# IMPRISONMENT AND RELEASE

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After the examination and improvement of our system of criminal justice became the task of the Law Reform Commission of Canada, many new pressures and movements became apparent. Issues raised and challenges advanced by the federal Law Reform Commission affecting the criminal justice system became the prime subjects of comment and criticism. Much that has needed examination has been exposed. Subjects that were taboo fifteen years ago have been opened to discussion.

The past Chairman of the federal Law Reform Commission, Mr. Justice E. Patrick Hartt, has recently handed over his position as chairman to Mr. Justice Antonio Lamer. I believe that the community would wish to express to the outgoing Chairman its thanks for a task which required a considerable amount of courage, bearing in mind the changing climate of public opinion in many of the areas which have been studied.

The time is fast approaching when government must act to propose and hopefully to provide the means to remedy the criminal justice ills which beset society. Unfortunately, in the last few years, there have been developments in the community at large which represent a significant swing away from some of the reforms proposed by the Law Reform Commission. The homicidal violence of inmates in penitentiaries and other custodial institutions, the frightening increase in many forms of crime, particularly violent crime, and the breakdown of a once well-organized criminal justice system have all served to alarm the public and inhibit the free exchange of ideas.

While the reality of public sentiment cannot be ignored, we owe it to ourselves to accept the opportunity to review pragmatically all that has been written. We must examine the available research and the present state of our criminal justice system for the purpose of assessing our future course. I believe, however, that simply because an idea is new and simplistically appealing, does not necessarily mean that it is the true solution. Old values have been properly challenged, but before they are discarded it is essential, not merely to assess the validity of the old methods, but to evaluate the effectiveness of the new. It may be that in this catharsis a viable alternative will emerge. Above all, it is essential to know that the task is more than worthy of the effort.

It should be noted, as a preamble to any comment on this Working Paper, [1] that our system, as it presently operates, renders the need for criti-

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[1] THE LAW REFORM COMMISSION OF CANADA, IMPRISONMENT AND RELEASE, WORKING PAPER 11 (1975).

cism of imprisonment and release procedures imperative. However, if public confidence were restored in the detection of crime and in court disposition processes, the need for that criticism would be lessened. If, with the assistance of the public, crime could be speedily detected and if court processes could reach a swift decision as to the guilt or innocence of the person charged, the problem of the sanctions to be applied would become less controversial and the sanctions themselves would be applied more realistically.

In considering the sanction of imprisonment, three factors are important:

(1) the certainty of apprehension or detection;

(2) the celerity of the court process toward a verdict; and

(3) the severity of the sanction. [2]

Reading this Working Paper at once creates in the uninformed certain reactions. Statistics are freely used in support of sweeping general statements. The shock value of such an approach is well recognized, but the statistical base should be sound. Regrettably, the base is not sound. The shortcomings of this statistical material have been clearly challenged, but despite that challenge, the Commission does not admit to the clear unreliability of the material it uses.

Imprisonment and the shortcomings of our correctional system have generated much study and comment in the past. Those who seek new initiatives cannot ignore the work of others in the field whose recommendations have been made after a Canada-wide, in-depth review. The Ouimet Committee Report [3] is such a work. Those who wish a yardstick by which to consider the Working Paper should carefully study this report. In addition, *The Submission by The Canadian Bar Association to the Senate Committee on Parole* [4] should also be examined.

The Ouimet Committee clearly recognized the serious problems posed in protecting the public from unlawful violence or conduct which represents a serious threat to the community. While the "rehabilitative" effect on habitual criminals of detention and release was not adequately commented upon, the Ouimet proposals at least grappled rationally with the difficulties society has with this type of offender. The Working Paper, in my view, treats these matters superficially and has not proposed any adequate alternatives. Indeed, the only reference to the Ouimet studies and comments is a brief allusion to the Committee's recommendations to abolish habitual criminal provisions. [5] No reference is made at all to the recommended alternative classification of "dangerous offenders" and to its procedures.

The Ouimet Committee reviewed the habitual criminal and dangerous

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[2] J. Andenaes, *General Prevention Revisited: Research and Policy Implications* (to be published in J. CRIM. L. & CRIMINOLOGY & POLICE SCI.).

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

[4] SUBMISSION BY THE CANADIAN BAR ASSOCIATION TO THE SENATE COMMITTEE ON PAROLE (1973).

[5] *Supra* note 1, at 27-28.

sexual offender provisions and recommended "that the present habitual offender legislation and dangerous sexual offender legislation be repealed and replaced by dangerous offender legislation". [6] In addition, the Committee proposed a definition of the dangerous offender, together with very specific principles which should be applied to dealing with them and a listing of offences (in a general way) to which these principles would apply. [7]

I would suggest that the Working Paper seriously undermines its credibility in this area of law reform when it avoids meeting clearly the plain recommendations of the Ouimet Committee.

The new terminology which the Working Paper uses seems to represent an active attempt to avoid, where possible, the well reasoned and descriptive words of the past which are already imbedded in our law. One wonders if the word "denunciation" really is "deterrence" in other clothing. The Working Paper's approach to deterrence (denunciation) as an element of a sentence of imprisonment is not adequately reasoned. Studies have clearly shown that punishment is relevant to crime prevention. [8]

The Working Paper chooses to divide crime into violent and non-violent categories. This categorization should be read with the statements in Working Paper 3 on Sentencing and Dispositions. [9] If it is so read, and if appropriate action is forthcoming, then the emergence in Canada of extremely serious problems in non-violent crime may yet be handled, even it it means "putting people in boxes and keeping them there". [10]

The pattern of non-violent crime in Canada today affects in a major way the quality of life of many citizens. Frauds on the old, on business and on others have reached frightening proportions. Statistically, they far exceed in value the impact of violent crimes. The Working Paper approached such problems without adequate answers or with none at all. The financial cost of custody of a prisoner is quoted as $14,000 per annum, which is said to be an unacceptable economic burden. [11] But for those who are familiar with the economic cost of allowing certain types of criminals a free run in society, the reader can be assured that such a cost is a small price to pay compared to the cost to our citizens in human suffering and economic loss caused by allowing such people "free reign".

One extremely interesting failure of the Working Paper in discussing violent crime and the maximum sentence of twenty years is its lack of analysis of the relationship between capital punishment and imprisonment. This is a problem which the Working Paper should have frankly and freely discussed. Perhaps it did not do so because it would be inconvenient for a

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[6] *Supra* note 3, at 257.
[7] *Id.* at 258-60.
[8] *Supra* note 2.
[9] LAW REFORM COMMISSION OF CANADA, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3, at 13-14 (1974).
[10] *Supra* note 1, at 8.
[11] *Id.* at 6.

Working Paper on imprisonment to consider the question of a minimum term for such an offence as murder.

The paper, in discussing the minimum sentence provisions in the Criminal Code [12] and the Narcotic Control Act, [13] discards the concept of minimum term. [14] The current thinking, obviously, of the vast majority of those who have studied the question of imprisonment in relation to homicide offences is that there should be a minimum sentence served. Consequently, the acceptability of the minimum sentence concept for certain offences is still very great among the majority of the public.

Diversion is not mentioned nor is any attempt made to discuss the alternatives known as conditional or absolute discharge. These tools have been used to a very large extent in recent years and are an innovation in the apparatus of sentencing. Their impact must be weighed in the light of the Canadian criminal justice experience. One should not be too anxious to accept some diversion procedures current in the United States. A study of diversion indicates that there are as many different programs as there are states in the United States.

Extensive study of the sentencing practices of judges and the criteria applied by them is available. [15] The elements which judges must bear in mind are clearly enunciated in the case law. Appeals on sentence are a daily occurrence and consequently the judiciary within its own structure regulates itself and, to some extent, provides guidelines. Basically, it is not the judiciary of first instance which creates the problems in sentence disparity, but the variables unexplained in sentence appeal dispositions. That the sanction of jail may be required as a deterrent could be well understood by the local judge but not by the appellate court, which sometimes appears unwilling to recognize the existence of deterrence as a consideration. The criticism of lack of "openness, visibility and fairness", when applied to the judiciary, is unfair and insulting. [16]

In discussing the relationship of the proposed Sentencing Supervision Board with penitentiary authorities, the paper recommends that changes in conditions of sentence or release rest initially with the prison authorities, with review by the Board. [17] Powers to review are listed, but no reference is made to the question of review of an absence granted. The paper does not appear to grasp, although it mentions, the pressures on prison officers and the confrontation problems they have with inmates over the question of early release, temporary or otherwise. [18] Any proposals for reform must take into account the ability of inmates to manipulate and intimidate penitentiary officers.

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[12] R.S.C. 1970, c. C-34.
[13] R.S.C. 1970, c. N-1.
[14] *Supra* note 1, at 24.
[15] *See, e.g.*, J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971).
[16] *Supra* note 1, at 41.
[17] *Id.* at 42-43.
[18] *Id.* at 7-8.

The general concept, however, of a Sentencing Supervision Board is sound and is presently fulfilled to a marked degree by the National Parole Board. It must be emphasized that any structure such as the one recommended must take into account the problems of supervision faced by the penitentiary service. It is vital that disciplinary sanctions exist and be effective. Areas which promote the possibility of conflict should be removed or restricted. In particular, the proposed changes of conditions of sentence or release should be scrupulously examined to ensure they do not create custodial confrontations in penitentiaries.

The paper recommends the final third of a prison sentence be served in the community.[19] The balance would be subject to various considerations affecting the requirement that it be served in custody.

Where denunciation is the rationale for sentencing, the offender may be released after two-thirds of the time has been served, *not* to be returned to the institution unless subsequently convicted. It is somewhat difficult to understand the new terminology proposed or its effect upon the custodial aspects of sentence. In effect this proposal appears to be the old statutory remission in another form. The Canadian Bar Association recommended abandonment of statutory remission but the retention of earned remission at a higher remission rate.[20] The control of dangerous offenders could be compromised by such proposals.

Any program of release must take into account the existing institutions for detention as well as the facilities to effectively implement a program of supervision in the community. There exists, in Ontario and British Columbia, another tier of correctional facilities, formerly called reformatories. Sentences of up to two years less one day (determinate) and two years less one day (indeterminate) are served there. Sentences of females below two years are considered indeterminate sentences. The Working Paper makes no apparent attempt to examine the roles played by provincially organized and funded institutions or to describe the effect of their sentence proposals on these structures.

In addition, any use of facilities for supervision or release requires some discussion of the existing overloaded condition of probation and parole agencies. These matters are not examined in any pragmatic way. It is clear from Ontario experience that the correctional or reformatory structure operates well and deals with many areas not handled similarly in other provinces. The Working Paper, in my view, should have examined these areas and made identifiable reform proposals.

Despite comments on the effectiveness of parole programs suggesting that there is hard data available to support the rehabilitative effectiveness on offenders of such programs,[21] I maintain that the question of whether the existing parole supervision does efficiently accomplish its avowed purpose is

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[19] *Id.* at 33.
[20] *Supra* note 4, at 41-42.
[21] *Supra* note 1, at 38.

as yet not statistically clearly established. The real statistic is not how the parolee behaves under direct supervision but how he performs afterwards in the community, unsupervised.

The involvement of the judiciary in post-sentence disposition is, I believe, a useful recommendation. [22]

Predictions of "dangerousness" which state that only one in twenty persons considered dangerous will actually commit a violent act [23] should be clarified by explaining whether these statistics are based upon periods of time when the persons surveyed are under detention.

There are quite a number of areas with which the Working Paper does not deal, such as prisoners' remedies or rights, females, native peoples and young persons.

In the case of young offenders, the most recent study is that of the Tassé Committee. [24] These proposals are the most radical reforms for this area since the Young Offenders Bill [25] was soundly attacked in the House of Commons and abandoned. Of all areas where "detention" of some kind is used, detention of the young offender obviously requires study. Regrettably, this Working Paper makes no attempt to deal pragmatically with the problem.

I regret that this comment must appear so critical of the Working Paper. My objective is to inform the reader of questions that require analysis in the hope that such analysis will result and will lead to a final proposal to the government embodying a working solution. Full comment is, of course, limited by the form dictated, but it is hoped that absence of comment on a particular area of the Working Paper will not be assumed as either approval or disapproval. [26]

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[22] *Id.* at 42, 44.

[23] *Id.* at 18.

[24] YOUNG PERSONS IN CONFLICT WITH THE LAW, A REPORT OF THE SOLICITOR GENERAL'S COMMITTEE ON PROPOSALS FOR NEW LEGISLATION TO REPLACE THE JUVENILE DELINQUENTS ACT (Tassé, Chairman 1975).

[25] Bill C-192, 28th Parl. (1970-72).

[26] Bill C-84, 30th Parl. (1974-76), enacted after the foregoing comments (July 14, 1976), and Bill C-71 (enacted Jan. 27, 1976) may substantially change sentencing ranges and actual time served.