SENTENCING: WHAT FOR? REFLECTIONS ON THE PRINCIPLES OF SENTENCING AND DISPOSITIONS

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The subtitle "reflections" implies perspective. It may imply complete objectivity and impartiality. The first implication is, let us hope, correct; the second one is not intended.

This piece presents reflections from a specific standpoint. It examines the new working paper in the light of my personal philosophy of criminal justice. This would seem to be carrying subjectivity to the extreme; but it is not, since my definition of the purpose of criminal justice, of which sentencing is a major and integral part, has been accepted by the Canadian Committee on Corrections. Moreover, the Report of that Committee [1] (Ouimet Report) shows that the purpose I first defined in the chapter on "Crime and Society" of W. T. McGrath's book on *Crime and Its Treatment in Canada* [2] is not an elusive ideal for the future but a practical and unifying principle of our contemporary correctional system. What the Ouimet Committee did—and what I had failed to do—is to demonstrate that my definition of the purpose of sentencing and other dispositions represents the present and the future, and that the old principles of sentencing are so out of date as to be entirely impractical.

Unfortunately, the Law Reform Commission's Working Paper represents, in my view, not reform but return, or at best a streamlining process of the old, classical theory of justice, which sounds mediaeval to any modern criminologist.

Since the Working Paper under discussion is to be looked at in the perspective of the definition of crime as published in "Crime and Society", and later adopted, in slightly different form, by the Ouimet Committee, let us look at this definition as the starting point.

"Crime and Society" defines crime as "an act for which criminal legislation prescribes sanctions aimed at the protection of society, which includes the offender". [3] Consequently, all sanctions—and the sentence prescribing these sanctions—have only one aim: the protection of society. It is im-

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[1] REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (Ouimet, J. Chairman 1969).

[2] Grygier, *Crime and Society, in* CRIME AND ITS TREATMENT IN CANADA 13-40 (W. McGrath ed. 1965).

[3] *Id.* at 18.

plied—and stated more clearly in one of my later publications [4]—that by "society" I mean all people living in a given territory and the essential functions of the state governing that territory. "Society" does not mean the government or the form of government. It does not mean a set of current values: it is not the purpose of the criminal law to enforce morals. It mainly means victims, actual and potential. The offender is protected by the criminal law not only because he is also a person, like everybody else, but because the criminal law limits the extent of sanctions against him. These limitations are necessary to assure that his suffering—never intended as such but nevertheless real—does not exceed the real and potential harm he has caused and may cause in the future. Without the limits imposed by the criminal law the offender may be "treated" unsuccessfully for extremely long periods. Treatment may be—and usually is—unpleasant. Criminological findings are *not* reassuring that it is effective. If true protection is to be achieved, continuous evaluative research is needed in order to achieve the maximum protection for all inhabitants of the state, including the offender. Research must be continuous, since new methods are being devised, old methods are often proved to be ineffective and even the effectiveness of the same methods may change as society and its criminals change. The Ouimet Report is strong in its support of evaluative research.

Where does the Law Reform Commission's Paper stand on this issue? We find its definition on page 1, and repeated several times on other pages. [5] We read that "the criminal law is . . . one of the ways in which society attempts to promote and protect certain values . . . ." [6] If so, neither the ordinary citizen nor the offender is protected as such: their value system—or morality—is to be protected. The chief purpose of sentencing and dispositions is not rehabilitation but the enforcement of morals. In a multicultural society, such as Canada, it is legitimate to ask: which morals?

The Paper under discussion skirts this important question; at least it admits that values are changing and that in these circumstances the criminal law should be used "with restraint", [7] and that sanctions should "be limited by considerations of fairness, justice and humanity." [8]

The emphasis on "enhancement, realignment and protection of community values" [9] is certainly the main theme of the Working Paper. This is to be for "the common good". [10] But there is also a second basis of sentencing, apparently not related to the common good: for better or worse, sentences must see to it that "a specific wrong be righted." [11] Since it is also

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[4] Grygier, *Crime, Punishment and the Protection of Society*, 48 CANADIAN WELFARE No. 6, at 5-7 (Nov.-Dec. 1972).

[5] THE LAW REFORM COMMISSION OF CANADA, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3 at 1, 6, 19, 33 (1974).

[6] *Id.* at 1.

[7] *Id.*

[8] *Id.* at 2.

[9] *Id.* at 3.

[10] *Id.*

[11] *Id.*

stated, without any attempt at justification by the principle of utility, that dispositions and sentences should be "proportional to the offence" [12] and that similar offences should be "treated more or less equally", [13] we are back to retribution or, in other words, to "fair" revenge. Are these the current aims of the correctional system? Are they to be the aims of the future? They reflect the classical theory of justice, devised at a time when correction and rehabilitation were unknown.

There is in the Working Paper "a place for deterrence and rehabilitation in a sentencing policy", [14] but it is obviously not the place of honour; moreover, "deterrence . . . may be used . . . to underline the wrong done to common values . . . ." [15] Rehabilitation is secondary in this context: it "may not be an unimportant factor in sentencing." [16]

Can one start from archaic punitive premises and yet make sensible recommendations for modern treatment? Can one criticize a document for its philosophy and yet accept many of its recommendations in practice? Apparently such possibilities do exist, since I find most recommendations acceptable, although some (for example, one in favour of avoiding "cruel or inhumane" [17] dispositions) sound rather platitudinous. But some platitudes are unavoidable if a document is to be comprehensive.

Some recommendations, such as that in the section on diversion, are commendable for various practical reasons, but it is good to remember that the criminal process does protect the offender by its procedure and limited sanctions, while the diversionary process may be either ineffective or—if enforced—abused. Restitution is an excellent principle in theory, but quite impractical in most cases. The need for guides to sentencing is obvious and there can be no harm in stating it. The requirement of written reasons for a sentence is obvious to someone acquainted with criminal procedure in Europe; it needs to be stressed in Canada and the Working Paper does its duty. The criteria for keeping an accused in custody are sensible and clear, but the discussion of release procedure produces more questions than answers.

Some recommendations are unacceptable to a criminologist. Giving a victim "an opportunity . . . to express a view as to the appropriate sentence" [18] may be dangerous rather than helpful; this recommendation is fully in line with the principle of retribution, as advocated by the Working Paper, and hardly compatible with rehabilitation.

The Paper leans towards retaining sentencing decisions in the hands of the trial judge rather than entrusting them to a sentencing board, and experience abroad seems to confirm that this is the correct stand. But judges should be trained in sentencing just as they are trained in law and in this

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[12] *Id.* at 3 & 34.
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.*
[16] *Id.* at 4.
[17] *Id.* at 3 & 34.
[18] *Id.* at 19.

respect the Working Paper is almost silent; meetings of judges cannot be a substitute for education. It is good to read that the authors of the Working Paper are opposed to plea bargaining which "can nullify the purposes of sentencing and reduce dispositions to a level of bargaining devoid of justice and fairness";[19] but it would be better still if the purpose of sentencing was protective rather than declaratory or punitive, and this brings us back to the main purpose of the criminal law.

It is possible to state out-dated principles and to follow them by sensible recommendations, but it isn't easy.

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[19] *Id.* at 23.