IMPRISONMENT*

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". . . let the punishment fit the crime"

I. INTRODUCTION

Bleak and foreboding, the penitentiary fortress, Dorchester, dominates the town that bears its name, much as imprisonment itself dominates sentencing. In the law books, page after page of print is devoted to imprisonment, a few scant lines to probation or fines. In the superior courts, judges pen volumes justifying the application of imprisonment, but little or no attempt is made to build a sentencing philosophy around probation or fines. In government administration, extravagant sums are spent building new and bigger prisons while little or no effort is made to measure their efficacy in protecting society from further crime. Imprisonment carries its own grim justification: punishment.

Retribution in sentencing is not dead. The Criminal Code was conceived in retribution, [1] and, beneath the rhetoric of deterrence and rehabilitation, the courts maintain retributive sentencing practices. [2] While retributive goals suffered minor setbacks at the hands of penal administrators converted to utilitarian reform, the basic retributive philosophy remains intact and still runs strong throughout the legal system; indeed, in 1969 a research report by The Foundation for Legal Research in Canada, funded by the Canadian Bar Association, affirmed in clear language that without punishment, first and foremost, the *raison d'etre* of imprisonment falls. [3]

This article examines the impact of sentences of imprisonment in magistrates' courts in New Brunswick and Nova Scotia, and questions the purposes of imprisonment. It is suggested that in sentencing retribution be

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[1] The CRIMINAL CODE was the product of a move toward codification and a concern for uniformity. The basic approach to criminal law and its purposes remained rooted in the English common-law view that punishment ought to fit the crime: Crouse, *A Critique of Canadian Criminal Legislation*, 12 CAN. B. REV. 545, 547, 551, 567 (1934).

[2] K. JAFFARY, SENTENCING OF ADULTS IN CANADA 14, 15 (1963); Decore, *Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity*, 6 CRIM. L.Q. 324 (1964).

[3] W. COMMON & A. MEWETT, THE PHILOSOPHY OF SENTENCING AND DISPARITY OF SENTENCES 12 (1969).

abandoned in favor of a utilitarian reductivist approach to the end that imprisonment might not be imposed unless it is likely to be more effective than other dispositions, having regard to cost and human dignity, in reducing the frequency of a given offence. [4]

II. SENTENCING PRACTICES

Since magistrates hear and determine ninety-five per cent or more of cases arising under the Criminal Code and base their sentencing policies on principles developed over the years, sentencing practices in magistrates' courts have a major impact on the sentencing process. In order to find out what sentencing practices were being carried on, particularly with respect to sentences of imprisonment, a survey was taken of sentences passed in Criminal Code offences in magistrates' courts. The survey included all sentences recorded in 1963 and in 1967 in the magistrates' monthly or quarterly returns to the Departments of the Attorneys-General of Nova Scotia and New Brunswick, thus providing an opportunity to compare sentencing practices at two points of time in adjoining provinces with similar economic, social and cultural conditions. Except for a few courts no information was obtained as to the circumstances of the offence, or the age, or record of the offender. It was assumed, however, that all courts would have approximately the same kinds of cases and generally be faced with the same type of offender. It was also assumed that each court would have a proportional number of recidivists and offences demanding greater or lesser severity in punishment. Where a court had only a handful of cases in a particular offence, the assumptions are more open to question and care must be taken in drawing conclusions. Female offenders, though likely to have lighter sentences than males, were so rare that they were not excluded from the sample.

Table I

Persons convicted per 100,000 population:

1963	Population*	Cases**	Persons convicted per 100,000 population***
N.S.	479,000	3357	316
N.B.	370,000	3480	346
1967			
N.S.	491,000	5329	309
N.B.	387,000	5735	345

*For 16 years of age or over.

**Total cases appearing in magistrates' courts under Criminal Code offences as revealed in the survey.

***Source: D.B.S., STATISTICS OF CRIMINAL AND OTHER OFFENCES 17 (1963, 1967).

[4] Professor Walker terms this "reductivism": N. WALKER, SENTENCING IN A RATIONAL SOCIETY 3-4 (1969); *see also* Grygier, *Crime and Society, in* CRIME AND ITS TREATMENT IN CANADA 13, at 23 (W. McGrath ed. 1965).

Although New Brunswick had an estimated population aged sixteen years or over considerably below the figure for Nova Scotia, the number of persons charged with indictable offences in magistrates' courts in New Brunswick was consistently higher than in Nova Scotia:

Such data may simply indicate that the crime rates are considerably higher in New Brunswick than in Nova Scotia with resulting increases in numbers of persons apprehended and convicted in the courts. On the other hand, the data may indicate more aggressive prosecution practices in New Brunswick or a greater readiness on the part of the courts to convict. Some support for this latter supposition is provided by the data indicating a surprisingly large number of prosecutions in Nova Scotia that do not end in convictions.[5] By comparison, New Brunswick appears to have a more efficient administration of justice in this respect, for relatively few cases are withdrawn for want of prosecution or result in acquittals. It remains to be seen to what extent this efficiency is a harbinger of stricter sentencing practices generally.

Among the numerous offences resulting in conviction and sentence, only those offences indicating a substantial number of convictions have been subjected to analysis. Even then some offences with relatively few convictions, sexual offences for example, have been included because of the availability of comparative sentencing practices in Toronto and England.[6] In particular categories of offences certain related offences have not been included because of the extremely small number of cases heard in magistrates' courts. For example, assault with intent under section 216 has been omitted because there were only three or four convictions recorded in this offence. Similarly, criminal negligence, rape and arson have been excluded. As expected, the great bulk of convictions appears under automobile driving offences, property offences, assaults and causing a disturbance as illustrated in the following tables for 1963 and 1967. Since the great majority of automobile cases were dealt with by fines in both provinces, no further analysis of the offence will be carried out here.

[5] L. Lenethen, Disparity in Sentencing (unpublished paper completed for Criminology Seminar, Dalhousie Law School, Halifax, 1970). Prosecutions that started in magistrates' courts but were withdrawn, sent on to a higher court, acquitted, remanded for mental examination or dismissed were surprisingly high in Nova Scotia compared to New Brunswick:

1967	Nova Scotia	New Brunswick
Weapons offences	46%	16%
Sexual offences*	70%	56%
Causing a disturbance	27%	12%
Assaults**	31%	19%
Theft***	28%	14%

*including rape
**including criminal negligence, wounding with intent
***including break and enter, possession, and robbery.

[6] J. MOHR, R. TURNER & M. JERRY, PEDOPHILIA AND EXHIBITIONISM (1964) [hereinafter cited as PEDOPHILIA]; SEXUAL OFFENCES (A Report of the Cambridge Department of Criminal Science, 1957); for studies relating to rape, an offence not included in this survey, see McCaldon, *Rape*, 9 CAN. J. CORR. 37 (1967).

Table II

Disposition by Offence Category
Nova Scotia and New Brunswick, 1963

	NOVA SCOTIA				NEW BRUNSWICK			
Offence Category	Convictions	Fine*	Suspended Sentence*	Imprisonment*	Convictions	Fine*	Suspended Sentence*	Imprisonment*
Weapons (sections 82-90)	39	66.6	20.5	12.9	35	31.4	34.3	34.3
Sexual offences (sections 138-149)	18	33.3	11.1	55.6	29	17.4	41.3	41.3
Causing a disturbance (section 160)	254	67.3	26.4	6.3	288	74.0	11.8	14.2
Assaults (sections 231-232)	354	49.2	39.8	11.0	252	46.4	31.8	21.8
Theft, Break and Enter, Possession (sections 280, 292-296)	999	16.7	44.8	38.5	740	8.0	37.7	54.3
False Pretences (sections 304-307)	74	13.5	37.8	48.7	37	8.2	40.5	51.3
Forgery (sections 310-311)	38	0	42.1	57.9	60	0	17.6	82.4
Property Damage (sections 372-373)	161	49.7	34.2	16.2	150	50.0	23.3	26.7

*Figures represent a percentage of total convictions.

Table III

Disposition by Offence Category: Nova Scotia and New Brunswick, 1967

	NOVA SCOTIA				NEW BRUNSWICK			
Offence Category	Convictions	Fine*	Suspended Sentence*	Imprisonment*	Convictions	Fine*	Suspended Sentence*	Imprisonment*
Weapons	55	50.9	25.5	23.6	49	38.8	18.4	42.9
Sexual offences	48	12.5	64.6	22.9	28	25.0	32.1	42.9
Causing a disturbance	446	83.4	9.6	7.0	422	82.9	8.0	9.1
Assaults	396	51.7	31.0	17.3	414	43.9	28.5	28.5
Impaired Driving	952	94.5	4.9	0.6	1376	95.2	0.1	4.7
Theft, Break and Enter, Possession	931	20.7	41.8	37.5	1050	15.9	29.5	54.3
False Pretences	133	15.04	27.07	57.9	138	5.07	15.22	79.71
Forgery	33	15.15	33.33	51.51	96	1.04	17.71	81.25
Property Damage	220	64.5	20.0	15.5	233	46.7	36.9	16.4

*Figures represent a percentage of total convictions.

What stands out in comparing the two provinces is the substantially greater use of imprisonment in New Brunswick; with a smaller population to draw on, New Brunswick achieves a higher conviction rate than Nova Scotia and a higher level of punitive sentences. Excluding consideration of impaired driving cases, the offences considered in Tables II and III indicate a high level of imprisonment in both provinces in 1963 and 1967. Although the rate of imprisonment remained almost constant in New Brunswick be-

tween 1963 and 1967, it declined somewhat in Nova Scotia, widening the gap in the rates between the two provinces to fourteen per cent.

Table IV

Use of Imprisonment in Selected Offences*

	1963 *Convictions*	*Imprisonment* Sentences	%	1967 *Convictions*	*Imprisonment* Sentences	%
N.S.	1937	539	27.8	2262	600	26.5
N.B.	1591	632	39.7	2430	986	40.6

*See offence categories Table III, excluding impaired driving.

III. Uniformity in Sentencing Practices

Differences in the rates of imprisonment between the two provinces showed up even more markedly when comparing individual offence categories. In all but one category (impaired driving excepted) in 1963 the difference in the rates of imprisonment between New Brunswick and Nova Scotia was at least seven per cent and in one category (forgery) the difference was twenty-four per cent. By 1967 similar rates of imprisonment were being used by both provinces in two minor offences: causing a disturbance and damage to property, but the gap widened to thirty points in forgery. Lack of uniformity in levels of imprisonment, however, may not preclude general agreement as to a rank order of offences appropriately dealt with by imprisonment. For example, assuming that imprisonment is to be selected as opposed to fines or suspended sentences, most persons would agree, other things being equal, that imprisonment is more likely to be a proper disposition in cases of forgery than in cases of causing a disturbance. Ranking the offences in order of frequency of sentences of imprisonment does reveal a wide measure of agreement as to which offences require sen-

Table V

(1967)

Offences Ranked in Order of Frequency of Sentence of Imprisonment

	NOVA SCOTIA		NEW BRUNSWICK	
1.	False pretences	57.9%	Forgery	81.3%
2.	Forgery	51.51%	False pretences	79.7%
3.	Theft over fifty dollars	42.5%	Theft over fifty dollars	61.7%
4.	Break & enter	48.5%	Break & enter	64.7%
5.	Possession	38.2%	Petty theft	43.6%
6.	Petty theft	25.8%	Weapons offences	42.9%
7.	Weapons offences	23.6%	Sexual offences	42.9%
8.	Sexual offences	22.9%	Possession	37.8%
9.	Assaults	17.3%	Assaults	28.5%
10.	Damage to property	15.5%	Damage to property	16.4%
11.	Causing a disturbance	7.0%	Causing a disturbance	9.1%

tences of imprisonment, an order which shows some marked differences when compared to a rank order based on statutory maxima. [7]

The agreement as to which offences should rank ahead of others in selecting sentences of imprisonment was not quite so general in 1963. While agreeing that forgery should rank first and minor offences such as assaults and causing a disturbance should come last, the courts in the two provinces in 1963 showed a greater diversity than in 1967:

Table VI

(1963)

Offences Ranked in Order of Frequency of Sentence of Imprisonment

	NOVA SCOTIA		NEW BRUNSWICK	
1.	Forgery	57.9%	Forgery	85.0%
2.	Sexual offences	55.6%	Break & enter	66.8%
3.	Break & enter	50.0%	Theft over fifty dollars	60.8%
4.	False pretences	48.7%	False pretences	51.3%
5.	Theft over fifty dollars	33.3%	Sexual offences	41.3%
6.	Petty theft	25.5%	Possession	40.3%
7.	Possession	24.4%	Weapons offences	34.3%
8.	Damage to property	16.2%	Petty theft	26.7%
9.	Weapons offences	12.9%	Damage to property	26.7%
10.	Assault	11.0%	Assault	21.8%
11.	Causing a disturbance	6.3%	Causing a disturbance	14.2%

Serious offences against the person such as manslaughter, rape and causing death by criminal negligence are tried in the higher courts; these offences, presumably, would rank very high in likelihood of being disposed of by way of imprisonment.

Averages do not reveal the whole picture; while the average rate of imprisonment increased slightly in New Brunswick in 1967 as compared to 1963, and a small decline took place in Nova Scotia, sharp changes in sentencing practices occurred in particular offences. In both provinces in 1967 substantial increases in the use of imprisonment took place in assaults, weapons offences and false pretences. At the same time, imprisonment declined substantially in sexual offences and property damage in Nova Scotia and New Brunswick respectively. A reduced use of imprisonment in minor offences such as damage to property and causing a disturbance was apparent, particularly in New Brunswick; unfortunately, Nova Scotia actually increased

[7] When ordered according to the statutory fixed terms of imprisonment, the offences rank as follows: 1. break and enter (life, 14 years); 2. sexual offences (life, 14, 10, or 5 years); 3. forgery (14 years); 4. false pretences (10 years, 5 years); 5. theft over fifty dollars (10 years); 6. possession (10 years, 2 years); 7. weapons (10 years, 5 years, 6 months); 8. assaults (5 years, 2 years, 6 months); 9. theft under fifty dollars (2 years); 10. damage to property (5 years, 6 months); 11. causing a disturbance (6 months). An intuitive sense of proper punishment resulting in a rank order of offences punishable by imprisonment is suggested by Walker after examining offenders convicted of crimes in England and sentenced to imprisonment by higher courts: N. WALKER, CRIME AND PUNISHMENT IN BRITAIN 215 (1965).

its use of imprisonment for the summary conviction offence of causing a disturbance.

Table VII

Change in Rates of Imprisonment from 1963 to 1967

OFFENCE CATEGORY	NOVA SCOTIA	NEW BRUNSWICK
Weapons	+10.7	+8.6
Sexual offences	−22.7	+1.6
Causing a disturbance	+0.7	−5.1
Assaults	+6.3	+6.7
Theft, break & enter, possession	−1.0	± .0
False pretences	+9.2	+28.4
Forgery	−6.4	−3.7
Property damage	+0.7	−10.3

The evidence does not suggest that the changes in sentencing practice between 1963 and 1967 with respect to imprisonment tended to be more drastic in one province than in the other. In New Brunswick, changes in excess of six per cent took place in four offence categories, while at the same time, equally large changes in Nova Scotia took place in five categories.

In spite of established opinion in the correctional field that imprisonment should be used only as a matter of last resort,[8] the courts appear to have remained relatively impervious to the need for a change in this direction. Some comparison can be made with the rates of imprisonment as shown in Jaffary's work on sentences in 1955.[9] Jaffary referred only to indictable offences and included sentences in the higher courts as well. Moreover, his tables do not expressly show rates of imprisonment covering both penitentiary and short terms. Nevertheless, a rate can be computed from his Table Three[10] showing total convictions and rates of fines, probation and suspended sentence. The following comparison results:

Table VIII

Rates of Imprisonment

	Theft over fifty dollars		Break & Enter		False Pretences		Common Assault (Indictable)		Assault Causing Bodily Harm	
	N.S.	N.B.	N.S.	N.B.	N.S.	N.B.	N.S.	N.B.	N.S.	N.B.
1955	35.0	41.0	66.0	69.0	61.0	67.0	11.0	07.0	30.0	25.0
1963	33.3	60.8	50.0	66.8	48.7	51.3	9.2	20.4	13.4	38.7
1967	42.5	61.7	48.5	64.7	57.5	79.7	13.1	39.5	28.3	38.8

[8] REPORT OF A COMMITTEE APPOINTED TO INQUIRE INTO THE PRINCIPLES AND PROCEDURES FOLLOWED IN THE REMISSION SERVICE OF THE DEPARTMENT OF JUSTICE OF CANADA 5, 11, 18 (1956) [hereinafter referred to as the FAUTEUX REPORT]; The Hon. Guy Favreau, then Minister of Justice, Address, October 8, 1964 as reported in part in Annot. 2 Can. Crim. (n.s.) 197, at 201 (1968); REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS 189, 191, 204, 307-311 (1969) (also referred to as the OUIMET REPORT).

[9] K. JAFFARY, SENTENCING OF ADULTS IN CANADA (1963).

[10] *Id.* at 34.

Only in break and enter have the magistrates' courts followed a slow but steady decrease in the use of imprisonment.[11] On the other hand, rates of imprisonment were up in both provinces in assaults and theft. New Brunswick used imprisonment more extensively in false pretences in 1967 while Nova Scotia showed a slight decline. Since relatively few cases in the crimes shown are tried in the supreme court, and only a modest number in the county courts, the figures for the three years in Table VIII are reasonably comparative and underline a remarkable reluctance to depart from traditional reliance on imprisonment.

IV. Offence Categories

While the courts in both provinces were moving in the same direction by increasing the frequency of prison sentences for weapons offences and the major property offences, as shown in Table VIII, the same pattern did not repeat itself in sexual offences. The New Brunswick courts maintained a consistent approach to sexual offences, using imprisonment in approximately forty-three per cent of the cases in 1967, an increase of two per cent over the 1963 figure. Nova Scotia, however, showed a sharp decline from 55.6% to 22.9% in 1967 with a major increase in the use of suspended sentences in these offences. Hopefully, this more enlightened approach in Nova Scotia has been maintained since research in Toronto[12] and Cambridge[13] has indicated the success of fines and probation even in cases of exhibitionism and pedophilia.

Increases in the use of imprisonment in weapons offences and in assaults may reflect a rise in the number of serious attacks upon the person and an attempt to deal with such increases through the deterrent effect of imprisonment. To some extent, this explanation finds support in an increase in convictions for possession of firearms for an unlawful purpose and the increased use of imprisonment in sentencing persons convicted of that offence.

Table IX

Imprisonment for Unlawful Possession of Firearms (section 82)

		Convictions	Imprisonment
N.S.	1963	15	2 (13.3%)
	1967	16	5 (31.2%)
N.B.	1963	15	5 (33.3%)
	1967	24	16 (66.6%)

[11] Further comparisons may be made with the statistics cited by the Ouimet Report, *supra* note 8, at 478. In England, Walker reports that courts have been "impressively slow" to alter the general pattern of their sentences: N. Walker, Crime and Punishment in Britain, *supra* note 7, at 225.

[12] Pedophelia, *supra* note 6.

[13] Sexual Offences, *supra* note 6.

However, the number of convictions are not large and several of the sentences of imprisonment may have resulted from conviction on multiple charges. Moreover, the five sentences of imprisonment in Nova Scotia were not concentrated in any one area but scattered throughout the province, weakening even further the likelihood of a conscious attempt to use increased rates of imprisonment in weapons offences as a deterrent to combat any alleged "crime wave."

Whether or not the increased use of imprisonment for possession of firearms for an unlawful purpose was related to a perceived threat to the security of the person generally, and an increase in serious assaults in particular, the courts did in fact make increased use of imprisonment in assaults in 1967. This change would be particularly understandable if there had been an increase in the number of convictions for more serious assaults under sections 231(2) or 232(1) as opposed to common assault under section 231(1). Strangely, however, the records indicate only two or three convictions were obtained under section 232(1). If there was an increase in serious assaults, they were not so serious as to be prosecuted under section 232(1), punishable by five years imprisonment, or the even more serious offence of causing bodily harm (section 216), punishable by fourteen years imprisonment. Virtually no offences were entered on the records for this latter offence; apparently, the increased activity in assaults was not so serious as to alter the conventional pattern of prosecution.

Table X

Assaults; Sentences of Imprisonment Expressed as a Percentage of Convictions

NOVA SCOTIA

	231(1)(*a*)		231(1)(*b*)		231(2)		232(2)(*a*)	
	1963	1967	1963	1967	1963	1967	1963	1967
Convictions	151	114	85	122	104	120	14	27
Imprison-	14	15	9	10	14	34	2	4
ment	9.2%	13.1%	10.5%	8.2%	13.4%	28.3%	14.2%	14.8%

NEW BRUNSWICK

Convictions	83	132	111	135	31	85	24	53
Imprison-	17	52	16	8	12	33	7	17
ment	20.4%	39.5%	14.5%	5.6%	38.7%	38.8%	29.1%	32.0%

The figures do not support the explanation that an increase in serious assaults may account for an increase in the use of imprisonment. While the actual number of convictions under section 231(2) increased slightly in Nova Scotia, the rate of convictions for assault per 100,000 population actually declined from 03.1 to 02.2, yet the imprisonment rate increased from 10.2% to 28.3%. In New Brunswick, however, the rate of convictions in assaults of this type increased slightly from .08 per 100,000 population to 0.14, yet the rate of imprisonment did not change in any substantial amount. The overall increase in the use of imprisonment in New Brunswick is accounted for by a sharp increase in the number of persons sentenced

to imprisonment for the less serious common assault under section 231(1)(*a*). Even increased numbers of assaults on police officers under section 232(2)(*a*) do not account for the sharp upward swing in the New Brunswick rates. If the general severity of assaults has not changed from 1963 to 1967, what justification is there for increased use of prison sentences? If the increased use of imprisonment had come in response to an increasing rate in serious assaults, the practice might be explained on the basis of deterrence. The efficacy of deterrence, however, can no longer be lightly assumed in the face of a growing awareness of the limitations of deterrence, particularly in crimes of passion such as assault.

Just as a provincial average may conceal a great diversity in the use of imprisonment from category to category, so too, an average for an offence category including several distinct crimes may hide significant changes taking place within individual offences. In the category of theft, break and enter, and possession, for example, the average rate of imprisonment in Nova Scotia and New Brunswick remained relatively stable at thirty-eight per cent and fifty-four per cent respectively. Yet Nova Scotia increased its rate of imprisonment for unlawful possession of stolen goods from 24.4% to 38.2% while the rate declined slightly in New Brunswick. At the same time, judges showed substantially greater reliance on imprisonment in cases of petty theft in New Brunswick (26.7% of convictions in 1963, 43.6% in 1967) while in Nova Scotia the rate remained steady at approximately twenty-five per cent. Both provinces reflected a decline in the use of imprisonment for break and enter; New Brunswick reduced its rate from 66.8% of convictions to 64.7% while Nova Scotia made a sharp change from 60.4% down to 48.5%. The result of these moves up and down was that a person convicted of petty theft in New Brunswick and a man convicted of break and enter in Nova Scotia in 1967 stood almost the same chance of being imprisoned. [14]

Table XI

Imprisonment Expressed as a Percentage of Convictions, Nova Scotia

	Theft over fifty dollars	Theft under fifty dollars	Break & Enter	Possession
1963	33.3	25.5	60.4	24.4
1967	42.5	25.8	48.5	37.5

Table XII

Imprisonment Expressed as a Percentage of Convictions, New Brunswick

	Theft over fifty dollars	Theft under fifty dollars	Break & Enter	Possession
1963	60.8	61.7	66.8	40.3
1967	61.5	43.5	64.7	37.8

[14] OUIMET REPORT, *supra* note 8, at 478. The comparisons are not all that meaningful since the Canadian Committee on Corrections included in its figures petty theft as well as theft over fifty dollars. The Nova Scotia imprisonment rate for all theft cases in 1967 was approximately thirty-one per cent; New Brunswick, forty-nine per cent.

V. ALTERNATIVES

Apart from differences or similarities in the frequency with which judges selected prison terms as an appropriate sentence, what effect did increases or decreases in the use of imprisonment have on fines and suspended sentences? Did judges tend to choose between suspended sentences and imprisonment or between fines and imprisonment? Since there was no increased use of prison sentences in assaults, false pretences and weapons offences, what alternative sentences did the judge apparently reject in favor of imprisonment?

In New Brunswick the increased rates of imprisonment were almost wholly absorbed by decreases in the rates of suspended sentences although fines were affected to a small degree. The same is true for Nova Scotia in cases of assaults, false pretences, and causing a disturbance. Increased prison sentences in weapons offences, however, were wholly made up for by a decrease in fines.

Decreases in the use of imprisonment in New Brunswick were matched, as might be expected, with corresponding increases in the use of suspended sentences. An exception was provided in convictions for causing a disturbance where the increases in the number of fines exceeded the increases in suspended sentences. An efficient use of correctional resources could hardly justify any other priority. Where imprisonment rates in Nova Scotia declined, courts again tended to increase the use of suspended sentences as an alternative particularly in sexual offences and in breaking and entering. In convictions of theft under fifty dollars with no change in the rate of imprisonment, there was a small but welcome move from suspended sentences to fines. The same change to fines from suspended sentences took place in summary conviction assaults in Nova Scotia.

The question that now presents itself is whether or not individual courts move uniformly in line with a general change in sentencing practice as reflected in provincial averages. Again, the answer is in the negative. While some courts are reducing rates of imprisonment in theft under fifty dollars, for example, others are increasing it. Indeed, a change in the provincial average one way or another in a particular offence may well be determined not by the trend in the majority of courts in a province, but by the practice in a court carrying a heavy case load. The tendency is for the busy courts to determine the provincial outcome. An exception to the lack of uniformity showed up in break and enter in Nova Scotia. In 1967 all courts but two reduced rates of imprisonment. However, in theft over fifty dollars, while the provincial average showed an increase in the rate of imprisonment, four courts reduced their use of this sentence to a marked degree while five others increased their rates even more sharply. Similarly, with theft under fifty dollars: four courts increased rates, while five courts decreased reliance on sentences of imprisonment as compared with 1963. This movement was taken against a national background where imprisonment in all theft cases

dropped from 49.3% in 1955 to 26.9% in 1966.[15] Comparable figures for Nova Scotia and New Brunswick in 1967 for all thefts are thirty-one per cent and forty-nine per cent respectively.

Comparisons are difficult to make where the case load is quite small, and a difference of a few cases may reflect itself in a high change expressed as a percentage. This difficulty is particularly apparent in New Brunswick where many of the magistrates heard relatively few cases in a particular offence with the result that comparative data is not available to the same extent as in Nova Scotia where most magistrates sat both in 1963 and 1967 and heard a reasonable number of cases in most offences under consideration. Comparisons are also difficult to make where a magistrate did not sit in 1963. The appearance of a new magistrate in a busy court may well affect provincial averages to a significant degree. For example, the provincial average for imprisonment in assaults increased in 1967 over 1963 in Nova Scotia from 10.9% to 17.3%. Yet four courts showed a decline in the use of imprisonment in indictable common assaults, another two courts did not use imprisonment at all, and only three courts increased their use of imprisonment; of these three, one judge had only two cases, so his increase can not be weighed heavily. Another of the three judges used imprisonment in fifty per cent of the sixteen convictions for assault of this kind. Unfortunately, since this particular magistrate did not sit in 1963 there is no way of gauging uniformity of practice within that court. It is safe to say, however, that fifty per cent of imprisonments in a busy court goes a long way to offset decreases in smaller courts.

Some of the problems referred to above are well illustrated in the following tables showing variations in sentencing practices in individual courts in theft cases.

Not only do the tables show the large number of courts reporting very few convictions in particular offences, and the dominating influence cast by one or two busy courts, the tables also show the great disparity between courts reporting a similar number of convictions. It is possible, though unlikely, that magistrate C in Table XIV, choosing a sentence of imprisonment in one out of three convictions before him, had a much larger number of recidivists in his court than magistrate L, who passed sentences of imprisonment in but one out of twelve cases. Even greater differences are shown in Table XIII between magistrates E and P. Those magistrates showing the greatest disparity, of course, are those with three or four convictions, some of whom chose a sentence of imprisonment in every case and others who did not use imprisonment in any case. With such small numbers, however, the age of the offender, previous record, and circumstances of the offence may well explain the different practices.

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[15] Fifty per cent of those convicted of indictable offences in Canada are sentenced to imprisonment. In England the corresponding figure is thirty-five per cent: Hogarth, *Towards the Improvement of Sentencing in Canada*, 9 CAN. J. CORR. 122-36 (1967); OUIMET REPORT, *supra* note 8, at 308-09; Jaffary, *supra* note 9, Benoit, *Service National des Liberations Conditionelles*, 7 CAN. J. CORR. 8-15 (1965).

Table XIII

Theft over fifty dollars; Dispositions Expressed as a Percentage of Convictions; New Brunswick, 1967

Magistrate	Convictions	Imprisonment	Suspended Sentence	Fine
A	3	100	0	0
B	4	100	0	0
C	4	100	0	0
D	3	100	0	0
E	14	85.7	14.3	0
F	5	80.0	20.0	0
G	36	77.7	16.6	5.7
H	20	75.0	25.0	0
I	5	60.0	20.0	20.0
J	13	54.0	23.0	23.0
K	4	50.0	50.0	0
L	6	50.0	50.0	0
M	17	41.1	47.0	11.9
N	7	28.6	71.4	0
O	4	25.0	75.0	0
P	12	25.0	75.0	0
Q	4	0	100	0
R	1	0	100	0
S	1	0	0	100
Total	164	61.5	32.9	5.6

Table XIV

Theft under fifty dollars; Dispositions Expressed as a Percentage of Convictions, New Brunswick, 1967

Magistrate	Convictions	Imprisonment	Suspended Sentence	Fine
A	188	75.5	4.8	19.7
B	11	45.4	18.3	36.3
C	22	35.4	54.5	11.1
D	6	33.4	66.6	0
E	26	26.9	61.5	11.6
F	15	26.6	73.4	0
G	17	23.5	70.5	6.0
H	11	18.2	0	81.8
I	14	14.3	28.5	57.2
J	29	13.9	20.6	65.5
K	9	11.2	88.8	0
L	24	8.4	45.8	45.8
M	19	5.5	15.6	78.9
N	4	0	100	0
O	2	0	0	100
P	6	0	0	100
Q	2	0	100	0
R	5	0	40	60
S	10	0	20	80
T	3	0	0	100
Provincial Total	423	43.5	25.5	31.0

Wide variations in selecting imprisonment as a proper sentence are not confined to New Brunswick. The following table relating to petty theft, a minor offence, about which there is more likely to be agreement on proper sentencing practice than some other offences, shows one judge passing sentences of imprisonment in every second conviction, and another only once in every twenty-five.

Table XV

Theft under fifty dollars; Dispositions Expressed as a Percentage of Convictions; Nova Scotia, 1967

Magistrate	Convictions	Fines	Suspended Sentence	Imprisonment
A	17	41.1	7.0	52.9
B	58	36.8	19.3	43.9
C	11	36.3	27.4	36.3
D	3	66.6	—	33.4
E	6	33.3	33.3	33.4
F	16	12.5	56.3	31.2
G	128	50.0	25.0	25.0
H	39	7.8	71.7	20.5
I	22	45.6	36.3	18.1
J	51	47.0	41.1	11.9
K	25	28.0	68.0	4.0

Other illustrations could be drawn to show an average rate of imprisonment for the offence of causing a disturbance, for example, of approximately eleven per cent in four courts in Nova Scotia, while one court with twelve cases did not use imprisonment in this summary conviction offence at all, and another four courts with a larger than average number of cases used imprisonment in 1.7%—6.3% of convictions. Unless such differences can be justified on sound principles of sentencing, needless waste and misery characterize sentencing practices.

VI. Reducing Rates of Imprisonment

While the task of reducing a heavy reliance on imprisonment will not be an easy one, a start ought to be made. What justification exists for imprisoning persons convicted of assault on summary convictions, or common assault on indictment when a more serious charge, assault causing bodily harm, or wounding with intent are available for serious cases of personal injury? The abuse of imprisonment in trival cases is aggravated by its use in only a handful of courts.

In 1967 only three magistrates in Nova Scotia and only three in New Brunswick imposed sentences of imprisonment in cases of summary conviction assault. Prison sentences for summary conviction offences should be abolished by the legislature, but until that is done, what principles of sentencing, or practical consideration make it necessary for one or two courts to use sentences of imprisonment in these cases while other courts with equal

Table XVI

Assaults; Nova Scotia, 1967; Dispositions Expressed as a Percentage of Convictions

	Section 231(1)(*a*)				Section 231(1)(*b*)				Section 231(2)			
Mag.	Con.	Fines	Sus. Sen.	Imp.	Con.	Fines	Sus. Sen.	Imp.	Con.	Fines	Sus. Sen.	Imp.
A	13	76.1	23.9	0	10	70.0	30	0	15	53.3	27.7	20.0
B	16	50	0	50	8	62.5	12.5	25.5	20	70	5	25
C	24	75	16.6	8.4	2	100	0	0	15	53.1	13.6	33.3
D	2	50	0	50	66	52.0	36.3	11.7	24	41.6	37.5	20.9
E	—	—	—	—	6	16.6	83.4	0	4	50	0	50
F	10	20	80	0	2	0	100	0	6	33.4	33.3	33.3
G	12	50	33.3	16.7	1	100	0	0	4	25	25	50
H	6	50	50	0	3	0	100	0	5	80	0	20
I	26	38.5	53.8	7.7	13	53.8	38.4	7.8	19	21.1	52.6	26.3
J	—	—	—	—	1	0	100	0	2	50	0	50
K	5	20	80	0	10	60	40	0	6	16.8	16.6	66.6
Prov. Total	114			13.1	122			9.0	120			28.3

or greater number of convictions, operating in the same type of community do not feel compelled to use prison sentences? Perhaps some of the custodial sentences were passed in cases of multiple convictions, but such instances probably are not common, and even then an offence such as common assault might better be dealt with by way of a heavy fine. Again in considering indictable common assault, four courts in Nova Scotia chose not to use imprisonment at all; five did. In all but one of the five courts, no more than two accused were sent to prison, while in the fifth court eight of sixteen convictions resulted in jail terms. It would appear that mutual agreement on the kind of assault case that should be dealt with by imprisonment might well result in some reduction of prison sentences in some courts.

The provincial averages in assault are not even encouraging by comparison with Jaffary's estimates based on 1955 statistics. According to calculations based on Table III in Jaffary's study in 1955, the provincial rate of imprisonment in Nova Scotia was two per cent lower than the 1967 rate shown here for indictable common assault; on the other hand rates for assault causing bodily harm were two per cent lower in 1967 than in 1955.

VII. Effectiveness of Imprisonment

In view of the heavy reliance on imprisonment not only in Nova Scotia but in other provinces as well, regard should be given to the effectiveness of imprisonment in preventing the commission of further crimes. Is imprisonment more effective than fines or probation, for example, in achieving the security of the community? Unfortunately, not enough empirical investigation has been carried out to point to any conclusive answer, but reconviction

studies by Hammond in England [16] raise serious doubts about imprisonment as the most effective penal sanction. Hammond found that for first offenders as well as for recidivists of almost all age groups, fines had a better success rate than imprisonment or probation. Discharges, also produced fewer than expected reconvictions for almost all age groups. Probation was found not to be particularly successful with first offenders, but proved to be the most effective sentence for those convicted of breaking and entering, while fines, particularly heavy fines, produced good results in cases of theft. Imprisonment produced better results than expected for offenders with previous convictions than for first offenders. To what extent the results of this most interesting research reflect selective sentencing by the courts is not known. Courts, undoubtedly, use fines and discharge in cases involving low risk, and imprisonment in cases of persistent offenders with a future of predictable reconvictions. Nevertheless, the fact that light fines were found not to be effective, combined with the finding that probation was not particularly successful with first offenders but with recidivist burglars suggests that there is more to Hammond's research results than the simple theory that judges are able to pick out low risk offenders from high risk offenders.

In addition, there is some evidence suggesting that long terms of imprisonment are no more effective than shorter terms in preventing further convictions. The reconviction rate of prisoners released at an early date from Florida prisons as a consequence of the Gideon decision have been compared with reconviction rates of a control group released on normal expiration of sentence. Surprisingly, the Gideon group had a markedly lower reconviction rate than the control group. [17] In England a study of borstal boys indicated that longer sentences are no more effective than shorter sentences in preventing reconviction. [18] In his analysis of parole releases under the Federal Youth Conviction Act in the United States, Glaser suggested that in some cases parole success decreased with longer periods of imprisonment. [19] Glaser acknowledges that sentencing and parole policies tend to impose the longest confinement on men with the poorest prospect of post release success, but pointed out that some types of offenders have better success rates when confined for long periods; other types of offenders do not appear to profit from long detention. An analysis of reconviction rates for

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[16] Pt. VI THE SENTENCE OF THE COURT 63, (1969); W. HAMMOND, THE USE OF SHORT SENTENCES OF IMPRISONMENT BY THE COURTS, REPORT OF THE SCOTTISH ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, Appendix D (1960).

[17] C. EICHMAN, THE IMPACT OF THE GIDEON DECISION UPON CRIME AND SENTENCING IN FLORIDA: A STUDY OF RECIDIVISM AND SOCIOCULTURAL CHANGE, FLORIDA DIVISION OF CORRECTIONS (1966).

[18] R. HOOD, BORSTAL RE-ASSESSD 212 (1965). In 1939, boys in borstal institutions were released early due to demands of war. The fact that the early releases did as well as those who served full time may be explained by the fact that some of the boys may have found in the armed services a supportive environment that permitted them to cope with life's tensions.

[19] D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 302-03 (1964).

prisoners released on parole in Canada with rates for prisoners released on expiration of sentence proves to be inconclusive. During a five year follow-up period the parole release group had a success rate of fifty-five per cent compared with thirty-five per cent for prisoners released without parole. [20] No allowance was made, however, for the fact that the Parole Board is highly selective in its approach, many of its releases being first offenders, while persons refused parole and released on termination of sentence tend to be the greater risks.

The usual justification for imposing prison terms is the deterrent argument. A judge will feel that the particular offender needs to be "taught a lesson." Some support for imprisonment as an individual deterrent may be found in Glaser's finding that no more than a third of persons released from prison are admitted to prison on a reconviction. [21] This figure is much lower than the figures that have been used in Canada, where approximately eighty per cent of penitentiary offenders are men who have been in prison before. As Glaser points out, to arrive at an estimate by considering only the men presently in penitentiaries is to study a biased sample, because men with three or four previous convictions tend to get longer sentences and stay in prison longer. When Glaser looked at the men being received into prison, he found that only a third had previously been imprisoned. Statistical evidence put out by the Commissioner of Penitentiaries, however, shows only too clearly that in 1963, for example, approximately seventy-eight per cent of men received into Canadian penitentiaries had previously been imprisoned. [22]

The fact that some prisoners released from prison are not reconvicted does not necessarily mean that the prison experience has been an effective individual deterrent. Some of the released men probably do not commit further crimes for a variety of motives other than fear; some probably do commit other crimes but are not apprehended or convicted. Others may simply "mature." Crime being a function of the young, as men get older they settle down, perhaps under the influence of family, friends or relatives; for still other prisoners the "spontaneous recovery" may be due to the shame of trial and sentence. In his study of probation, Ralph England suggested that many individuals placed on probation were "self-correcting" and would probably not offend again even without the supervision of a probation officer. [23] May not the same "self-correcting" phenomenon be at work among the many persons sentenced to short terms in jail?

Factors predictive of reconviction may be of some help in assessing the role of imprisonment in reducing the commission of further crimes. Both age and the number of previous convictions are highly predictive of future

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[20] OUIMET REPORT 335 (1969).

[21] *Supra* note 19, at 13-35.

[22] ANNUAL REPORT OF THE COMMISSIONER OF PENITENTIARIES 60 (1963).

[23] England, *What is Responsible for Satisfactory Probation and Post-Probation Outcome?*, 47 J. CRIM. L.C. & P.S. 667-676 (1957).

convictions. The older the prisoner the less likely he is to be reconvicted. For example, Hammond found [24] that fifty per cent of offenders aged under fourteen at their first offence were reconvicted within five years compared to thirty per cent of offenders aged twenty-one to twenty-nine and only nine per cent for offenders aged forty or over. A previous conviction for an adult offender made it twice as likely that he would be reconvicted as first offenders of comparable age.

Also, it is known that some offences have a higher reconviction rate than others. Studies of sexual offenders, [25] for example, indicate a low rate of reconviction for rapists and some other types of sexual offenders. Forgery, on the other hand, appears to be an offence with predictably high reconviction rates. Whether persons convicted of forgery as a group tend to be unaffected by punishment, [26] while sexual offenders are, or whether certain sexual offenders are simply more difficult to apprehend and convict, the fact remains that forgers have a much higher reconviction rate than rapists or pedophiliacs.

Perhaps the greatest weakness in the individual deterrent argument arises from the sobering side effects of imprisonment. It is not only penitentiary custody that is very expensive; even the incarceration in a county jail can cost at least as much as a hotel room with shower and bath. In one of the magistrates' court included in this survey, the cost involved in imprisoning persons convicted of petty theft alone probably amounted in one year to over 8,000.00 dollars. Considering that the value of the property stolen in each case was less than fifty dollars it would be very much cheaper to compensate the victim outright and take relatively inexpensive alternative correctional measures against the offender.

Many persons, including Packer [27] and Walker, [28] feel that the corrupting influence of prisons on adults as well as the young, engendering as they do, feelings of hatred, bitterness and revenge may well produce a net loss in crime prevention. In addition to the direct costs and the corruption of the offender, there are the indirect costs to the community in the form of lost earnings, increased welfare costs and a weakening of family ties. In determining what place imprisonment ought to play in a sentencing structure, whatever deterrent value the prison may have on some prisoners, the very large economic and social costs must also be placed in the balance and weighed.

In certain offences the side effects of imprisonment may weigh more heavily than in others. To imprison persons convicted of wilful damage to

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[24] *Supra* note 16, at 64-68.

[25] PEDOPHILIA (1964); SEXUAL OFFENCES, A REPORT OF THE CAMBRIDGE DEPARTMENT OF CRIMINAL SCIENCE (1957).

[26] McCaldon found women prisoners at Kingston penitentiary serving terms for fraud, false pretences, uttering, or forgery as a group were manipulative-sociopathic. Treatment prospects with such a type of personality are poor: McCaldon, *Lady Paperhangers*, 9 CAN. J. CORR. 243, at 255 (1967).

[27] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 47 (1968).

[28] N. WALKER, SENTENCING IN A RATIONAL SOCIETY 76 (1969).

property, petty theft, causing a disturbance or vagrancy, for example, would seem to be unnecessarily wasteful both in economic and human terms. Indeed the trend in sentencing across Canada from 1955 to 1966 shows a sharp drop in the percentage of persons sentenced to imprisonment for theft and also for breaking and entering.[29] In Canada only twenty-seven per cent of theft cases in 1966 were disposed of by imprisonment. All the more reason in the light of this trend to take a hard look at the waste and cost involved in imprisoning vagrants, drunks, and petty thieves. In one magistrates' court in this survey, four persons convicted of being drunk in a public place served a total of 164 days; at twenty dollars a day that approximates a direct cost of 3,280.00 dollars.

Many judges pass sentences of imprisonment rather than order probation or fines in the not unreasonable belief that imprisonment, as an effective general deterrent, will prevent other persons from committing the crime in question. In a study by Willcock and Stokes, discussed by Professor Walker in his book, *Sentencing in a Rational Society*,[30] a group of young men, aged fifteen to twenty-two years, were surveyed in order to learn something about attitudes of potential offenders. What is remarkable is that the boys were held back from engaging in breaking and entering more from fear of losing the esteem of family and friends, or losing their jobs, than they were from fear of punishment. As to penal sanctions, eighty-one per cent of the sample ranked prison as the penalty they most feared, and borstals were ranked first by another thirteen per cent; the next most feared penalties were approved schools, detention centres, probation, and fines in that order. For potential offenders with a belief that imprisonment would actually be imposed, the threat of incarceration should be a real deterrent. Walker points out, however, that in the survey, over sixty per cent of the young men did not believe that a custodial sentence would be imposed on a first offender. For those young men, the threat of imprisonment could not operate as an effective deterrent unless through publicity they could be persuaded that prison terms would be imposed on first offenders. Correctional opion in England and Canada, as elsewhere, has been, however, to try to reduce the number of sentences of imprisonment not to increase them. Yet to increase penalties to the extent necessary to get publicity and effect a changed belief among potential offenders would require a very high increase in the use of imprisonment with corresponding increases in costs.

Some judges resort to sentences of imprisonment to set an example, in order to curb a local outbreak of offences of a particular nature.[31] Whether such sentences really do have the effect claimed for them has not been empirically demonstrated. The two examples of exemplary sentencing

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[29] OUIMET REPORT, 478 (1969).

[30] At 63-68 (1969) with reference to H. WILLCOCK & J. STOKES, DETERRENTS TO CRIME AMONG YOUTHS AGED 15 TO 21, 11 GOVERNMENT SOCIAL SURVEY REPORT NO. 355 366 (1968).

[31] Decore, *Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity*, 6 CRIM. L.Q. 324, at 359 (1964).

that have received most attention to date, whipping and capital punishment, do not appear to have been particularly successful in reducing crime. After a study of corporal punishment the findings of the Cadogan Committee [32] in England were supported by a Joint Committee of the Senate and House of Commons of Canada. [33] The Cadogan Committee was not able to conclude that flogging by the courts had suppressed outbreaks of violent crime in particular districts in England. [34] Nor does the recent Canadian experience with respect to drug offences support the claims of exemplary sentencing. For various reasons the number of young persons in violation of drug laws has continued to increase dramatically. [35] Another weakness of exemplary sentencing as an effective deterrent arises from the fact that judges even in a local area may not agree upon the need for exemplary sentences. Accordingly, offenders may simply move to the adjoining jurisdiction, while the original judge congratulates himself on the success of his sentencing policies.

Certain types of exemplary sentencing may be so modified by humanitarian considerations, or the limiting demands of retribution, as to appear relatively ineffective. For example, shoplifting at a certain shopping centre may be quite prevalent. In an effort to reduce the crime, a judge may decide to give up imposing light fines and to pass sentences of imprisonment instead. Humanitarian or other considerations forbid his imposing substantial prison terms so he sentences shoplifters to one or two days in jail, with time taken to be served by the accused's having appeared in court. Apart from the legality of such sentences, the efficacy of such dispositions comes into question. The accused suffers neither a financial penalty nor loss of liberty. The sentence is a paper one whose deterrent effect on potential offenders is questionable, although the shame of detection and the disgrace of trial may act as a significant individual deterrent. Shoplifting is so widespread, however, and prosecution so sporadic, that general deterrence at the sentencing level probably has minimal effect.

The danger in recognizing the weakness of the deterrent argument is that the possible deterrent value of punishment in particular types of crimes may be overlooked. After a well-publicized change in the law relating to public drunkenness (persons found drunk in public were merely picked up by the police and held overnight without charges being laid) in New Brunswick, police statistics indicated an increase in this type of crime. [36] Since

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[32] REPORT OF THE DEPARTMENTAL COMMITTEE ON CORPORAL PUNISHMENT, CMD. No. 5684 90-94 (1938). The conclusions of the CADOGAN REPORT were re-affirmed in a follow-up study in 1960: CORPORAL PUNISHMENT, REPORT OF THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, CMD. No. 1213 (1960).

[33] REPORT OF THE JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT (3d Rep.) (1956).

[34] *Supra* note 32, at 79-90.

[35] INTERIM REPORT OF THE COMMISSION OF ENQUIRY INTO THE NON-MEDICAL USE OF DRUGS 276, 396 (1970).

[36] Halifax Chronical Herald, August 14, 1970, at 5. Moncton police indicated that the number of persons picked up for being drunk increased by eighty-nine per cent over last year.

the change in the law is still relatively recent, a longer experimental period should be considered before firm conclusions are drawn. Moreover, similar changes in law were carried out in Saskatchewan and British Columbia, but no results have been released as yet. In tax evasion cases it is assumed that heavy fines operate as a general deterrent.[37] Chambliss found that in parking violations the knowledge of increased fines coupled with heightened risks of apprehension tended to reduce violations.[38] Evidence ranging from the arrest of the Danish police force during the German occupation,[39] to the strike by Montreal policemen in 1969,[40] tends to confirm the common sense conclusion that in property offences such as robbery, theft and wilful damage to property, a well publicized reduction in the risks of detection is likely to be attended by a sharp rise in crime.

These last examples are a reminder that the threat of punishment contains several constituent elements. For potential offenders the threat of punishment involves not only threat of actual imprisonment but the risk of apprehension and trial with its consequent shame and loss of face among family and friends. Willcock's boys did not refrain from housebreaking out of a fear of imprisonment so much as fear of adverse family reaction, loss of job and dislike at being identified as criminals. Accordingly, to increase the risk of apprehension is likely to have a far greater restraining effect than threats of increased punishment.

The limits of general deterrence are also suggested in a report from the Legislative Assembly of California.[41] The report shows that even well-publicized increases in punishment of drug offences, rape, robbery and burglary with violence made very little impression on more than fifty per cent of the persons surveyed.[42] That is, the persons surveyed did not know that the penalties had been increased. Moreoever, it was found that many people did not know what the current penalties for these specific offences were, and of those that took a guess many underestimated the severity of penalties. It would seem that effective increases in general deterrence could only be achieved by making prohibitive increases in levels of punishment, accompanied at the same time by a professional public education program in order to bring the increased penalties home to the public. After considering Willcock's study, Professor Walker also concluded that general deterrence probably could not be increased effectively at the judicial level, ex-

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[37] *See, e.g.*, Regina v. Sumarah, 10 Can. Crim. (n.s.) 169, at 179 (N.S. Co. Ct. 1970); Regina v. Kitto, 8 Can. Crim. (n.s.) 277, at 278-79 (B.C. Co. Ct. 1970).

[38] W. CHAMBLISS, CRIME AND THE LEGAL PROCESS 388, at 391-393 (1969).

[39] Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA L. REV. 949, at 962 (1966).

[40] A strike by Montreal police October 7, 1969 resulted in widespread looting and damage to property.

[41] REPORT OF THE ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS (1968) (Assembly of the State of California, Sacramento).

[42] *Id.* at 28-29.

cept by unacceptably sharp increases in sentences of imprisonment for first offenders. [43]

Even if the effect of general deterrence could be measured, increases in severity of punishment in certain offences would be expected to be less effective than in others. As Packer points out, [44] the roots of crime lie deep in psychic and social conflict and in some crimes the psychic element overwhelms whatever rational or deliberative qualities would be responsive to deterrents. Many assaults, for example, arise out of domestic jealousies and quarrels, or brawls outside taverns or dance halls. [45] As products of impulse, such offences are committed in a state of mind that is not open to a rational consideration of the consequences. Similarly, certain sexual offences, exhibitionism, or some homosexual offences, for example, are the product of compulsion. Persons who are addicted to alcohol or to drugs, or who have a heavy commitment to their use are not likely to be responsive to increased threat of punishment. Deterrence presupposes a rational, disciplined and educated mind; the reality of life is that many potential offenders live from hour to hour, show little foresight or even self-discipline. [46] Under these circumstances any reliance on general deterrence ought not to be general but selective.

If the evidence is weak in support of deterrence as a principle of sentencing it is even weaker in respect of reformation. Most convicted persons are not sick. They are as normal, mentally, as most other persons. Psychiatrists have never made any pretence of claiming to be able to treat normal people, so that even if we wanted to change the values, attitudes or motivations of convicted persons, we probably do not know how to do it. [47] Even the relatively small number of persons in prisons and penitentiaries in need of psychiatric help are not able to receive meaningful treatment because of the lack of trained staff.

The penitentiary service aims at education, training and discipline, [48] yet there is no demonstrable causal connection between "reform" and upgrading educational qualification. Doubtless it is humanitarian to help

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[43] SENTENCING IN A RATIONAL SOCIETY 68 (1969).

[44] THE LIMITS OF THE CRIMINAL SANCTION 55 (1968).

[45] F. MCCLINTOCK, CRIMES OF VIOLENCE 151, 155 (1963). Also in the survey conducted among magistrates' courts in Nova Scotia, insofar as the circumstances were recorded in some courts, assaults tended to arise from domestic disputes, sexual jealousies, or drinking incidents.

[46] "The penalties of the criminal law probably have some deterring effect on criminals but not to the extent that is commonly imagined. Criminals, on the whole, are thoughtless, irresponsible, imprudent and not farsighted and do not, in general, contemplate the penal consequences of their acts. The more normal, in the sense of thoughtful, prudent, responsible, and farsighted an individual is, the more he is likely to be deterred by criminal sanctions . . . ." Regina v. Sumarah, *supra* note 37, at 178.

[47] *Supra* note 44, at 55-58; Outerbridge, *Re-Thinking the Role of Treatment in Probation*, 18 CHITTY'S L.J. 189 (1970).

[48] "[O]ur primary function is to teach the inmate self-discipline so that he will develop self-control, self-reliance and self-respect." Address by A. J. MacLeod, Commissioner of Penitentiaries, to a conference of judges on sentencing, Toronto, 1967.

people improve their education and trade skills; it has also been demonstrated that educational achievement is a factor predictive of success on parole release. It is another matter, however, to say that prisoners "go straight" once they get an education; in the words of the Ouimet Committee, "[r]esearch into the effectiveness of these programs is almost totally absent." Even if a causal connection could be drawn between training and reform, the facilities for education and training programs in the penitentiaries and jails leave much to be desired. To send a man to jail so that he may go to school or learn a trade is largely wishful thinking, and to hope to achieve "training" within the repressive atmosphere of penitentiaries and prisons may also be illusory.

While the Ouimet Committee agreed with Dr. Szabo that no definite conclusion could yet be drawn with respect to true rehabilitation under detention, [49] they indicated that any hope for progress probably lay in community-oriented institutions and intermittent sentences rather than in the traditional jails and penitentiaries. A departure in this direction makes possible the recognition of the fact that crime prevention or corrections is not simply a matter of changing the offender, but of modifying those social and economic forces in his environment that make it difficult for him to function within the law. [50]

An appreciation of the limitations of imprisonment as a reformative influence is not new, nor is it confined to Canada. As Walker stated after reviewing the scene from England, "so far as adults are concerned the main function of custodial measures must always be to deter and to incapacitate." [51] Particularly must this be so in certain parts of Canada, including the Atlantic provinces, where many penal institutions could be "taken physically out of a novel by Dickens." [52]

A recognition of the limitations of deterrence and reformation as principles of sentencing may lead some persons to affirm retribution as the primary justification for punishment. Such an affirmation may be found in a 1969 report on *The Philosophy of Sentencing and Disparity of Sentences.* [53] The report uses punishment in the sense of an "enforced deprivation" either of money, property, or freedom. The purpose of the punishment is "the punishment of the offender and the prevention of further criminal acts" limited only by the most efficient, least expensive and most humane way of effecting it. It follows that imprisonment "must consist first and foremost in punishment or else its *raison d'être* falls." Only after this primary ob-

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[49] OUIMET REPORT 202 (1969).

[50] Recognition of the environmental factors was also acknowledged by the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 7 (1967).

[51] Walker, *supra* note 43, at 76.

[52] OUIMET REPORT 499, separate statement by Mrs. McArton; *see also* 289 (1969).

[53] A research study by A. Mewett and W. Common, published by *The Foundation for Legal Research in Canada.*

jective is met, can consideration then be given to rehabilitation or training. "To hold otherwise would be to defeat all principles of uniformity." [54]

The form of retribution implicit in this report is not mere denunciation (as found in the Fauteux Report), [55] for intermittent sentences, such as week-end imprisonment, or incarceration at night only, are dismissed on the ground that such dispositions "merely pay lip service to the concept of imprisonment." [56] Other aspects of retribution pervade the report; a concern that punishment be related to the objective gravity of the offence, that it be related to harm, and to the evil intent or otherwise of the offender.

The philosophy of the report is quite in keeping with the sentencing philosophy that has prevailed in the courts for a long time. Each offence is thought to have an objective gravity, the extent of which can be found by consulting the scale of punishment set out in the Code. Within the discretionary limits set by the Code such factors as the degree of violence, the extent of the harm, the remorse shown, or the degree of preparation and planning required, all go to determining a sentence either in line or departing in some measure from "the tariff" that usually prevails in crimes of that type. As Judge O'Hearn recently pointed out, it is not fashionable to talk of retribution these days, and judges more frequently speak in terms of deterrence or reformation. The rhetoric of reform, however, cannot hide the fact that punishment looks backward to the offence, and in so doing must be retributive:

> Preventive justice is deterrent. Punishment after the crime is also deterrent but deterrence cannot be the sole motive of punishment. If deterrence were the only reason for inflicting punishment, it would not matter too much whether it was just or unjust; whether the criminal knew what he was doing or not; whether he was sane or insane. The moral outlook of our society demands that a punishment be just, that it be inflicted only on a reasonable human being and that it be proportionate to the crime, *i.e.*, the harm done, and to his responsibility. Indeed, punishment as a deterrent can have a prospective effect only. Its retrospective effect must be retributive, that is, it can deter the offender and others only from their future crimes. Accordingly, the measure of punishment must be the harm that the offender has actually committed. That, no doubt, is why Parliament has allotted different maximum penalties for different offences. No matter how large a penalty it thinks would actually be required to deter any specific individual in any particular case, a court is not justified in going beyond the magnitude of penalty that is prescribed for the harm done. This indicates that however much retribution is out of favour these days as a concept, it remains part of the law because of the persistent demand for it, not only by the public and the injured party, but by the criminal himself. [57]

Difficulties in assessing retribution, however, have given rise to still another general approach to sentencing: primary attention is paid to what is the most effective, least expensive and most humane sentence that can be

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[54] *Id.* at 2, 12, 13.
[55] At 11 (1956).
[56] *Supra* note 53, at 14.
[57] Regina v. Sumarah, 10 Can. Crim. (n.s.) 169, at 177-178 (N.S. Co. Ct. 1970).

passed in order to reduce the frequency of the offence. This approach, "reductivist" as it is called by Walker, [58] may lead in many cases to the same disposition as that suggested by limited retribution. On the practical side, however, reductivism will lead to a decrease in the use of imprisonment, and thus will be less expensive; secondly, reductivism is more likely to be capable of rational evaluation. Difficult though it be, measurement of the efficacy of certain dispositions is possible. It is impossible to measure accurately the quantum of pain and suffering necessary for a selected offence; even more difficult to determine objectively that the punishment should be decreased or increased in the interests of just atonement. The position adopted by the Canadian Committee on Corrections is in keeping with the reductivist approach, in that the Committee does not support retribution as the basis of a correctional system and affirms the value of reducing needless imprisonment: "If two methods are equally effective, the method that imposes less hardship on the offender and on the tax payer is to be preferred." [59]

An application of the reductivist position to sentencing in Canada would mean important changes at the legislative, judicial, and administrative levels. First, the principles of sentencing should be uniformly understood and agreed upon; in Canada this calls for legislative action. A correctional philosophy is a matter of public policy, and, therefore, more suited to formulation by a legislature than by courts; whether the state ought to inflict pain and suffering on convicted persons as a matter of retribution or as a means to reducing the frequency of crime through efficacious sentencing cannot be settled by an appeal to cases through ten independent courts of appeal. The matter calls for the legislative approach: fact finding and public debate. Secondly, the very nature of the judicial method does not make possible marked departures from an historically retributist position even if all the judges and magistrates were able to agree on a direction of change. Thomas, in his review of the work of the Court of Criminal Appeal in England, [60] concluded that the court had been successful in the course of years in establishing sentencing principles in England. For this to happen, however, two factors must be operative: (1) an appeal court courageous enough to adopt a liberal attitude in hearing appeals and willing to intervene in sentences that may be appropriate if judged on the basis of retribution, but not if judged on the basis of rehabilitation; (2) a fairly large volume of cases coming to the appeal court in order that the principles may be established within a reasonably short time. These conditions do not obtain in Canada, as a review of Decore's article, [61] for example, and the statistics on criminal appeals will show. [62]

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[58] SENTENCING IN A RATIONAL SOCIETY 3-4 (1969).

[59] OUIMET REPORT, *supra* note 52, at 426. *See also* 185, 190.

[60] Thomas, *Appellate Review of Sentencing Policy: The English Experience*, 20 ALABAMA L. REV. 193 (1968).

[61] Decore, *Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity*, 6 CRIM. L.Q. 324 (1964).

[62] In 1967, in Canada approximately 5.3% of sentences in indictable offences were appealed either by the Crown or by the defence. In those appeals initiated by

The first step is, then, a legislative pronouncement that sentences should be selected according to what disposition is most likely to be effective in reducing the frequency of a particular crime. As a second step, the current levels of punishment set out in the Code should be reviewed. Apart from the need for incapacitation for a special group of dangerous offenders, long terms are not required in order to further the primary aim of sentencing. In some cases it may well be that a sentence of imprisonment will be passed as a deterrent and still be in keeping with the aim of effective reduction. However, prison terms of ten years, fourteen years or life are now imposed so rarely that their deterrent effect must be very low.

Offences carrying maximum terms of either life or fourteen years imprisonment are impressive in their number:

Life

Some Forms of Treason (section 47)
Failure to disperse on the reading of the riot act (section 69)
Piracy (section 75)
Breach of duty re explosives (section 78)
Causing injury with intent (section 79)
Perjury with intent to procure a conviction (section 113)
Rape (section 136)
Statutory Rape (section 138)
Criminal Negligence (section 192)
Non-capital murder (section 206)
Manslaughter (section 207)
Killing an unborn child (section 209)
Attempted murder (section 210)
Accessory to murder (section 211)
Overcoming resistance with intent (section 218)
Interfering with transportation with intent (section 220)
Failure to guard dangerous places (section 228)
Kidnapping (section 233)
Procuring miscarriage (section 237)
Robbery (section 289)
Stopping mails with intent (section 290)
Breaking and entering (section 292)
Destruction of property endangering life (section 372)

Fourteen Years

Some forms of Treason (section 47(d))
Alarming Her Majesty (section 49)
Assisting the Enemy to Leave Canada (section 50)
Intimidating Parliament (section 51)
Inciting Mutiny (section 53)
Sedition (section 62)
Explosion Causing Bodily Harm (section 78)
Causing Injury with Intent (section 79)
Bribery of Officials (section 100)
Bribery of Officers (section 101)
Perjury (section 113)
False Statements (section 114)
Giving Contradictory Evidence (section 116)
Fabricating Evidence (section 117)
Breaking and Entering (section 295)
Possession of Housebreaking Tools (section 295)
Forgery (section 310)
Uttering a Forged Document (section 311)
Possession of Counterfeiting Equipment (section 312)
Unlawfully drawing a Document (section 317)
Obtaining by means of a Forged Document (section 318)
Using Counterfeit Stamp (section 319)
Selling Defective Stores (section 361)
Wilful Destruction of Public Property (section 372)
Arson (section 374)
Making Counterfeit Money (section 392)

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the defence the accused was successful in fifty-nine per cent of the cases. Frequency of appeals varies widely from sixteen per cent in Saskatchewan to one per cent in Nova Scotia and 0.5% in New Brunswick: D.B.S., STATISTICS OF CRIMINAL AND OTHER OFFENCES 16 (1967) and as computed from data in Table 22.

Incest (section 142)
Buggery (section 147)
Procuring Defilement (section 155)
Counselling Suicide (section 212)
Causing Bodily Harm with Intent (section 216)
Administering Noxious Things (section 217)
Breach of Criminal Trust (section 282)
Refusing to Deliver Property (section 283)
Extortion (section 291)
Possession of Counterfeit Money (section 393)
Uttering Counterfeit Money (section 395)
Clipping Coins (section 398)
Making Counterfeiting Tools (section 401)
Conveying Counterfeiting Tools (section 402)
Conspiracy to Murder (section 408(a))
Conspiracy to Bring False Accusation (section 408(b))

Keeping in mind that some of the more frequent criminal offences fall within the second list and that theft is also punishable by ten years imprisonment, it is remarkable that eighty per cent of all prison terms in 1963 in Canada were for less than two years. Even penitentiary terms in 1963 did not approach the permissible maxima, the average penitentiary term being thirty-seven months, while sixty per cent of all penitentiary terms were for two years only. Of 43,000 persons convicted of indictable offences in 1963 only twenty-nine received sentences of fourteen years or more and another sixty-one were sentenced to terms ranging from ten to fourteen years. In short only .0013% of persons convicted of indictable offences in 1963 were sentenced to terms in excess of ten years.[63] Even when the figures are restricted to those persons liable to fourteen years. or life, no more than five per cent of those who might have been sentenced to such long terms actually received sentences of fourteen years or more.[64] In short the effective working tariff at the court level is very much lower than the decreed legislative penalties.

Comparative statistics are hardly to be relied upon; nevertheless it is instructive to note that in England in 1961 only 2.7% of all sentences imposed were for more than three years,[65] and sentences of twenty years or more, as they are in Canada, are quite exceptional.[66] In European countries too, sentences in excess of five years are rare.[67] By contrast, in the United States federal system the average prison term was 5.7 years in 1965; forty per cent of the prison population had been sentenced to terms in excess of five years and approximately 1,100 persons had been sentenced to terms in excess of twenty years.[68] In the light of experience elsewhere and the empirical data casting doubts on the efficacy of long sentences, the ABA report suggested a statutory maximum of five years and only in rare cases, ten years[69] with a special sentence of an extended term for dangerous

[63] These computations were based on D.B.S., STATISTICS OF CRIMINAL AND OTHER OFFENCES, 1963, No. 85-201 24-25, Table 1 (1964).

[64] Compiled from ANNUAL REPORT OF THE COMMISSIONER OF PENITENTIARIES 50, 53 (1964).

[65] N. WALKER, CRIME AND PUNISHMENT IN BRITAIN 153 (1965).

[66] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 57 (1967).

[67] *Id.*

[68] *Id.*

[69] *Id.* § 2.1.

offenders. [70] The Model Penal Code also suggested statutory maxima of five, ten years or life for felonies, with only a few offences coming within the ten year maximum. In their Code revisions, New Mexico and New York have followed closely the sentencing provision of the Model Penal Code.

Keeping in mind considerations of cost, the corrupting side effects of imprisonment, and the fact that prisoners released on parole after one or two years in prison do reasonably well, there is much to be said for reducing legislative maximum terms to more realistic limits. Only in rare cases such as manslaughter or rape, for example, should a ten year maximum be required, while a life sentence may be required in cases of murder. In the light of what is now known about the effects of punishment, the scale of punishment for most offences under the retributist philosophy of the Code is unreasonably harsh, wasteful and unnecessary. Since little or no justification can be found for imprisoning persons convicted of summary conviction offences and trivial indictable offences, all terms of imprisonment of less than one year should be abolished and offences grouped according to a scale of prison terms of one, two, five, and ten years with life sentence for murder. In keeping with the reductivist approach, discharge, fines, suspended sentence, [71] probation or intermittent sentences [72] should be alternative dispositions at the discretion of the court in all cases.

Corporal punishment, from several points of view, should be abolished. The Cadogan Committee, [73] supported by the Joint Committee of the Senate and House of Commons [74] concluded that whipping did not have a uniquely deterrent quality. Almost no evidence was advanced to show its reformative value, and any positive aspects it may be shown to have are outweighed by the shocking inhumanity of the lashings and the corrupting side-effects on all concerned.

Preventive detention for so-called habitual criminals has been shown to be wasteful and inhumane; rarely is it invoked in cases of persons convicted of one or more serious offences against the person. [75] The principle of reductivism does not require locking up petty thieves for the rest of their natural lives, but does require, instead, a long period of detention for persons found to be dangerous and likely to commit further crimes of serious personal violence unless detained. The weakness of the existing dangerous sexual

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[70] *Id.* § 3.3.

[71] By this I mean suspended execution of sentence similar to that obtaining in England under the Criminal Justice Act 1967 and in many jurisdictions in the United States and Europe.

[72] Intermittent sentences include week-end jail terms or spending nights in jail while working by day. These would differ from day parole in that they would be judicially imposed: OUIMET REPORT 203 (1969).

[73] REPORT OF THE DEPARTMENTAL COMMITTEE ON CORPORAL PUNISHMENT, CMD. No. 5684 (1938).

[74] REPORT OF THE JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT (3d Rep.) (1956).

[75] *Supra* note 72, at 241-53. Not only is the law unevenly enforced, it tends to fall heaviest on those persons who are a nuisance rather than a danger, as in cases of damage to property not to the person.

offender legislation has been discussed by the Ouimet Committee;[76] their recommendation that the present dangerous sexual offender and habitual criminal provisions be replaced by a more selective dangerous offender law punishable by an indeterminate prison term has considerable merit.[77]

The committee recommended a term of life imprisonment with possibility of termination upon a hearing provided as of right every three years. Potential abuses arising under such a shockingly long deprivation of a man's liberty are averted by the review hearings; the reality is, however, that judges will be very reluctant to terminate the sentence except on very strong evidence by psychiatrists that the prisoner has "recovered" or is no longer dangerous. The reluctance of the Lieutenant-Governor to release persons committed to mental hospitals through the criminal courts, and the inability of psychiatrists to predict with certainty, all suggest that few persons sentenced to life imprisonment as dangerous offenders would have their terms terminated on review.

The criteria suggested by the Committee, unlike that set out in the Model Penal Code[78] or the Model Sentencing Act[79] restrict the dangerous offender law to persons showing a character, emotional, or mental disorder or defect: "Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others."[80]

The criteria are not meant to encompass professional criminals in organized crime, or persistent non-dangerous offenders, both of which groups are included along with dangerous offenders in the Model Penal Code's criteria for extended terms. In the opinion of the Ouimet Committee both professional criminals and persistent offenders can be dealt with adequately under the present law with its very high maximum terms. The difficulty with this last position is that in order to catch the exceptional case everyone is threatened with unreasonably harsh terms. Both the Model Sentencing Act and the Model Penal Code, as well as the recommendations of the ABA,[81]

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[76] *Id.* at 253-264.

[77] *Id.* at 258.

[78] MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962).

[79] The MODEL SENTENCING ACT § 5 (1963). The MODEL SENTENCING ACT and the suggestion put forward by the OUIMET COMMITTEE are somewhat similar in their criteria. Both would require proof of an attempt to inflict serious bodily harm, or of serious danger to the life of another; the MODEL SENTENCING ACT requires proof of a personality disorder indicating propensity toward crime. Unlike the MODEL SENTENCING ACT which requires proof of an act in which the attempt was made, or the serious harm resulted, the Ouimet Committee recommendation is entirely prospective. Once a prohibited act has been done, then the only concern is with the likelihood of future danger to others.

[80] OUIMET REPORT 258 (1969).

[81] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (1967).

recognize the desirability of a substantial lowering of the general scale of punishment and devising special criteria for extended terms for the exceptional, dangerous or persistent offender. In England, under the Criminal Justice Act 1967, extended terms up to ten years are available for persistent offenders. [82]

A reductivist with some skepticism as to the ability of psychiatrists to predict with great accuracy who is and who is not dangerous and, secondly, as to their ability to treat dangerous persons, would have trouble with the Ouimet Committee recommendation of life detention. Certainly, the provision for review every three years, with assistance of counsel, should go some way to ensure no unnecessary deprivation of liberty. Yet an alternative measure of social defense might well be satisfied with a shorter term more in keeping with feelings of fairness, with provision, in the interest of protection, that the term be extended for four year terms, upon a hearing with counsel, on proof that the condition of dangerousness still persists. The Model Penal Code and the English legislation remain committed to a recognition of limited retribution with the consequence that the length of the extended terms are related to the ordinary maximum for the particular offence.

In any event, in Canada, there is probably little need to extend a dangerous offender law beyond the dangerous mentally abnormal person contemplated by the Canadian Committee on Corrections. The principle of incapacitation that justifies this kind of law should be very sparingly used, and used only to protect society from harm that cannot otherwise be undone. That is to say, reparation can be made for property damage particularly in the case of the persistent non-dangerous offender. Ordinary terms should be quite sufficient to deal with this type of offender. Long terms are expensive; treatment prospects are not encouraging; on balance, society should be prepared to use moderation in these cases rather than extend dangerous offender legislation too far. As for professional criminals, little concrete evidence is available to show whether they are a real problem in Canada. [83] Those who may be engaged in narcotics offences already face very severe sentences under the Narcotic Control Act. On the whole, too little is known about the extent of organized crime in Canada to justify the passing of sentences of life imprisonment for offences that may not yet be transcribable into precise legislative prohibitions.

In any dangerous offender legislation, criteria should be directed to the probability that the harm will be repeated. Evidence indicates that a past record is the best prediction of future conduct. Present legislation requires one previous conviction for sexual offenders and three previous convictions for habitual criminals. The latter appears to be more in keeping with empirical evidence showing that the likelihood of further convictions for violence

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[82] Criminal Justice Act 1967, c. 80, §§ 39-41.

[83] REPORT TO THE ATTORNEY GENERAL FOR ONTARIO ON ORGANIZED CRIME, ONTARIO POLICE COMMISSION (1964).

increase by thirty-five per cent, forty per cent and sixty-seven per cent after the second, third and fourth convictions respectively.[84] How large a risk is society prepared to take, keeping in mind costs and the long period of detention with release on parole at the discretion of the parole board? The word "likely" as used in the Ouimet Committee definition suggests that the dangerous offender law would become operative only if the chances were more than even that the offender would cause harm as indicated.

Application of the reductivist principle to young offenders requires particular attention. A very large proportion of persons convicted of criminal offences in Canada are nineteen years of age or younger.[85] Since the juvenile courts do not have jurisdiction after the offender reaches age sixteen, the impact of young offenders on the adult court is substantial. As crime is to a large extent a factor of youth and is associated to some degree with rebellious nature of youth, and early exposure to imprisonment may accelerate rather than diminish the probability of further reconvictions, particular efforts should be made, apart from consideration of cost and humanity, to restrict the passing of imprisonment terms on young offenders.

The need for legislative action is evident from the record of sentences passed in magistrates' courts in Nova Scotia and New Brunswick. Among the examples that are readily available on the record are the following: Case 1. A seventeen-year-old single laborer; educational achievement: grade seven; stole a game called "Monopoly." Sentence: two years penitentiary; Case 2. Sixteen-year-old student; stole shaving lotion. Sentence: three days in jail; Case 3. Seventeen-year-old unemployed laborer, stole a pair of shoes. Sentence: thirty days in jail.

In addition, the Annual Report of the Commissioner of Penitentiaries for 1963 showed a total of 578 persons aged nineteen years or under were received into penitentiaries that year.[86] Other jurisdictions have already acted to restrict by legislation the application of jail terms to young offenders. In England, the Criminal Justice Act 1961,[87] authorizes alternatives to imprisonment in the form of detention centres for persons under twenty-one years. Persons between the ages of fourteen and seventeen years may be ordered to be detained in a junior detention centre or to attend an attendance centre.

In addition, in England young males aged fifteen to twenty-one may be sentenced to a borstal institution. The only province that has set up any

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[84] N. WALKER, SENTENCING IN A RATIONAL SOCIETY 143-144 (1969).

[85] OUIMET REPORT 474 (1969):

Males convicted of indictable offences by age group; Rate per 100,000 population.

16-17	1267	35-39	543
18-19	1346	40-44	454
20-24	1147	45-49	360
25-29	870	50-59	235
30-34	663	60 & over	82

[86] At 55.

[87] C. 39, §§ 2, 3, 4, 5.

similar institutions in Canada is British Columbia, where under the Prisons and Reformatories Act, young offenders may be sentenced to an indefinite term of three months to two years in a borstal institution. [88] It is not known how effective the British Columbia borstals are as compared with other forms of disposition in preventing further offences, and in the light of doubts as to the effectiveness of British borstals [89] and reformatory institutions [90] as compared with community programs, correctional resources probably should be directed into community-oriented measures rather than institutional programs such as borstals. [91]

Legislation restricting the imposition of sentences of imprisonment on young offenders should be carried out in conjunction with a program of providing alternative community-oriented institutions for young offenders at the provincial level. The detention centres and borstals in England have had some measure of success, but other experiments, such as Highfields in the United States, hold out some prospect that residential group centres may be at least as successful as reformatory treatment and probably not as expensive. Further possibilities exist with non-residential treatment programs such as the one at Provo and at Essexfields. [92] Again such programs appear to be at least as effective as incarceration and are less expensive both financially and in terms of negative side effects. After reviewing the encouraging results of experiments such as Highfields, the ABA Advisory Committee on Sentencing Standards were agreed that community-oriented institutions offered a far more encouraging future for corrections than traditional imprisonment: "The promise which it holds is more effective at less cost." [93]

In order to ensure a uniform application of sentencing principles and to see that imprisonment is not imposed except as a last resort, judges should be required to give written reasons for imposing the sentence and special provision should be made to see that appeals against sentence may be effectively had even by poor persons unable to afford counsel.

Other legislative action should take account of the need to state a priority in favor of alternatives to imprisonment, not only for young offenders but for adults as well. The Model Penal Code's statement of priorities has been endorsed by the Ouimet Committee:

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[88] Criminal Law Amendment Act, Can. Stat. 1968-69, c. 38, § 115.

[89] R. HOOD, BORSTALS RE-ASSESSED (1965).

[90] Empey, *The Provo Experiment: Evolution of a Community Program, in* CORRECTION IN THE COMMUNITY ALTERNATIVES TO INCARCERATION 29-38, (Monograph No. 4, California State Board of Corrections 1964). In the same issue see the account of the Essexfields Group Rehabilitation Centre, at 51-57. *See also* an account of the Highfields experiment in residential as opposed to total incarceration: L. MCCORKLE, A. ELIAS, & F. BIXBY, THE HIGHFIELDS STORY: A UNIQUE EXPERIMENT IN THE TREATMENT OF JUVENILE DELINQUENCY (1957).

[91] The Canadian Committee on Corrections also supported development of correctional resources in this area rather than a continued concentration on traditional institutions: OUIMET REPORT 202-04 (1969).

[92] *Supra* note 90.

[93] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 57 (1967).

Section 7.01 Criteria for Withholding Sentence of Imprisonment and for placing Defendant on Probation

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime. [94]

This statement in many cases would result in the same disposition as that warranted by the reductivist principle: the proper sentence to impose is the one which is most likely to reduce the frequency of the crime, due regard being had to cost, fairness, and humanitarian considerations. The Model Penal Code statement is basically retributist, however, in the priority it appears to give to past harm and to culpability. Quite properly, some legislative criteria should be laid down to guide sentencing discretion in accordance with sentencing principles. Accordingly, an alternative statement more in keeping with the general position advanced here would put the priority not on culpability but on relative effectiveness of sentences:

Criteria for Withholding Sentence of Imprisonment

A court shall not pass a sentence of imprisonment unless, having regard to current correctional knowledge respecting efficacy of different types of sentences, as well as to the character and condition of the accused, it is of the opinion that imprisonment is a measure of last resort and necessary for the protection of the public because:

(a) It is likely, despite a fine, probation, or suspended sentence, or other disposition, that the accused within a year will commit another serious offence; or

(b) a lesser sentence will seriously undermine the deterrent effect of the criminal law.

Finally, it would seem that any statement of priorities in sentencing from a reductivist's point of view should not pose the alternatives as imprisonment or suspended sentence, but should leave open a choice of absolute discharge, [95] fines, probation, suspended sentence (in the sense of sus-

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[94] MODEL PENAL CODE (Proposed Official Draft, 1962).

[95] The Canadian Committee on Corrections and The Fauteux Committee both recommended a broadening of sentencing alternatives to legalize the practices that are now carried on under the guise of "filing" or laying the charge on file. Mewett and Common also point out the advantages of this disposition even from a retributist position: THE PHILOSOPHY OF SENTENCING AND DISPARITY OF SENTENCES 8.

pended execution of sentence as provided in England under the Criminal Justice Act 1967 [96] and in many jurisdictions in the United States), as well as intermittent sentences recommended by the Ouimet Committee. [97]

Does adherence to a reductivist approach in sentencing require the abolition of indeterminate sentences as urged by the Ouimet Committee and others? [98] The report on the Philosophy of Sentencing and Disparity of Sentences urged their abolition on the grounds of uniformity, while the Ouimet Committee felt that the definite sentence tied to a parole authority "sufficiently close to the situation" would serve the reformative aims contemplated by indeterminate sentences. Mr. Wolff, in examining the relation between the courts and the National Parole Board, argued for an extension of indeterminate sentences to all Code offences in lieu of the present definite sentences. [99] If the evidence supporting the reformative effect of prison sentences were more substantial, Mr. Wolff's case would be much stronger. In the absence of such evidence, and indeed, in the light of some evidence that alternative dispositions produce at least as good results as imprisonment in particular offences, should support be given to a sentencing system that tends to lengthen the term of imprisonment, if not the actual term spent in custody before release on parole? [100] It is not at all clear, either, that longer parole periods are more effective than short parole periods. Even under a system of indeterminate sentences there is no guarantee that the parole authority would use their discretion to provide for early release on parole. On balance, considering the recent changes in parole law, and providing the parole authority relax their criteria and effect early release on parole, the reductivist would probably be inclined to agree with the Ouimet Committee, at least until further evidence could indicate that indeterminate sentences are more effective than the present definite sentences in reducing the frequency of crime.

While sentencing practices in magistrates' courts in Nova Scotia and New Brunswick have made abundantly clear the need to reduce levels of imprisonment and the need for federal legislation along the lines indicated, certain action can be taken at the judicial level. In the first place, magistrates should be required to give written reasons every time a sentence of imprisonment is passed; secondly, an attempt should be made to record and collate sentences passed on a day to day basis, and this information should then be readily available to magistrates. At the present time, no systematic effort is made to keep magistrates and other persons informed of sentencing practices. Thirdly, magistrates and other persons in the field of corrections should be able to meet regularly to discuss sentencing principles and sen-

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[96] C. 80, §§ 37-38; *see also* G. S. WILKINSON, SUSPENDED SENTENCES (1968).

[97] *Supra* note 91, at 203-204.

[98] *Id.* at 205-206; W. COMMON & A. MEWETT, *supra* note 95, at 5.

[99] Wolff, *The Relation Between the Courts and the National Parole Board*, 19 U. TORONTO L.J. 559, at 594-595 (1969).

[100] Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, at 535 (1958).

tencing practices. In metropolitan areas, three or four magistrates may find it convenient to meet more regularly than magistrates elsewhere, but even then semi-annual meetings on a provincial or regional basis should prove valuable, much as sentencing institutes in the United States have proved to be beneficial. [101]

VIII. CONCLUSION

The use and abuse of imprisonment is of primary concern in sentencing. Excessive resort to sentences of imprisonment and unnecessary disparity in selecting imprisonment over alternative dispositions are encouraged by sentencing laws permitting a wide discretion in the selection of appropriate dispositions.

No legislative criteria assist the judge in choosing between fines, probation, or imprisonment. Indeed, the Code actually hinders the proper exercise of discretion by placing arbitrary prohibitions on the use of fines in cases punishable by terms in excess of five years. In adopting their own form of civil disobedience by refusing to be bound by these limitations, some judges have created even greater disparities between courts.

In addition, Canadian courts of appeal have failed to develop a uniform statement of principles that would assist in determining when to use imprisonment as opposed to fines and probation. Even if the courts of appeal did develop such a statement, since each provincial court of appeal is autonomous in these matters, it is possible, though unlikely, that ten different statements would emerge. Without a significant increase beyond the one per cent of appeals against sentence that went to the Nova Scotia Supreme Court in 1967, and the even lower figure in New Brunswick, some courts of appeal would not have a sufficient number of cases to develop a coherent sentencing philosophy.

The question of disparity in choosing between imprisonment and an alternative disposition is aggravated not only by individual differences among the many judges and magistrates imposing sentences, but by the absence of agreement on a philosophy of sentencing. While some judges are frankly committed to rehabilitation, other recognize a role for rehabilitation only after satisfying the minimum requirements of retribution. This disagreement as to the ends of sentencing tends to be obscured by writers and judges acknowledging protection of society as the primary aim of sentencing, and by much rhetoric about deterrence and rehabilitation. Basically, however, the courts remain committed to the tariff approach in which the primary aim

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[101] Olney, *The Sentence Institutes of the United States Federal Courts, in* PROCEEDINGS OF THE SEMINAR ON THE SENTENCING OF OFFENDERS 20 (1963); *Pilot Institute on Sentencing*, 26 F.R.D. 231 (1961), 35 F.R.D. 381 (1964); Devitt, *How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?*, 41 F.R.D. 249 (1967); Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966).

is to make the punishment fit the crime; of secondary importance is the mitigation of a "proper" punishment in the light of the character of the offender and the claims of rehabilitation.

Necessarily, this basically retributist approach to sentencing is highly subjective. What was a "proper" punishment in 1892 may now be looked upon as shockingly excessive. Normally, in determining a proper punishment some help might be had by looking to the maximum term set out in the Code, presumably for the worst possible offence of the kind in question. In fact, average sentences of imprisonment are so far removed from the excessively high statutory maxima as to amount to a judicial rewriting of these provisions. As a result, judges tend to look not to the maxima set out in the Code for help in setting a proper term of imprisonment, but to past cases.

The subjective quality inherent in the retributist approach to sentencing encourages disparities in Canada. One province with the assistance of appellate court judges with strong views on the need for strong punishment may develop a more punitive approach to sentencing than a neighbouring province where appellate judges are reluctant to express views on sentencing, and where individual magistrates are left much on their own.

This may account in part for the large difference in imprisonment rates between Nova Scotia and New Brunswick. New Brunswick judges have been known to take a strong stand on corporal punishment and on the need for deterrence. By contrast, Nova Scotia judges have been reticent. The weakness in this explanation, however, lies in the lack of uniformity that exists even among individual courts in New Brunswick; in the final analysis, the substantially higher rates of imprisonment in New Brunswick appear to be traceable to one or two specific courts. Since it is unlikely that there would be dramatic differences in the kinds of persons convicted in these courts as compared to other courts, the difference in sentencing must arise either from factors peculiar to the social and economic environment of the courts in question, or from the personality of the sentencing judges.

Another cause for concern is the judges' persistence in relying heavily on imprisonment. Despite the appeal to reformation in ministers' speeches and commission reports during the past twenty years, sentencing practices do not appear to have changed significantly; indeed, in Nova Scotia and New Brunswick the use of imprisonment appears to have increased.

Such practices are especially sobering in the light of some empirical evidence, though far from conclusive, tending to undermine the old assumptions regarding the efficacy of deterrence and treatment. Longer prison terms probably are not more effective than shorter terms in preventing further crimes; treatment oriented institutions such as borstals may not be more effective than ordinary imprisonment in preventing reconvictions; for young offenders community-oriented residential institutions do have a more effective record than traditional reformatories. Even intensive supervision in the community without a residence requirement may be more effective than imprisonment. Indeed, even such alternatives to imprisonment as absolute

discharge, fines, or probation appear to be more effective than imprisonment in reducing the risk of further offences.

The time has surely come to re-examine priorities and allocation of resources in corrections, for the very high costs both economic and social that accompany imprisonment can no longer be wholly justified by simple reference to deterrence, rehabilitation, and retribution. Reduced costs and reduced disparities will result from greater attention to 'what is the most effective sentence' not 'what punishment does he deserve'.

In Canada, with the great diversity of jurisdictions, the numbers of judges involved in sentencing, and the record of appeal courts in failing to develop an effective philosophy, development of a modern approach to sentencing requires legislative action along the following lines:

1. Reduction of present excessively high maxima terms to five years, or ten years in rare cases.

2. Enactment of sentencing principles designed to insure that a court shall not pass a sentence of imprisonment, unless, having regard to current correctional knowledge respecting efficacy of sentences and the character or condition of the accused, it is of the opinion that imprisonment is necessary for the protection of the public. In arriving at such a determination the court should consider the likelihood of the accused committing a further serious offence within the next twelve months, and the likelihood of some alternative punishment seriously undermining the deterrent effect of the criminal law.

3. Extension of the range of alternatives to imprisonment including absolute discharge, suspended sentences, intermittent sentences and a liberalized law respecting fines.

4. Enactment of a dangerous offender law to replace the present 'preventive detention' sentences for habitual offenders and dangerous sexual offenders.

5. Allocation of resources for the development of community-oriented facilities as alternatives to imprisonment.

6. Assistance to courts in keeping informed on sentencing practices, and provision of opportunities through sentencing institutes or sentencing councils, for example, to discuss common sentencing problems.

A coordinated effort by provincial governments in providing community-oriented facilities, and federal action in changing laws and providing economic assistance is required. Needless to say, implementation of the new sentencing approach depends upon an understanding and willing judiciary and parole board. The task of a reformed approach to corrections will not be an easy one, and it will call for cooperation, sympathy, and understanding at all levels of the correctional process. Nevertheless, the challenge must be met. A repressive system of justice, falling, as it does, most heavily on the poor and uneducated, is both shocking and degrading to democratic values and fundamental fairness.