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A VALUES AND EVIDENCE APPROACH TO SENTENCING PURPOSES AND PRINCIPLES

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¹ The task I was given was to write a “think piece” on how I would reform the Purpose and Principles of Sentencing as expressed in Sections 718 to 718.21 of the *Criminal Code*. Obviously, therefore, the views expressed or implied in this paper are mine and mine alone and do not necessarily reflect the views of the Department of Justice, Canada.

Overview

Sentencing purposes and the principles that guide sentences are a reflection of the values of the society that imposes these sentences. Sentences are, by their very nature, punishments. The nature of the punishments that are imposed by the state, as well as the quantity of the punishments that are imposed for certain acts, reflect the values of that society.

Canada no longer has corporal or capital punishment. But, in historical terms, it was not long ago that we had both: Canada's last legal execution took place in December 1962. Although the whipping of prisoners was fairly common between 1957 and 1967 – 333 recorded instances took place during that period – the last recorded legal use of the lash on a prisoner in a Canadian penitentiary occurred in October 1968.² The reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values. Sentencing, then, is all about values. Hence to understand what should be contained in the statement of the Purpose and Principles of Sentencing in the *Criminal Code*, we need to understand Canadian values with respect to sentencing. And to understand Canadians' values on sentencing, we have to look first at our history.

Canadian Values on Sentencing: An Uncontroversial Topic

Until 1996, Canada's *Criminal Code* gave very little guidance to judges on sentencing. Each offence had a maximum sentence; a few offences had minimum sentences associated with them. With one major exception³, the power to determine the sentence was – at least in theory - in the hands of trial and appeal judges.

With few exceptions – at least one of them notable⁴ – when the new Part XXIII of the *Criminal Code* (C-41, 35th Parliament 1st session) was introduced into Parliament on 13 June 1994 – it was seen as being nothing new. Indeed the next day, "Canada's [self-styled] National Newspaper," the *Globe and Mail*, described the new sentencing bill on its front page under the headline. "Ottawa wants crackdown on violent offenders."

Though that story was on the front page ("below the fold"), the top centre story had the headline "Violence not up, Statscan finds" and reported on a recently released report on the results of Canada's second victimization survey. Below the story about the Statistics Canada report was a picture of Princess Ann and her husband. And below that was the story on the sentencing bill.

² For a very brief discussion of this aspect of our history, see Webster, Cheryl Marie and Anthony N. Doob (in press). *Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective*. In Kevin Reitz (ed.) *American Exceptionalism in Crime and Punishment*. New York: Oxford University Press.

³ The exception is that prosecutors were, and still are, given explicit power to determine at least the range of possible sentences in many offences in which they hold the unappealable power to make the decision to proceed summarily or by indictment.

⁴ I am referring to Section 718.2(a)(i) as it was at first reading. This section – making hate motivated crimes an aggravating factor – was controversial only because the then Reform Party MPs found objectionable the fact that "sexual orientation" was included in the list.

Saying that the sentencing package that had been introduced into Parliament represents “a slight improvement in the right direction but certainly falls short in key areas” the Reform Party spokesperson interviewed by the Globe and Mail said that the “package has to be examined closely to see if it is window dressing or serious reform.”

Later, the Opposition would criticize the government’s section listing the groups included in the “hate motivated crime” section (718.1(a)(i)). Their concern was simple: they didn’t like the fact that if a victim was targeted because of that victim’s “sexual orientation,” that was an aggravating factor at sentencing. Reviewing the debates in the House of Commons, one gets the definite feeling that the Bill itself was not controversial given that so much time was spent by the opposition criticizing the Minister for his decision to suggest in legislation that a crime was more serious if it targeted someone for reasons of that person’s sexual orientation.

As the then Minister of Justice, Allan Rock, noted in an interview much later,

It’s an irony that when we tabled [the sentencing bill] – 75 pages of proposed legislation ... [that] the one thing that preoccupied the House of Commons and the public for six months before it got passed was the appearance of two words... “sexual orientation” in the hate crimes provision. Those boneheads didn’t spend a moment talking about the policy of conditional sentences, didn’t talk even about the [Aboriginal] provisions for recognizing the particular circumstances of Aboriginal punishment, which I thought was daring at the time. I expected to have the roof fall in on me over that. They focused on those two words.It was wild.⁵

Especially in retrospect, it is perhaps not so wild. There certainly were some aspects of the bill that would later become controversial. The Minister mentioned two in this quote – the phrase relating to Aboriginal people in S. 718.2(e) and conditional sentences which were brought in as part of this bill. But the framework for the Bill – the principles and purposes of sentencing – were, generally, not controversial.

As an aside, S. 718.2(e) – stating that “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders” in itself reflects Canadian values. Parliament, in passing the bill with this section was, in effect, acknowledging the need to address Aboriginal over-representation in Canada’s prisons.⁶

⁵ Anthony N. Doob and Cheryl Marie Webster: *Weathering the Storm? Testing Longstanding Canadian Sentencing Policy in the 21st Century Crime and Justice: A Review of Research* (Michael Tonry, editor). In press: 2016.

⁶ It is interesting to note that the original version of the *Youth Criminal Justice Act* that was passed by the House of Commons and sent to the Senate did not have a comparable (“with particular attention to the circumstances of Aboriginal young persons”) section in it. It was the Senate, in a vote of 41 to 40 on 13 December 2001 that inserted a comparable section into S. 38 of the *Youth Criminal Justice Act*, requiring, then, that the Bill return to the House of Commons for approval. The House of Commons subsequently accepted the Senate’s ‘value based’ amendment.

It is notable – but not surprising - that in 1994 the Reform opposition did not to attack the Government on the fundamental aspects of the sentencing bill. I say this for a very simple reason: most of the values implicit in this bill reflected Canadian values.

Twelve years earlier, the Liberal Justice Minister, Jean Chrétien, had released his statement of government policy on criminal justice matters – a booklet titled *Criminal Law in Canadian Society*. Its release received almost no publicity whatsoever even though it was described in its preface as being Canada’s first statement of policy on criminal law. Indeed, it got no mention in “Canada’s National Newspaper” until 8 days later when a *Globe and Mail* columnist described it as being “a discussion of only very broad notions about crime and society and a set of principles which fall into the region of motherhood.”⁷ Four days later, an editorial appeared in the same newspaper gently chiding the government for not being more specific in its policy development. Other than that, the report seems to have been ignored by the *Globe and Mail* and all other Canadian newspapers.⁸ The reason that this statement of policy was seen as little more than ‘motherhood’ statements is that it probably was: there was some consensus that the criminal law should be used with restraint⁹ and that heavy use of prison sentences was not in the public interest. It seems unlikely that the statement about proportionality¹⁰ or restraint in the use of imprisonment¹¹ were terribly controversial.

Most of the basic principles of sentencing enunciated in a 1984 sentencing bill (that died on the order paper when the 1984 election was called) and in statement of government policy on sentencing (*Sentencing*, released in February 1984) probably still aren’t controversial.¹² The booklet *Sentencing* seems to have been ignored.

Each of these policy documents – and perhaps most of two other very important documents on sentencing that were released later in the 1980s – might be seen as simultaneously reflecting a Canadian consensus and helping to build or strengthen a consensus on sentencing. Indeed, the Deputy Minister responsible for the development of *Criminal Law in Canadian Society* saw the project as a way

⁷ Valpy, Michael. The first major step. *Globe and Mail*, 3 September 1982, page 6.

⁸ I searched various Canadian newspaper sites and couldn’t find any other references to “*Criminal Law in Canadian Society*” from August 1982 (when it was released) until the end of 1982.

⁹ The report notes that “Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other, non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate. It is also necessary because, if the criminal law is used indiscriminately to deal with a vast range of social problems of widely varying seriousness in the eyes of the public, then the authority, credibility and legitimacy of the criminal law is eroded and depreciated. The lumping together of seriously harmful and wrongful conduct with a host of technical, minor, or controversial matters blunts the impact and undermines the effect the criminal law should have as society’s institution of ultimate recourse” (p. 42)

¹⁰ “The criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others” (p. 53).

¹¹ “In awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances” (p. 53).

¹² That statement of policy suggested that harsh sentences can be used to deter the person being sentenced (specific deterrence) or people generally (general deterrence) from committing offences. The 1984 statement of government policy was not wildly optimistic about the notion that deterrence could be accomplished through sentencing, noting that “there is only ambiguous or inconclusive evidence” on the matter. (Government of Canada, February 1984. *Sentencing*. p. 35).

of consolidating a consensus that could later be a starting point for the development of future policies. Or, as Jean Chrétien said in a press release dated 25 August 1982, “I believe that this statement offers the foundation for a credible and effective criminal law, reflecting the needs and values of Canadian Society.”

That same day Chrétien wrote to all other Ministers (and his Deputy wrote to all other deputies) reminding them of a cabinet commitment to review all federal statutes that create criminal offences with the goal of bringing them in line with the new policy.

That document, however, did not take a firm stand on an important issue: whether crime could be controlled with harsh sentences. The 1982 document included somewhat contradictory statements about sentencing that did not seem to be controversial.

[T]he criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others. (page 5)

In awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances. (page 6).

There was no discussion about how to resolve possible inconsistencies between a proportionate sentence and deterrence, or between the “least restrictive alternative” and deterrence. Nor was what was ‘appropriate in the circumstances’ discussed. Nevertheless, the consensus view was clear: the Government of Canada had created a policy of restraint in the use of the criminal law and of imprisonment.

There were two other reports issued during the 1980s that also related to sentencing – the report of the Canadian Sentencing Commission¹³ and the report of the House of Commons Committee¹⁴ that examined sentencing and conditional release for about 9 months in 1987- 1988. These groups also suggested restraint in the use of imprisonment.

More important, perhaps, is the fact that the Canadian Sentencing Commission placed the utilitarian goals of sentencing – deterrence and incapacitation most notably – as goals that were subservient to the principle that sentences should be (largely) proportionate to the gravity of the harm inflicted on the victim or society and the offender’s responsibility for that harm.¹⁵

The 1988 House of Commons committee expressed its skepticism about imprisonment in another way by recommending that:

“A term of imprisonment should not be imposed, nor its duration determined, solely for the purpose of rehabilitation” (page 247).

¹³ Canadian Sentencing Commission (1987). *Sentencing Reform: A Canadian Approach*

¹⁴ Canada, 1988. “Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections.” David Daubney (chair). Canada: House of Commons.

¹⁵ For convenience, the 1987 Canadian Sentencing Commission’s “Principles of Sentencing” (page 154-155) is reproduced as Appendix 3.

By 1990, when the Conservative government released a set of three policy papers (and, in early 1992 a sentencing bill), the consensus on such matters as restraint in the use of imprisonment were well established. The 1990 policy paper *Directions for Reform: Sentencing* was described by the then Minister of Justice, Kim Campbell, as “the thinking of the federal government about this very complex issue [sentencing].”¹⁶ As if to emphasize the agreement on certain fundamental issues, this (Conservative) Minister went out of her way to quote, and cite with approval, statements from the 1982 “policy of the Government of Canada with respect to the purpose and principles of the criminal law” (*Criminal Law in Canadian Society*) as released by (Liberal) Jean Chrétien.¹⁷ She said that it “was necessary for us to endorse some specific principles that would guide our efforts” (page 5). Among these, she noted that:

Restraint and balance are vital:

Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other, non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate. It is also necessary because, if the criminal law is used indiscriminately to deal with a vast range of social problems of widely varying seriousness in the eyes of the public, then the authority, credibility and legitimacy of the criminal law is eroded and depreciated. (p. 42)

What had been established? Clearly restraint in the use of imprisonment was important as were proportional sentences. There was less clarity on the importance of the utilitarian purposes of sentencing such as deterrence and incapacitation. But nobody in power was arguing that prisons were effective in reducing crime. There was a good deal of agreement about criminal justice policies. This is illustrated by the “sameness” of the quotations in a “quiz” contained in Appendix 1.¹⁸

Attempting to Change Canadian Values on Sentencing: The Harper Decade

No matter what one’s political orientation, there is little doubt that the consensus that might have existed in the early 1990s, which largely carried over until the mid-2000s, was challenged by the Harper “tough on crime” agenda, 2006-2015. As Cheryl Webster and I have written elsewhere¹⁹, symbolically,

¹⁶ Canada, 6 July 1990. *Directions for Reform: Sentencing*. Preface.

¹⁷ The Conservative government in 1989 found that it had run out of copies of the 1982 (Liberal) report. In that pre-internet period, it decided to reprint the 1982 report exactly as it had been released by the Liberal government 7 years earlier with one exception: the single page preface signed by Jean Chrétien was removed.

¹⁸ An illustration of the consensus that existed on criminal justice issues more generally, you are invited to take the “Quiz” that Cheryl Webster and I included in our paper in *Policy Options* in 2015 (see next footnote). It is contained here as Appendix 1.

¹⁹ Doob, Anthony N. and Cheryl Marie Webster (2015). The Harper Revolution in Criminal Justice Policy... and What Comes Next. *Policy Options*, 36(3), 24-31. Webster, Cheryl Marie and Anthony N. Doob (2015). American Punitiveness ‘Canadian Style’? : Cultural Values and Canadian Punishment Policy. *Punishment & Society* 17(3), 299-321. Doob, Anthony N. and Cheryl Marie Webster (Autumn, 2015) The Promise Ahead: Using the Past to Guide Reforms of Canada’s Criminal Justice System. *Justice Report* (Canadian Criminal Justice Association), 30(4), 6-9.

the Harper Decade was a dramatic break with our past as far as sentencing policy, and the values inherent in sentencing, are concerned. Other than the fact that the Harper government promoted, as a result of either ignorance or dishonesty, the notion that harsh policies were an effective way of reducing crime²⁰, the Harper crime policies appear to have had relatively little effect overall in one index of Canada's punitiveness: imprisonment rates. Canada has (thus far) continued to have a moderate imprisonment rate – one that is in keeping, as of now, with our traditional imprisonment rate of 100 adult prisoners (plus or minus about 20) per hundred thousand total residents.²¹ This is not terribly surprising: a careful examination of most (but not all) of the Harper government's many crime bills that became law would suggest that few, in fact, were likely on the surface, to have much impact on the size of Canada's prison population. Although many crime bills would appear to be likely to have small effects, some could reasonably be expected to have no effect on imprisonment rates. For example, adding to the list of 'aggravating factor' in sentencing the fact that the "offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation"²² is unlikely to have had much effect just as raising the maximum sentence and adding a mandatory minimum sentence to the offence of bestiality in the presence of a child would affect very few cases.

The more important question, in this context, is whether the Harper government was successful in changing Canadians' views about how best to respond to crime. I don't know of any direct evidence of this, but research in Canada starting in the early 1980s (sponsored by the Department of Justice, Canada) up to the present suggests that Canadian views on sentencing are more complex than they would appear to be on the basis of answers to questions which ask whether Canadians would prefer harsher sentences.

Simply put, when people have more detailed information about cases and alternatives – or they are asked questions about cases they actually know something about – they tend to be more content with the sentences that are actually handed down by the courts. The answers to the simple public opinion question – "In general, would you say that sentences handed down by the courts are too severe, about right or not severe enough?" have to be interpreted carefully. People aren't evaluating a representative sample of sentences and answering this question. What questions such as these might tell us is whether there is a broad shift toward what less-than-well-informed members of the public think about sentences. But questions such as these tell us little more. At best, they tell us what people feel; they don't tell us what people 'know'.

Nevertheless, we do have data from reliable surveys carried out by Statistics Canada. These data suggests that at least until 2009, there had been no clear shift toward punitiveness in the Canadian

Doob, Anthony N. and Cheryl Marie Webster (2016, in press). Weathering the Storm? Testing Longstanding Canadian Sentencing Policy in the 21st Century. *Crime and Justice: A Review of Research* (Michael Tonry, editor)

²⁰ Perhaps one of the more blunt examples of this occurred in October 2014 when the Canadian Press reported that Prime Minister Harper stated that "We said 'do the crime, do the time.' We have said that through numerous pieces of legislation. We are enforcing that. And on our watch the crime rate is finally moving in the right direction, the crime rate is finally moving down in this country." Sault Ste. Marie, Ontario, 17 October 2014.

²¹ See Appendix 4.

²² This is the totality of Bill C-36 (41st Parliament, 1st session)

public. The percent of a large (typically over 10,000) sample of Canadian adults in the 10 provinces shows no evidence that Canadians are getting more punitive. Indeed, between 1993 and 2009, the proportion of Canadians who report that they believe that sentences are not severe enough dropped substantially.²³

Year	Proportion of Canadians who Say that Sentences Are Not Severe Enough
1988	65.3%
1993	71.5%
2004	62.5%
2009	60.3%

One of the most dramatic illustrations of the conclusion that the public opinion questions related to ‘wanting’ harsh sentences in the abstract do not translate into wanting harsher sentences in practice comes from a study in Australia. Jurors in actual criminal cases were asked, after having convicted the accused, what they thought the proper sentence would be. In addition, after hearing the sentence handed down by the judge in ‘their’ case, they were asked whether they thought that sentences in general were too lenient, about right, or too harsh. Overall 52% chose a sentence that was more lenient than the sentence actually imposed by the judge, 44% chose a more severe sentence, and 4% gave exactly the same sentence as the judge. There was some variation across offence types but in all 138 cases in which jurors participated in the study, about half or more of the jurors recommended the same or a more lenient sentence than did the judge.

When asked about sentences, generally, the majority thought that sentences were too lenient even though they had seen that they were more lenient than the judge.²⁴

A similar illustration of this comes from the United States. Even though sentences in the US are notorious for being harsh, about half of Americans think that sentences are too lenient.²⁵ In federal courts operating under the United States Sentencing Commission’s guidelines, this study collected systematic data on jurors’ recommended sentences in 22 criminal trials. 88% of the jurors’ recommendations were lower than the minimum allowable sentence under the guidelines.²⁶

Returning to Canada, we should remember that the one area of the criminal law in which jurors have a very real impact on punishment are those cases in which a person is sentenced to life imprisonment with a parole ineligibility period of more than 15 years. In those cases (until the provision was abolished) a person could apply under the so-called “faint hope” clause to have parole ineligibility reduced. Since 1998 the jury that heard the “faint hope” application has to be unanimous to reduce the parole

²³ These percents are based on the total sample – including those who, quite legitimately, indicate that they don’t know. Data source: GSS 3, 8, 18, and 23.

²⁴ Warner, Kate, Julia Davis, Maggie Walter, Rebecca Bradfield, and Rachel Vermey. (2011). Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study. Australian Institute of Criminology: *Trends & Issues in Crime and Justice*, No. 407. A summary (some of which is quoted here) is available as Criminological Highlights 11(6)#2.

²⁵ See, for example, the report “The NCSC [National Center for State Courts] Sentencing Attitudes Survey: A Report on the Findings” Princeton Survey Research Associates International, 2006.

²⁶ Gwin, (Judge) James S. (2010). Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values? *Harvard Law & Policy Review*, 4, 173-200. A summary (some of which is quoted here) is available as Criminological Highlights 14(1)#6.

ineligibility period. In other words, a single person on the 12 person jury can stop the applicant from having the parole ineligibility period reduced. Overall there have been 213 court hearings since these hearings began in the late 1980s. In 77% of these hearings before a jury (163 of the 213) the prisoner was successful in getting the parole ineligibility reduced. What is, perhaps, more remarkable is the fact that since the requirement that the jury be unanimous was imposed, 74% of the hearings have resulted in reduced parole ineligibility periods. To the extent that jurors in these cases represent an informed public (i.e., they hear about offence and the prisoner), these data suggest that the Canadian public wants some of its most serious offenders to have a chance of leaving prison and returning to society.²⁷

As everyone is fully aware, the Harper government put in place numerous mandatory minimum sentences. In addition, they raised other mandatory minimums. One can, once again, find Canadian data to support the view that Canadians like mandatory minimums. In one national poll, 58% of the respondents in the national poll indicated that they thought mandatory minimum sentences were a 'good idea.' However, they were then asked whether they "agree or disagree that there should be some flexibility for a judge to impose less than the mandatory minimum sentence under special circumstances." The results show that 74% supported the idea that there should be judicial discretion in imposing 'mandatory' minimums. 72% agreed with the idea that a court should be allowed to impose a lesser sentence if the judge had to provide a written justification for a decision in which he or she goes below the mandatory minimum sentence. 68% agreed with the idea that judges should be able to sentence below the mandatory minimum term if Parliament had outlined clear guidelines for the exercise of discretion.²⁸

The central purpose of sentencing

A necessary starting point for thinking about the purpose of sentences might be to accept two basic premises. First, the purpose needs to resonate with Canadians. Said differently, it must make sense to people. In other words, it needs to resonate with Canadians' values related to those who commit offences. Second, it needs to be honest. It cannot promise to do things that can't be delivered.

Sentencing is about punishment. Our criminal justice history would suggest that we have been content with the idea that the amount of punishment should be the minimum amount necessary to reflect the act which is being punished. But there should be no mistake: sentences are punishments. Hence a justification for sentencing is useful in that it can help guide the imposition of an appropriate sentence and can provide a framework for everyone when thinking about sentences in individual cases.

²⁷ It would appear that the Canadian public was not pleased with the "faint hope" clause in the abstract. A report prepared for the Department of Justice, Canada, suggests that, "Results from the only poll dealing with the question of parole for life prisoners have shown that most Canadians appear to oppose the granting of full parole to prisoners serving life terms for murder.... The explanation for the discrepancy between the results of the applications [actual faint hope hearings] and the results of the opinion poll question would appear to lie in the amount of information available. Most Canadians may oppose parole for lifers when asked a general question, but change their minds when provided with a great deal of information about the specific prisoner making the application." Conditional Sentencing in Canada: An Overview of Research Findings. RR2000-6e Julian V. Roberts and Carol LaPrairie. Department of Justice, Canada. April, 2000.

²⁸ Roberts, Julian V., Nicole Crutcher and Paul Verbrugge. (2007) Public Attitudes to Sentencing in Canada: Exploring Recent Findings. *Canadian Journal of Criminology and Criminal Justice*, 49, 75-107. A summary (some of which is quoted here) is available as *Criminological Highlights* 8(6)#1.

In Appendix 2, I have reproduced nine statements of the purpose of sentencing. These come from the *Criminal Code* (before and after July 2015), the *Youth Criminal Justice Act*, two *Criminal Code* amendment bills that were not passed, and four other Canadian documents that are important in understanding issues around sentencing in Canada. They all obviously vary somewhat.

One of the most important differences in these statements lies in the centrality of what might be called “protecting the public through sentencing.” This is, perhaps, most clear if one looks at the two (recent) versions of the *Criminal Code*. The Code currently states that the “purpose of sentencing is to protect society...” The earlier version was less ambitious. It stated that the purpose was to “contribute... to respect for the law and the maintenance of a just, peaceful and safe society....”

The most clear statement that appears to suggest that sentencing is central to issues other than crime control is contained in the *Youth Criminal Justice Act* which states that “the purpose of sentencing... is to hold a young person accountable for an offence through the imposition of just sanctions....” Requiring judges to be responsible for the amount of youth crime in a community is not part of the *Youth Criminal Justice Act*.

Turning to other formulations of the purpose of sentences, the Canadian Sentencing Commission²⁹ in 1987 suggested that the purpose of the criminal law was “to contribute to the maintenance of a just, peaceful and safe society.” Sentencing, on the other hand, was supposed “to preserve the authority of and promote respect for the law through the imposition of just sanctions.”

This is not the place to examine, in detail, the evidence about the ability of the criminal justice system, through variation in sentencing, to control crime. There is an enormous amount of research on the various mechanisms by which crime might be affected by sentences. These mechanisms include general and individual deterrence, incapacitation, and rehabilitation programs (typically in prison facilities). The most popular mechanisms are probably general and individual deterrence in part because they are so simple. These two mechanisms would suggest that, at least theoretically, longer sentences will both deter other people from committing crime, but will also reduce the likelihood that the person being sentenced will reoffend. The only problem with this view of crime control is that the evidence does not support it. Although there are occasional papers suggesting that crime can be reduced by imposing harsh sentencing practices, such conclusions usually take a selective view of the data or the studies themselves are flawed.³⁰ In a more detailed and recent review of current findings, my colleagues and I found little evidence to support the idea that crime could be deterrence through harsh sentences.³¹

²⁹ In the interests of full disclosure, I should mention that I was a member of that Commission.

³⁰ Perhaps one of the most famous of these flawed studies is that published by Kessler and Levitt in 1999 on a change that took place in California in 1980 as a result of a referendum. A critique of that study – showing, among other things, that Kessler and Levitt reported only half of the available data – can be found in Webster, Cheryl Marie, Anthony N. Doob and Franklin E. Zimring (2006) Proposition 8 and Crime Rates in California: The Case of the Disappearing Deterrent. *Criminology and Public Policy*, 5(3), 417-447. See also Levitt’s reply to this paper (in the same issue) and the commentary on the controversy in the same issue of this journal by an independent academic, Steven Raphael.

³¹ See Webster, Cheryl Marie and Anthony N. Doob (2012) Searching for Sasquatch: Deterrence of Crime Through Sentence Severity. *Oxford Handbook on Sentencing and Corrections*. Edited by Joan Petersilia and Kevin Reitz. New York: Oxford University Press (pages 173-195). For a more detailed summary of relatively recent ‘deterrence’ related studies see Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation Research Summaries Compiled from Criminological Highlights by Anthony N. Doob (University

But there are other practical concerns about imprisonment. There is substantial evidence, now, that harsh sentences do not reduce the likelihood of reoffending by the person being sentenced. Furthermore, aside from costs to society, it appears that there are negative collateral effects of imprisonment to others and perhaps the community. Canada, throughout its history, has never endorsed the idea that prisons are an effective weapon against crime. It turns out, we have almost certainly been empirically correct.³²

If the *Criminal Code's* statement of purpose were to be modified to simply require judges to hold people accountable by imposing sentences that were proportional to the harm that they created and their responsibility for it, we would be making a clear statement – as we did in sentencing for youths – about what we were likely to accomplish.

If judges were required to hold those who offend accountable for their actions by imposing proportional sentences, then sentencing would no longer be held up as an effective way of reducing the likelihood of offending. If this were done, then it would also make sense to eliminate specific sections³³ which justified sentences by their deterrent effects. Though there is not the quantity of data on the impact of sentences on the denunciation³⁴ of the behaviour involved in an offence, given that it is well accepted that sentences should be proportionate to offence seriousness, it does not appear that basing sentences on denunciation makes much sense.

One point that needs to be made, however, is that for the offences that matter to most members of the public – serious violent offences, most particularly – proportional sentences almost certainly deal with what might be called the ‘incapacitation problem.’ It seems to me to be almost certain that the offenders whom people want to incapacitate are those who have committed very serious offences.

Looking at all of this, then, the first question for the government to consider if they are interested in changing the purpose of sentencing is whether it wants to be honest with Canadians about the relationship between sentencing and crime. Clearly it is not difficult to be honest: In 2002, when Parliament finally passed the *Youth Criminal Justice Act*, it decided that it was reasonable to focus sentencing on holding people responsible for their criminal acts rather than saddling judges with the task of controlling crime.

I would recommend, therefore, that something analogous to the *Youth Criminal Justice Act's* goal of holding those who are being sentenced accountable for their actions would be a good start.

of Toronto) Cheryl Marie Webster (University of Ottawa) Rosemary Gartner (University of Toronto). 14 February 2014. Available: <http://criminology.utoronto.ca/criminological-highlights/>

³² The Effects of Imprisonment: Specific Deterrence and Collateral Effects Research Summaries Compiled from Criminological Highlights by Anthony N. Doob (University of Toronto) Cheryl Marie Webster (University of Ottawa) Rosemary Gartner (University of Toronto) 14 February 2014. See also Webster, Cheryl Marie and Anthony N. Doob (in press). Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective. In Kevin Reitz (ed.) American Exceptionalism in Crime and Punishment. New York: Oxford University Press.

³³ See, for example, Sections 718.01, 718.02, and 718.03.

³⁴ See Canadian Sentencing Commission, p. 142: “Public views of the seriousness of offences appear to derive more from other sources... than ... the harshness of the sentence actually imposed in court.” (p. 143).

Other purposes of sentencing

Sentencing can – and sometimes does – do other things as well. The most obvious – but relatively rare – benefit from sentencing has been contained in the *Criminal Code* since 1996: “to provide reparations for harm done to victims or the community.” Obviously, most of those being sentenced are not easily capable of providing reparations. Redress or reparations for victims or the community was in the 1984 (Liberal) and 1992 (Conservative) bill as well. The Daubney committee in 1988 went into more detail on this than other proposals.

Another purpose is made very clear in the *Youth Criminal Justice Act*. It suggests that sentences should “promote” rehabilitation and reintegration “thereby contributing to the long-term protection of the public.”

Few would argue that there is a lot that a sentencing judge can do to make society better. But there is a value to realistic aspirational statements such as this.

Just as judges are currently required, (especially when sentencing Aboriginal offenders) to search for alternatives to imprisonment, it would appear to be sensible – and consistent with our history and Canadian values about those who are before the courts – to require judges to look for opportunities to make things better (or to lessen the harm that resulted from the criminal offence). Hence it would be reasonable to continue to allow – or perhaps to require

– judges to look for ways of lessening the lasting harm done to victims (through whatever mechanisms have been shown to be effective). And it makes sense for judges to consider choices that might reduce the harm (e.g., of imprisonment) so that those who have committed offences might be reintegrated peacefully into society.³⁵

“Doing good” at sentencing is not incompatible with proportionality. It simply has to be done within the limits of a proportional sentence.

Proportionality and restraint in the use of imprisonment

On its own, a statement of purpose of sentencing doesn’t get one very far, though, if effective, it limits the justifications (and perhaps also the sanctions) that could be imposed in certain cases.

More is obviously needed. One aspect of sentencing that has appeared throughout the period surveyed in this paper is the idea that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender (for the offence). This was contained in the Liberal 1984 sentencing bill as well as the Conservative 1992 sentencing bill.

It was finally written into the current law in 1996 and made part of the *Youth Criminal Justice Act* when that became law in 2003.³⁶

³⁵ This was expressed quite succinctly in the 1982 government statement of policy – Criminal Law in Canadian Society – which suggested that “Wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for (i) opportunities for the reconciliation of the victim, community, and offender; (ii) regress or recompense for the harm done to the victim of the offence; (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community” (p. 62).

³⁶ It is interesting to note that even when the Harper government made denunciation and individual deterrence

Proportionality – between the offence and the sentence – is part of our sentencing culture. It is almost certainly part of Canadian values about sentencing. Obviously it needs to remain.³⁷

But another part of our sentencing culture – that also needs to remain and be strengthened – is restraint in the use of imprisonment. This is now stated in three obvious ways in the *Criminal Code*.³⁸ It is also a central concern in the general principles in *Youth Criminal Justice Act* in various ways.³⁹ More importantly, perhaps, the *Youth Criminal Justice Act* specifies that there are only four ways in which a young person can be sentenced to prison⁴⁰ but even when one of those paragraphs could justify custody, the judges is still required to consider other alternatives.⁴¹

As noted elsewhere, Canada has had a stable rate of imprisonment for over 50 years.⁴² It would appear that it is important to maintain the kind of restraint language that currently exists and, perhaps, to

permissible objectives of sentencing, these (new) purposes were limited in their applicability by being “subject to” proportionality. In addition, providing the most rehabilitative sentence possible was a requirement (... “the sentence must” ...). In contrast, judges were merely permitted to invoke denunciation and deterrence.

³⁷ As various scholars have pointed out, deciding to base sentence severity on “proportionality” is, only, the beginning. One then should decide systematically what factors determine offence seriousness. See Bagaric, Mirko (2000). Proportionality in Sentencing: Its Justification, Meaning, and Role. *Current Issues in Criminal Justice*, 12, 143-163. This is summarized as *Criminological Highlights* 5(1)#8. But in addition, two sentencing systems can be equally proportional, but one might be much more severe than the other. Proportionality, in other words, does not solve the problem of how severe a sentencing system should be.

³⁸ Section 718.2 (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

³⁹ Section 38 (2) (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; (e) subject to paragraph (c), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community...

⁴⁰ **39 (1)** A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless (a) the young person has committed a violent offence;

(b) the young person has failed to comply with non-custodial sentences;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act... or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

⁴¹ **39 (2)** If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

⁴² This is discussed in detail in Webster, Cheryl Marie and Anthony N. Doob (2007) Punitive Trends and Stable Imprisonment Rates in Canada. In Tonry, Michael (ed.). *Crime and Justice: A Review of Research*. Volume 36.

strengthen it. One way to strengthen it would be to use language such as that contained in the *Youth Criminal Justice Act* which specifies the circumstances in which imprisonment can be used. Such explicit language would move restraint in the use of imprisonment from its status as a suggestion to being closer to being a rule.

Mandatory Minimum Sentences

There is sufficient evidence to know that mandatory minimum sentences do not accomplish what they are said to accomplish⁴³ (reduced crime) and they create a series of other problems in the sentencing process. As America's leading sentencing expert, Michael Tonry, wrote⁴⁴, "Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms... are a bad idea" (p. 65). That "is why nearly every authoritative nonpartisan law reform organization that has considered the subject... [has] opposed enactment, and favoured repeal of mandatory penalties" (p. 66). Three justifications are offered for mandatory penalties: evenhandedness, transparency, and the prevention of crime. None withstands careful scrutiny. Tonry points out that "Mandatory penalties often result in injustice to individual offenders. They undermine the legitimacy of the courts and the prosecution process by fostering circumventions that are wilful and subterranean. They undermine... equality before the law when they cause comparably culpable offenders to be treated radically differently" (p. 100). And 40 years of increasingly sophisticated research shows they do not have deterrent effects.

Nevertheless, as we know from the Harper decade, mandatory minimum sentences are politically popular.⁴⁵ And Canada has, over the years – mostly during the Harper years – accumulated a fair number of them. The question is what to do now. One suggestion would be to deal with them as part of the current Section 718.2 and to add a provision that suggests, in effect, that all mandatory minimum sentences are presumptive, not mandatory. Judges who find it necessary in terms of the essential principles of sentencing to depart from the mandatory minimum would have to give reasons for the departure. Legislation could specify the criteria that would have to be met in order to 'escape' the mandatory penalty. As pointed out earlier, such an approach would be consistent with Canadian views of what is appropriate.

It is worth pointing out that a 'first cousin' to mandatory minimum sentences would be the requirement that the sentences for certain offences be served consecutively. I haven't reviewed the *Criminal Code* and related statutes to determine the number of required consecutive sentences, but some of them can easily be seen as having the possibility of either creating peculiar sentences⁴⁶ or interfering with proportionality when looked at across offences.

Chicago: University of Chicago Press and in Doob and Webster (in press). See footnote 5.

⁴³ See the Criminological Highlights collection referred to in Footnote 31.

⁴⁴ See, for example, Tonry, Michael (2009). *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*. In *Crime and Justice: A Review of Research* (Tonry, Michael, ed.), Volume 38. University of Chicago Press. This is summarized in *Criminological Highlights*, 11(1)#3. Parts of that summary are used here.

⁴⁵ Doob, Anthony N. and Cesaroni, Carla. The political attractiveness of mandatory minimum sentences. *Osgoode Hall Law Journal*, Summer/Fall 2001, 287-304.

⁴⁶ This could happen in cases of mandatory consecutive sentences where a judge gives an unusually short prison sentence for one or more counts in order not to exceed what would be seen as a reasonable 'total' sentence.

In this context, judges are, of course, required to consider not only the sentence being handed down for each offence, but in cases of multiple offences, they must also consider the totality of the sentence to ensure that it is not disproportionately long.⁴⁷ This can easily conflict with a requirement of consecutive sentences. Judges could, of course, avoid the “unduly long” sentence by reducing the length of one or more of the consecutive sentences. That, however, would make the individual sentences look inappropriate even though the ‘total’ sentence might look appropriate.

But the uneven requirement of consecutive sentences, itself, creates problems. Consider the following case: someone breaks into a house. As he is leaving the house, a police officer happens to arrive with his police dog and in trying to capture the offender, the officer’s police dog is injured by the burglar. The (new) offence of injuring a law enforcement animal while it is aiding a law enforcement officer in carrying out that officer’s duties⁴⁸ states that the sentence for this offence and any other sentence arising out of the same incident must be consecutive. So those sentences – the break in and the injury to the police dog – get consecutive sentences automatically. On the other hand, if the offender committed aggravated assault against the home owner in escaping, there would seem to be no statutory requirement of a consecutive sentence. If sentencing reflects Canadians’ values, it would appear to me that this requirement, like mandatory minimum sentences, creates inequities.

Aggravating and mitigating factors in sentencing

When Canada’s sentencing legislation became law in 1996, there were two aggravating and no mitigating circumstances listed under S. 718.2(a). We now have 8 aggravating and (still) no mitigating factors listed in this section. Some of the aggravating factors seem rather unnecessary (e.g., “that the offence was a terrorism offence”). This is obviously not an exhaustive list of possible factors, but listing some and not others raises questions.

I have already mentioned the criticism that the government received in the 1990s for listing “sexual orientation” as one of the bases for hate-motivated crime. Given that a list does exist in the *Criminal Code*, it is understandable – and almost certainly symbolically important – that the current government has introduced legislation to add “gender identity or expression” to this list (Bill C-16, 42nd Parliament 1st session). However, even that list (in S. 718.2(a)(i)) is a bit of a problem. Why, for example, are religion and language listed in the section but not “political affiliation”?⁴⁹ Why are there no mitigating factors listed even though the section has been in place for 20 years? It would appear to me to be sensible to rethink the list of aggravating factors and to think clearly about what might be mitigating factors in sentencing.

⁴⁷ Section 718.2 (c): “Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.”

⁴⁸ The offence is described in Section 445.01(1). Subsection (3) says that “A sentence imposed on a person for an offence under subsection (1) committed against a law enforcement animal shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.”

⁴⁹ When this bill was first introduced, the list was exhaustive. Later the words “or any other similar factor” was added.

The sentencing of organizations (S. 718.21)

I have little knowledge or experience with this section. However, I did read the debates at second reading in the House of Commons concerning the bill that introduced this section into the *Criminal Code*.⁵⁰ What is notable, perhaps, is that there seemed to be general support for the bill – and more particularly there was support for this section – from not only the Liberals who introduced it, but from the Canadian Alliance, the Conservatives, the NDP, and the Bloc. As one Liberal MP pointed out in the debate at second reading, the then proposed “718.21 would provide the courts with what amounts to a checklist of 10 things that should be considered in setting the level of a fine” (Hansard, 15 September 2003).

At third reading, the response to these sentencing provisions was similar: there was no opposition. We can, perhaps, learn from this experience. The section gives judges guidance where, it was thought, judges actually could use guidance. It didn’t tell them what to conclude, but it did tell them what they should think about. And politically, a thoughtful ‘check list’ seemed to have support not only from the government that proposed the bill, but from the four opposition parties.

Summary and Conclusions

Sentencing is all about values: How we punish and how much we punish relate to our views of other people and how we interpret their transgressions. The purpose and principles sections of the *Criminal Code*, then, are not just philosophical statements that have no meaning in reality. They tell Canadians what sentencing is all about, and should reflect Canadian values.

Until 2006, there was a great deal of consensus in Canada about what how sentencing of offenders should be seen. This is not to imply that everyone was uniformly happy with sentences. But it does mean that those bodies – Parliament, Commissions, Governments, etc. – that looked into sentencing issues, tended to come up with the same view.

Although the majority of the Canadian public since the mid-20th century has said that sentences are too lenient, those groups (including Parliamentary committees, governments, commissions, etc.) that have examined sentencing in Canada have almost uniformly concluded that restraint in the use of imprisonment was important in sentencing. Statements urging that imprisonment should be used only when necessary and that sentences should reflect the seriousness of the offence and the offender’s responsibility for the offence have traditionally been seen as simply reflecting the obvious.

The “purposes and principles” sections of the sentencing bills that were introduced in 1984 by the Liberals and in 1992 by the Conservatives looked remarkably similar to each other and to the bill that finally put the current Part XXIII into the *Criminal Code*. Governments may have been worried about looking soft on those being sentenced, but their legislative initiatives were quite similar over time.

By the late 1980s, governments were beginning to be skeptical about the assertion that harsh sentences would lead to less crime. By 1999, when the Youth Criminal Justice Act was first introduced into Parliament, it would appear that the government’s sentencing policies (at least for youths in this instance) were congruent with the empirical evidence: sentencing was about holding those who have

⁵⁰ Bill C-45, 37th Parliament, 2nd session. 15 September 2003.

offended responsible for what they have done. The government did not take the view that severity of sentences was related to crime rates.

Restraint, holding offenders accountable for their actions, and proportionality are well established in Canada as principles that should guide sentencing decisions. By the late 1990s, these principles can be assumed to have reflected Canadian values.

Although imprisonment did not increase much during the Harper Decade, the Harper approach to criminal justice was very different. It was much more than simply a “tough on crime” regime. The message was a simple one: those who offend did not deserve to remain full members of society. Restrictions on pardons, consecutive parole ineligibility times for those convicted of murder, mandatory minimum that clearly violated proportionality were all signs of this. The values implicit in criminal justice policies promoted between 2006 and 2015 reflected a change from our past. Officially, the Harper government appeared to believe that crime could be controlled – at least in part – with harsh sentences. Empirical evidence suggests otherwise.

But even if the Harper government had – or has - succeeded in increasing the punitiveness of our courts, recent research suggests that neither the rate nor the duration for which offenders are imprisoned (across Canadian provinces) is related either to perceptions of severity of sentences by the Canadian public or Canadians’ confidence in the justice system.⁵¹ Given that ordinary citizens have little information about sentences, this result is hardly surprising. But the findings of this study (and others like it) suggest that it is highly unlikely that public confidence in the justice system would be enhanced if punishment severity were to increase.

The Canadian public, it turns out, has complex views of sentencing. Although they say, in response to simple questions on public opinion polls, that they want harsher sentences, mandatory minimums, etc., it turns out that when pushed slightly, they reject rigid uniformly harsh approaches. Proportionality in sentencing is important. Holding those who offend responsible for their actions is important. The rigid imposition of fixed or minimum penalties is not part of Canadian justice values.

Taking all of this together would lead to the following recommendations with respect to a statement of purpose in sentencing.

- Though the exact form of the language can easily be debated, it seems to me to be reasonable to suggest that a statement of purpose in sentencing should reflect the importance of imposing sentences that are seen as just and which, thereby, preserve the authority of the law and promote respect for the law.
- Sentencing should not be held out as being an effective mechanism for controlling crime. Said differently, judges can’t reduce crime with harsh sentences. Governments have a responsibility not to suggest that a problem as serious as crime can be reduced through mechanisms that are known not to work.
- At the same time, it seems reasonable – within limits defined by proportionality – to look for opportunities which would enhance the quality of Canadian society. Promoting

⁵¹ Sprott, Jane B., Cheryl Marie Webster, and Anthony N. Doob (2013). Punishment Severity and Confidence in the Criminal Justice System. *Canadian Journal of Criminology and Criminal Justice*, 55(2), 279-292.

reintegration into the community would be one such purpose as would attempts to make reparations to victims.

- There is no value in promoting a criminal justice system that sees the interests of those being sentenced and their victims as a zero sum. Sentence severity should reflect the seriousness of the offence and the offender's responsibility for it. And opportunities should be examined whereby the position of victims can be improved.

Such an approach need not be seen as being soft on those who offend. After all, those who commit the most serious offences are likely, in a proportionality model, to be given long prison sentences. The mechanisms by which the supposed utilitarian goals that some people believe in are achieved – long penitentiary sentences for serious violent offences, for example – are typically going to be imposed on the most serious offenders based simply on proportionality.

When one looks at more specific principles to guide the imposition of sentences, it is clear once again that each of the following has been part of Canada's thoughts about sentencing for decades:

- Sentences should be proportionate to the seriousness of the harm that was done and the offender's responsibility for that harm.
- Prison should be used with restraint.

Though not strictly part of sentencing, it is in the public interest to ensure that those who are removed from society for some time by being imprisoned are then given opportunities and guidance to reintegrate into society. At the moment, it would appear that for various reasons the "administration of sentences" (in particular prison and penitentiary sentences) is in need of attention.⁵²

Given that we now know that prisons and penitentiaries are likely to increase the likelihood that those subjected to them will commit offences, it is especially relevant to limit their use to those cases where other alternatives cannot be found or created that adequately reflect the severity of the crime. Therefore, consideration should be given to providing a more prescriptive set of provisions limiting the use of imprisonment such as those contained in Section 39(1) of the *Youth Criminal Justice Act*. Aside from any other considerations, guidance of this kind could help explain to the public what types of cases could reasonably be eligible for Canada's harshest penalties. Clearly, however, provisions for adults are going to be more complex than the analogous provisions that were designed for youths.

In order to be consistent with both the purpose of sentencing and the restraint and proportionality principles, mandatory minimum sentences and consecutive sentences need to be modified so that they are presumptive, not mandatory. Judges should be provided with legislative guidance on what the criteria are for 'escaping' mandatory minimum sentences should be and the law should require them to state their reasons for not imposing mandatory minimums.

⁵² I am thinking, of course, to the various issues that have been raised in recent years about the operation of prisons and penitentiaries. But I am also concerned that the operation of conditional release in Canada is in need of serious attention. See, for example, Doob, Anthony N., Cheryl Marie Webster, and Allan Manson (2014) *Zombie Parole: The Withering of Conditional Release in Canada*. *Criminal Law Quarterly*, 61(3), 301-328.

In the long run, however, there is a need to review mandatory minimum sentences (and requirement of consecutive sentences). The messages they communicate – especially when compared across offences – make no logical sense.

At the moment, only aggravating factors in sentencing are listed in the sentencing principles of the *Criminal Code*. Some are unnecessarily (e.g., that it is a terrorism offence); others are probably unnecessary but symbolically important (e.g., the hate provisions); others may have some value in stating factors that otherwise there could be some debate about (e.g., spousal abuse). It is peculiar that governments have not found any broad mitigating factors. I am quite certain that some could be listed. Again, listing these factors could provide a better understanding within the public, but could also lead to a more uniform approach across sentencing judges.

One can see the value of listing mitigating factors by looking at Section 718.21 which deal with the sentencing of organizations. Some of these are almost certainly mitigating.⁵³ Listing them clearly can give guidance to judges in what to consider.

The overall review of the purpose of principles of sentencing should, however, be carried out with attention focused simultaneously on another serious Canadian problem – the over-representation of disadvantaged groups, in particular, Canada's Indigenous peoples, in the justice system. As has been described elsewhere,⁵⁴ policies that appear on the surface to be neutral with respect to race of 'groups' in society may turn out not to be in practice. This is most obvious in programs that, for example, require certain levels of community support (e.g., in the form of adequate housing separate from vulnerable people, and those with criminal records or drug/alcohol problems) before sanctions such as a conditional sentence with house arrest can be imposed.

Assessing the impact of changes in the purpose and principles of sentencing on the current over-representation of Indigenous peoples in prison should be part of the reform of this part of the *Criminal Code*.

For more than 45 years, Canada has been talking about reviewing and 'modernizing' the criminal law. Plans to write 'a new criminal code' were abandoned decades ago. However, it is still clear that certain parts of the criminal law should be examined 'as a whole'. Bail is one of these, conditional release from prisons and penitentiaries is another, pardon legislation is a third. And, of course, sentencing purposes and principles is another. Approached as an attempt to improve our justice system by trying to re-establish a consensus on how to proceed may be difficult. The mechanisms for engaging Canadians in discussions about sentencing purposes and principles have been successful in the past. It would be better, I would suggest, to move slowly and deliberately on this project than to see it as something that needs to be 'fixed' immediately.

⁵³ For example, (d) "the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees."

⁵⁴ Webster, Cheryl Marie and Anthony N. Doob "Thinking about the Over-Representation of Certain Groups in the Canadian Criminal Justice System: A Conceptual Framework." (March 2008). Available at http://www.metropolis.net/pdfs/webster_doob_e.pdf

Appendix 1: The Quiz

What is the source of each of the following statements about criminal justice policy? Think about what period it might be from as well as the political orientation of the speaker. If it appears to come from a Commission, when do you think that commission was appointed, and by what political party?

- 1) “I want to congratulate the minister for realizing at last that crime is not just a sordid happening but rather a result of human behaviour brought about by our economic and social conditions which we have failed to change.”
- 2) “Crime prevention means recognizing connections between the crime rate and the unemployment rate, between how a child behaves at school and whether that kid has had a hot meal that day. In the final analysis crime prevention has as much to do with [the Minister of] Finance, [the Minister of] Industry, and [the Minister of Human Resources Development, as it does with [the Minister] at the Department of Justice. To some people, crime prevention is code language for going soft on crime. I don’t care what they say. I am interested in what works. It is easy to bring a crowd to its feet by demanding harsh retribution for the most brutal of murderers... “
- 3) “If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.”
- 4) “A safe society depends on strong crime prevention efforts as well as traditional justice responses. At the heart of [our] policies on crime is the belief that a safer society is one where crime is not only punished but prevented.”
- 5) “The best solution to crime problems is a strong, growing economy that provides more jobs and opportunity. However, if Canada is to have the safest communities in the world, we must also make sure that criminals are caught and properly dealt with, that victims of crime are given the help and respect they deserve and that everything possible is being done to prevent crime in the first place. Canadians have been saying for many years now that the justice system is too soft on criminals and too hard on victims. We agree. Our plan includes measures to ensure that criminals get the punishment they deserve and victims get the respect and treatment they deserve. At the same time, we must be realistic in recognizing that an ounce of crime prevention is worth a pound of cure. Keeping young people in school, early intervention in the lives of young people in trouble, and education of young people in general about the consequences of crime do more to prevent crime than any other kinds of action.”
- 6) “There was a lot of agreement that we can’t just continue to build more jails... We have to get into the social aspects that contribute to crime.”
- 7) “Research indicates that criminal sanctions have only a limited effect in terms of some of their traditionally-invoked objectives, such as rehabilitation, deterrence and incapacitation.”

- 8) "Certainty of punishment, and more especially certainty that the sentence imposed by the judge will be carried out, is of more consequence in the prevention of crime than the severity of the sentence."
- 9) "It is the Committee's view that in all cases where there has been no finding of dangerousness, sentences of imprisonment should be imposed only where protection of society clearly requires such penalty.... The Committee wishes to emphasize the danger of overestimating the necessity for and the value of long terms of imprisonment except in special circumstances... The Committee maintains that imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed..."
- 10) "In awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances."
- 11) "All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."
- 12) "All available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with special attention to the circumstances of aboriginal young persons."
- 13) "The Committee further believes that, except where to do so would place the community at undue risk, the correction of the offender should take place in the community and imprisonment should be used with restraint."
- 14) "Imprisonment is generally viewed as of limited use in controlling crime through deterrence, incapacitation and reformation, while being extremely costly in human and dollar terms.... Reducing our dependency on prisons is needed to achieve greater effectiveness, balance, and restraint in our system."
- 15) "The undeniable responsibility of the state to those held in its custody is to see that they are not returned to freedom worse than when they were taken in charge. This responsibility has been officially recognized in Canada for nearly a century but, although recognized, it has not been discharged. The evidence before the Commission convinced us that there are very few, if any, prisoners who enter our penitentiaries who do not leave them worse members of society than when they entered them."
- 16) "The use of incarceration in Canada has become a concern on a number of levels. ... Incarceration costs approximately 10 to 15 times as much ... as community-based [sanctions]. ... At the same time as there are concerns about the costs ... doubts about its value are also prevalent. ... Correctional administrators consistently report that a large proportion of persons in their jails do not belong there..."
- 17) "Non-violent provincial inmates should be out of jail and working in the community.... I think that there are other ways of dealing with some of the criminal activity that goes on that are more effective than putting a person in jail..."

- 18) “If the punishment of the offender is the only object society should have in view, the Penitentiaries of Canada fully meet the requirements. They are old-time prisons dominated by the idea that, not only should the offender be punished by being deprived of his liberty and confined by iron bars and stone walls, but the avenging hand of the law he has violated should continue to bear heavily upon him in his place of incarceration.... Viewed from the economic standpoint, the reformation of the convict is a matter of prime importance to the State. The prison of punishment is the most expensive prison to maintain...”

Quiz Answers

- 1) Conservative Justice critic, Eldon Woolliams, responding to the (Liberal) Solicitor General. House of Commons, 1972
- 2) Allan Rock, Liberal Justice Minister, 1995.
- 3) 12th Report of the [Conservative dominated] Standing Committee on Justice and the Solicitor General, February 1993.
- 4) Liberal Party of Canada platform, 1997.
- 5) Progressive Conservative Party of Canada platform, 1997.
- 6) Conservative MP (former RCMP officer) Bob Horner, February 1993.
- 7) Sentencing. Liberal government, February 1984.
- 8) John A. Macdonald (Canada’s First Prime Minister), 1871
- 9) Canadian Committee on Corrections, 1969
- 10) Criminal Law in Canadian Society. Liberal government policy statement, August 1982.
- 11) *Criminal Code* of Canada, s.718.2, (1996-present)
- 12) Youth Criminal Justice Act, s.38(2)(d)), (2003-present)
- 13) House of Commons Standing Committee report. Taking Responsibility 1988. (Conservative dominated committee chaired by Conservative David Daubney).
- 14) Conservative Justice Minister (Kim Campbell) and Solicitor General (Pierre Cadieux). Preface to government policy statement, 1990.
- 15) Royal Commission to Investigate the Penal System of Canada – 1938.
- 16) Government Task Force (Neilson Task Force) investigating federal government programs for the Conservative Government, 1985.
- 17) Brian Evans, Justice Minister (Alberta) in Conservative Ralph Klein’s government, 1966.
- 18) Report of the Royal Commission on Penitentiaries, 1914.

Appendix 2: Some Examples of Purposes of Sentencing

The Criminal Code (from 23 July 2013)

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

The Criminal Code (from 3 September 1996 until 22 July 2015)

718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

The Youth Criminal Justice Act

38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Criminal Law in Canadian Society (1982)

The criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others.

The Criminal Law Reform Act, 1984 (C-19, 32nd Parliament, 2nd session)⁵⁵

645. (1) It is hereby recognized and declared that the fundamental purpose underlying the imposition of a sentence for an offence is the protection of the public and that this end may be furthered by:

- (a) promoting respect for the law through the imposition of just sentences;
- (b) separating offenders from society, where necessary;
- (c) deterring the offender and other persons from committing offences;
- (d) promoting and providing for redress to victims of offences or to the community; and
- (e) promoting and providing for opportunities for offenders to become law-abiding members of society.

The Canadian Sentencing Commission (1987)

Overall Purpose of the Criminal Law

It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

Fundamental Purpose of Sentencing

It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

The “Daubney” Committee (House of Commons Standing Committee), 1988:

The purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by holding offenders accountable for their criminal conduct through the imposition of just sanctions which:

- (a) require, or encourage when it is not possible to require, offenders to acknowledge the harm they have done to victims and the community, and to take responsibility for the consequences of their behaviour;

⁵⁵ Discussed in detail in the 1984 Government of Canada booklet entitled Sentencing.

- (b) take account of the steps offenders have taken, or propose to take, to make reparations to the victim and/or the community for the harm done or to otherwise demonstrate acceptance of responsibility;
- (c) facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs;
- (d) if necessary, provide offenders with opportunities which are likely to facilitate their habilitation or rehabilitation as productive and law-abiding members of society; and
- (e) if necessary, denounce the behaviour and/or incapacitate the offender.

Directions for Reform: Sentencing (1990)

1. The fundamental purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society through the imposition of just sanctions.
2. The court [shall/may] consider the following objectives in assessing the appropriate sentence to be imposed upon an offender:
 - a. denouncing blameworthy behaviour
 - b. deterring the offender and others from committing offences;
 - c. separating offenders from society, where necessary;
 - d. providing for redress for the harm done to individual victims or to the community;
 - e. promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

An Act to Amend the Criminal Code (sentencing)... (Bill C-90, 34th Parliament, 3rd session) Introduced: 23 June 1992)

718. The fundamental purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society;
- (d) to provide reparations for harm done to victims or to the community;
- (e) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community; and
- (f) to assist in rehabilitating offenders.

Appendix 3: Canadian Sentencing Commission (1987) Purpose & Principles of Sentencing

1. *Definitions*

"Sentencing" is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.....

"Sanction" includes an order or direction ... (Note: The definition of sanction is intended to include all sentencing alternatives provided for in the *Criminal Code*).

2. *Overall Purpose of the Criminal Law*

It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

3. *Fundamental Purpose of Sentencing*

It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

4. *Principles of Sentencing*

Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:

- a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.
- b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.
- c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
 - i) any relevant aggravating and mitigating circumstances;

- ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
 - iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;
 - iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
 - v) a term of imprisonment should be imposed only:
 - aa) to protect the public from crimes of violence,
 - bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,
 - cc) to penalize an offender for willful 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.
- d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:
- i) denouncing blameworthy behaviour;
 - ii) deterring the offender and other persons from committing offences;
 - iii) separating offenders from society, where necessary;
 - iv) providing for redress for the harm done to individual victims or to the community;
 - v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

Appendix 4: Canada's Imprisonment Rate(s)

Total, Federal, and Provincial Adult Imprisonment Rates per 100,000 Residents (1951-2014)

