure "just desert" approach, we are condemning recidivists to a lifetime of punishment. We are saying that they aren't worthy of any effort to help them, but they are worthy of being punished severely each time for their repetitive criminal conduct[235].

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231 J. V. Roberts, Empirical Research on Sentencing (Ottawa: Dept. of Justice, 1988) at 11.

232 T. Gabor, "Looking Back or Moving Forward: Redistributivism and the Canadian Sentencing Commission's Proposals" (1990) 32 Cdn J. of Crim. 537 at 537.

233 Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Can. Govt. Pub. Centre, 1987) at 8.

234 D.A. Andrews, "Some Criminological Sources of the Anti-Rehabilitation Bias in the Report of the Canadian Sentencing Commission" (1990) 32 Cdn J. of Crim. 511 at 514.

235 *Ibid.* at 515.

Currently, many of the intermediate sanctions which are available (i.e. community service, half-way house) are aimed at some kind of rehabilitation. These have been in place for years and have been effective to varying degrees in helping offenders to acquire a sense of responsibility and/or to overcome mental/emotional /addiction problems. These programs must be promoted not only for their rehabilitation potential, but for their ability to imbue the sentencing process with greater flexibility, less dependence upon incarceration.

Deterrence

The idea of using the punishment of offenders to dissuade others in society from committing offences is an idea which has been popular at various times. It cannot be denied that for offences which require greater amounts of premeditation, the harshness of the punishment may indeed provide some deterrent effect. For instance, corporations may well act on a strict profit/loss basis. When they consider performing an act which may attach criminal liability, the punishment which awaits (i.e. size of fine) will be weighed to the dollar against the potential gain. However, this is the extreme case of the rational actor.

The majority of offenders will never assess the down side of an offence in such a cost/benefit way. It would be extremely difficult to assess the material benefits of a robbery against the cost of some time in prison. Even if this were possible on a subjective basis for one offender, no two people will weigh the costs/benefits the same way. How can the judiciary be expected to set sentences aimed at deterring society in general from committing particular offences? The notion of deterrence has limped along without any real evidence as to whether it can or how it can be achieved.

Sentencing, indeed the whole process of arrest, indictment, trial etc.. is a deterrent in itself. Deterrence has always been a valuable byproduct of the criminal process. To go further and instill this as an objective of sentencing though is both an unnecessary and misplaced intention.

Thus, deterrence cannot be used as a primary rationale for setting appropriate sanctions. However, unlike rehabilitation, deterrence cannot be used even as a secondary objective because of its potential for inflating sentences. As will be discussed later, to allow the sentence to become disproportionate to the crime actually committed would be irrational and unfair.

Incapacitation

The notion of incapacitation is based on the belief that dangerous and/or serious offenders who pose a risk to society should be put away for longer periods of time. Yes, society must be protected. The Green Paper considers protection of society to be the overriding objective of sentencing. However, incapacitation does so at too great a cost to the individual's freedom and in too arbitrary a fashion.

Incapacitation assumes that the sentence given is not long enough and that the offender will actually pose a risk to society for a much longer period. But for how long? The prison sentences which would be given under a "just desert" rationale would, as do all punishments involving custody, incapacitate the offender for their duration. Incapacitation advocates want to go beyond this byproduct effect and instill incapacitation as a dominant consideration in sentencing. Suppose that we are able to overlook the problems with the factors used to assess "risk" (these include the prejudice to minority members whose lack of social status becomes an aggravating factor). We must still insist upon some credible basis for deciding upon how much longer a prison sentence must be to satisfy incapacitation.

Yet, as with the other utilitarian objectives - deterrence and to a lesser degree, rehabilitation, the "experts" themselves have little or no way of telling if, when or for how long a risk exists. If prevention of future danger to society is used as a rationale for sentencing, the "payoff" will only be found where the sentence given is considerably longer than otherwise[236]. Given the arbitrary nature of the calculation, incapacitation cannot be justified.

More importantly, given that the effectiveness of incapacitation is measured by the amount which it reduces crime, the doctrine is an empirically-determined failure also. A U.S. study has shown that mandatory minimum sentences and "other more punitive strategies" have resulted in virtually negligible reductions in the crime rate[237].

Further, although this paper has stated that the reduction of imprisonment should not be considered in developing a rationale, it should be noted that incapacitation would almost certainly not help to reduce imprisonment.

> The difficulty with incapacitation as a crime-control strategy is simple : too many people would have to be imprisoned unnecessarily in order for crime levels to decrease appreciably[238].

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236 A. von Hirsch, "The Politics of "Just Deserts"" (1990) 32 Cdn. J. of Crim. 397 at 408.
237 *Supra*, note 231 at 10.
238 *Supra*, note 234.

Just Deserts

According to this notion, the sentence should be proportionate to the "gravity" of the offence and the "degree of responsibility" of the offender[239]. Its success or lack of it cannot be measured in any intended effect upon recidivist crime or upon crime rates in general. "Just Desert" advocates believe that sentencing should simply ensure respect for the rule of law, the glue that holds society together. Respect for the law will be watered down where the punishments handed out are perceived as arbitrary and not clearly connected to the behaviour which prompted them.

Critics point out that by focusing exclusively on the offender's conduct, "just desert" ignores the underlying social inequalities that may not only have caused the offence, but that give the offender an unequal footing before the court (i.e. less qualified counsel). Pure "just desert" rationale looks primarily at factors determining the crime's seriousness and gives little if any attention to social factors (i.e.employment, education, age). To do so, it is argued, would invite the courts to use these same factors as indicia of risk and give socially unequal offenders even longer sentences than otherwise.

However, under a system where incapacitation has been removed both as an underlying rationale for sentencing and as part of specific guidelines this need not happen. Judges may take offender characteristics into consideration, but they will have been instructed to not use them as going towards "dangerousness". Instead, the factors will only aggravate or mitigate an offender's "blameworthiness" for the offence committed.

Redress to Victims

Where possible, the Court should require offenders to acknowledge harm done to victims and to account for any reparations made (a mitigating factor)[240]. There is no good reason why this could not be instituted as a secondary objective, similar to this paper's view of rehabilitation. So long as the redress imposed does not make the sentence any harsher or longer than it would otherwise be, this would add another socially useful dimension to sentencing.

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239 *Ibid.* at 10.

240 I. Waller, "Victims, Safer Communities and Sentencing" (1990) 32 Cdn J. of Crim. 461 at 462.

Recommendations

This paper has established that the "just desert" rationale, tempered with the secondary objectives of rehabilitation and redress to victims, must be used to guide Canada's sentencing process. In order to ensure that these objectives are effectively pursued, in light of the system which is currently in place and in consideration of points suggested by competing proposals, the following recommendations are submitted :

1) Incorporation into the *Criminal Code* of a legislated "Statement of Purposes and Principles of Sentencing".

2) This Statement would have the following form :

(1) The fundamental purpose of sentencing should be to preserve the authority of and promote respect for the law through the imposition of just sanctions.

(2) In furtherance of the purpose set out above, a court that sentences an offender for an offence shall exercise its discretion within the limitations prescribed by this or any act of parliament, and in accordance with the following principles :

(a) punishment, to be just, must be linked to a criminal offence and must be consistently applied;

(b) a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender;

(c) rehabilitation of the offender, and restitution of property, where they can be advanced within the context of a just punishment for the crime, should be encouraged;

(d) incapacitation of offenders and general deterrence are not to be used as objectives in sentencing;

(e) a term of imprisonment is a last resort and imposed only :

(i) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender;

(ii) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.

3) Abolition of the current concept of parole. Parole would simply refer to a period of mandatory out-of-prison supervision which would make up the latter part of a prison sentence. The rationale for parole would be to help re-integrate the offender back into society before their sentence is completed. The current re-integration theme of parole would remain the same; however, gone would be the discretion to release or detain inmates based upon any "risk" assessment. The current ability to later vary a sentence at the parole stage according to the risk of offending again is to say, "Yes we sentenced you according to your bad act, but now that we have, you you're not getting out because we think you're a bad person." This smacks of mid-nineteenth-century thinking.

The exact date on which parole would begin would be decided by the trial judge when sentencing. Sentencing guidelines for particular offences will recommend particular prison/parole ratios (i.e. 70% sentence for sexual assault must be served in prison).

4) Creation of Sentencing Supervision Board. This board would take responsibility for the offender from the time sentence is imposed until they are out of the system altogether. Corrections would continue to exercise their current jurisdiction; however this board would have authority to review any decisions regarding the treatment of the offender while in prison.

Perhaps most importantly, the Sentencing Supervision Board would create and update sentencing guidelines to be used by trial judges. The guidelines, created in accordance with the principles enunciated in recommendation #2, would be of a *presumptive* nature. The presumed sanction for many offences will be community-based, while the most serious offences will carry a presumption of incarceration.

5) The factors which may be considered by the trial judge when sentencing would include those which affect the gravity of the offence and those which reflect the blameworthiness (responsibility) of the offender. Also allowable, since the punishment must ultimately be in proportion to the severity of the offence, are offender characteristics which make particular punishments more or less severe to that person. Other factors may be considered by the trial judge so long as they go towards achievement of the paramount objective and principles.

6) Revocation of the "dangerous offender" provisions in s.752-761 of the *Criminal Code*. These provisions allow for the offender to be imprisoned for an indeterminate period following an assessment of their potential for future violent conduct. This clearly goes beyond punishing for the severity of the crime committed.

The Supreme Court of Canada in R. v. Swain[241] has found that the indefinite committal of those found to be insane is in violation of s.7 and s.9 of the Charter of Rights. Now, the treatment of the insane accused is to be determined by what they require to overcome this state and to protect the public. The same may soon be found regarding the indefinite incarceration of "dangerous" offenders. This would likely take many dangerous offenders out of the prisons and put them in some new program more closely dealing with their particular problems. The trial judge, with evidence given from specialists in the field, could still be the one to deliver this unique sentence. If incapacitation is still considered to be an objective in these cases, it must be no more than an exception to the overall parameters of "just desert".

[241] (1991) 63 C.C.C. (3d) 481.