Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons

Aidan R. Vining

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The Canadian sentencing system is in need of major reform. This article, after reviewing those areas that are widely perceived to be most in need of overhaul—the sentencing process itself, the parole system, dangerous offender legislation, and remission—will contend that while the weaknesses of the present system are now well documented, the commonly proposed “reforms”
have been borrowed inappropriately from those that already have been attempted, and discredited, in the United States. To paraphrase Santayana, if we do not learn from their mistakes, we are destined to repeat them. The more recent American efforts that do not appear, as yet, to have influenced Canadian reform proposals greatly, but, as historical experience suggests, also may soon be advocated in this country, are examined and criticized. Finally, it is suggested that a more uniquely Canadian approach to sentencing reform, based more on the practical contributions of our judiciary than on abstract theorizing, could avoid many of the pitfalls of the American experience.

I. THE NEED FOR REFORM

A. Sentencing and Disparity

There are several conceptual reasons for believing that the Canadian sentencing system does not encourage uniformity. There is also empirical evidence of considerable disparity. John Hogarth, for example, has conducted an extensive study of the sentencing practices of magistrate's courts, which deal with over ninety-four percent of all indictable cases, and he concludes that:

Wide variation in sentencing practice appears to exist between courts in different provinces and between courts within particular provinces. In 1964, courts in Ontario varied in using probation, from one court using this form of disposition in nearly half the cases coming before it, to another never having used it ... On their face, these differences appear to be too large to be explained solely in terms of differences in the type of cases appearing before the courts in different areas.1

Robert Evans has reached similar conclusions. Table 1, reproduced from Evans, illustrates some of the inter-provincial differences in sentencing outcomes.

<table>
<thead>
<tr>
<th></th>
<th>Percentage of Convicted:</th>
<th>If Tried, Probability of Being Incarcerated</th>
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<tbody>
<tr>
<td></td>
<td>Percent Convicted,</td>
<td>Sentenced to Incarceration</td>
</tr>
<tr>
<td>Indictable Offences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Newfoundland</td>
<td>97.3</td>
<td>47.7</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>97.5</td>
<td>29.4</td>
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<tr>
<td>Nova Scotia</td>
<td>89.9</td>
<td>33.5</td>
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<tr>
<td>New Brunswick</td>
<td>96.9</td>
<td>40.9</td>
</tr>
<tr>
<td>Quebec</td>
<td>84.3</td>
<td>43.7</td>
</tr>
<tr>
<td>Ontario</td>
<td>86.6</td>
<td>38.4</td>
</tr>
<tr>
<td>Manitoba</td>
<td>87.8</td>
<td>45.0</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>92.9</td>
<td>42.0</td>
</tr>
<tr>
<td>Alberta</td>
<td>89.9</td>
<td>45.9</td>
</tr>
<tr>
<td>British Columbia</td>
<td>83.1</td>
<td>51.1</td>
</tr>
<tr>
<td>Canada</td>
<td>86.8</td>
<td>42.6</td>
</tr>
</tbody>
</table>


Evans concludes:

Here we should re-emphasize the lack of equity as illustrated in Table [1]. There it will be seen that there are extensive differences in the use of incarceration among various provinces. In Nova Scotia only about one-third of those convicted are sent to a jail or prison in the province, but a very high proportion of those incarcerated are sent to a federal prison. In Saskatchewan, 42 per cent end up behind bars, but the federal prison rate is only 60 per cent of that of Nova Scotia. The most interesting information in the table is probably in the last column, which shows the probability of being incarcerated if tried on an indictable offence. There it can be seen that Prince Edward Island's probability of 0.286 is almost 38 percent less than Newfoundland's .464.3

These findings are hardly surprising, given the wide discretion embodied in the present system and the lack of guidance as to how that discretion should be exercised by judges and prosecutors. Professor Hogarth, in the aforementioned study, extensively examined judicial attitudes and concluded:

Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information, and in the sentences that they impose. In a variety of ways it was demonstrated that magistrates interpret the world selectively in ways consistent with their personal motivations and subjective ends. Regardless of what position one takes with regard to the social purposes that sentencing should serve, it is likely to be repugnant to the average man's sense of justice if such differences are allowed to persist.4

Generally, in Canada, the courts impose “fixed”5 sentences within relatively wide ranges set out in the Criminal Code.6 For example, breaking and entering a dwelling house is punishable by any term of imprisonment up to life imprisonment; theft over $200 is punishable by any term of imprisonment up to ten years.7 The Law Reform Commission of Canada has concluded that these ranges “place an unreasonable burden on judges in requiring them to exercise an unnecessarily wide discretion” and are, in fact, “anachronistic.”8

Additionally, the Law Reform Commission's Studies on Imprisonment concluded that although “[fixed] sentences of imprisonment may only be pronounced by the courts ... [i]n practice, however, they become indefinite sentences.”9 There are several reasons for the illusory quality of “fixed” sentences:

Indeed, although there is only one way to be sent to prison, there are many ways to leave it. Inmates may be released before the end of the term set by the court either by an act of clemency, by application of the legislation which provides for the remission of one quarter of the inmate's sentence (statutory remission), because the inmate has earned a remission by his work, diligence and industry,

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3 Id. at 89.
4 Supra note 1, at 385-86.
5 As I will argue below, this fixed nature is more illusionary than real.
7 Criminal Code, R.S.C. 1970, c. C-34, s. 294(a) for theft; s. 306(1) for breaking and entering.
or by an administrative decision of the Parole Board, which has the power to release an inmate anytime after he has served part of the prison term set by the Governor in Council.\(^\text{10}\)

B. The Parole Process

Probably the most important factor, in practical terms, that alters the “fixed” nature of prison sentences is the National Parole Board. Admittedly, the parole process is particularly problematic because it does not affect all sentences. Thus only thirty-five percent of all inmates released after serving between one and five years were released on parole, and forty-five percent of those inmates serving between five and fifteen years were released on parole—the majority of inmates, in fact, serve out their sentences.\(^\text{11}\) However, several important questions are raised by the parole process: first, why are some inmates released on parole and not others; second, what release criteria are used by the Parole Board; and third, are the criteria appropriate? There appears to be considerable consensus that the parole process results in differential sentencing. For example, a working paper of the Law Reform Commission of Canada gloomily concluded that “parole is applied by different authorities, has different goals and purposes and may be applied under different terms and conditions.”\(^\text{12}\) On the other hand, there appears to be disagreement as to whether the parole process is inherently unsound, given its present orientation, objectives and structure. This question can be addressed in two ways: first, by determining whether the objectives of the Board are conceptually appropriate and practically attainable; and second, by reviewing the empirical literature on the actual operation of the Parole Board.

The first major conceptual difficulty arises from the fact that the Parole Board does not even admit that it is, in fact, sentencing offenders. At various hearings, the National Parole Board has maintained steadfastly that “the Board is not concerned with the propriety of the conviction or the length of the sentence.”\(^\text{13}\) The Board maintains that its function is primarily to evaluate the “progress” of the offender since his incarceration. All of the evidence suggests that this is an unrealistic assessment, especially when one examines the factors that the Board reviews.\(^\text{14}\) Unfortunately, this refusal to accept the true nature of its role, understandable though it may be from a political perspective, has important practical consequences. For example, the Board does not appear to regard uniformity as an important goal. This can be contrasted with the sentencing process itself, where uniformity is one of the criteria utilized in appellate review of sentences.\(^\text{15}\)

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\(^{10}\) Id.

\(^{11}\) Evans, supra note 2, at 95; data from 1969-70. Later evidence from Mandel, *Rethinking Parole* (1975), 13 Osgoode Hall L.J. 501 at 512 suggests approximately similar figures for more recent years.

\(^{12}\) Landreville and Carrièrè, supra note 9, at 84.

\(^{13}\) Street, *Canada's Parole System*, A Presentation to the Subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs (Ottawa: Information Canada, 1972) at s. II.

\(^{14}\) See text accompanying notes 25-28, infra.

likely to develop rational sentencing criteria to institutionalize uniformity if it consistently denies that it is sentencing offenders.

This particular problem is compounded by the enormous discretion granted to the Parole Board by the Parole Act of 1959: "[T]he National Parole Board has, with two exceptions, exclusive jurisdiction and absolute discretion to grant, refuse to grant or revoke parole in the case of any person who is under a sentence of imprisonment pursuant to an Act of the Parliament of Canada."\(^{16}\)

Additionally, the present parole system appears to be vulnerable in terms of its own criteria, namely that "the inmate has derived maximum benefit from prison, that reform and rehabilitation of the inmate will be aided by parole and that the release of the inmate does not constitute an undue risk to society."\(^{17}\) The overt reason for much of the present discretion in sentencing (judicial and via the parole process) is that the penalty should be tailored to take into account the likely future behaviour of the offender, i.e., the likelihood that he will recidivate or, put positively, the likelihood that he will be "reformed." There is a growing disillusionment with this approach based on both practical and normative grounds. A recent comprehensive study on parole release decision-making came to the following conclusion on "rehabilitation":

> Extensive social science research strongly suggests that rehabilitation—defined as an increasing likelihood of successful adjustment upon release—cannot be observed, detected or measured. When inmates with similar backgrounds and past records are compared, neither institutional program participation and achievement, nor disciplinary record, nor the level and type of pre-incarceration or post-release supervision programs have any measurable impact on the probability of successful rehabilitation, the rate of recidivism, or the likelihood of later parole success. Holding other factors constant, time served in an institution appears to have, if anything, a slightly negative effect on the inmate's chances for success once he or she is released. Nor do "expert" decisions by parole officers or psychologists appear any more accurate in discerning likely success than decisions by lay people. There simply is no way to know when "rehabilitation" has occurred in an individual.\(^{18}\)

Given the inability actually to implement rehabilitation criteria, many critics in the United States have argued that parole boards primarily utilize...
the potentiality for release as a means of social control within the prison.\textsuperscript{10}

For example, in Maryland, Prettyman concluded: "If the inmates thought that those who ran their lives were stupid, misguided and wrong—but fair—the therapeutic concept could perhaps get off the ground."\textsuperscript{20} In a recent study of four American states by the Council of State Governments, the parole situation was summarized as follows:

The critical commentary in the States studied suggests that, by and large, parole board decision-making is marked by undefined procedures, unpredictability, and rulelessness. Essentially, parole board decisions are drawn from fragmentary information relating to an inmate's reincarceration history, institutional behavior, and participation in and responsiveness to treatment, education and vocational programs, together with a brief interview averaging 15 minutes in most States. (In California, seven minutes per inmate is the cited norm.) Seldom do parole boards apply these criteria with any uniformity.\textsuperscript{21}

The situation is no different in Canada. Indeed, the Report of the Task Force on the Creation of an Integrated Canadian Corrections Service has endorsed the strong statement of a leading United States commentator, Norval Morris, who argues: "'Rehabilitation,' whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction."\textsuperscript{22} Yet such a purpose still is required legislatively.

The practical difficulties of predicting future propensity to criminality have provided plentiful additional ammunition to those, such as Andrew von Hirsch, who have argued that consideration of future behaviour should be normatively irrelevant in the sentencing process.\textsuperscript{23} If one accepts either of these propositions—that future criminal behaviour cannot be predicted or should not be predicted—then the rationale for the paroling process is weakened considerably.\textsuperscript{24}

Finally, it is worth pointing out that the Parole Board does not, on its face, limit itself to predicting either rehabilitative potential or future dangerousness. Rather, it appears to engage in a complete resentencing, albeit without any of the traditional procedural safeguards associated with sentencing. For example, some of the evidence used by the Parole Board, as described by a senior parole official, includes:

The R.C.M. Police Fingerprint Section record is forwarded to us automatically by

\textsuperscript{10} "The California and Washington Boards not only fix, they may refix sentences. This gives them enormous power to punish prisoners not solely for their crimes but also for their behavior in prison." Rubin \textit{et al.}, \textit{The Law of Criminal Correction} (St. Paul: West, 1963) c. 4 at 14 [In general, see c. 4 and c. 14]. Also see Prettyman, \textit{The Indeterminate Sentence and the Right to Treatment} (1972), 11 Am. Crim. L. Rev. 7 at 35.

\textsuperscript{20} Prettyman, \textit{id.} at 35.

\textsuperscript{21} Foster \textit{et al.}, \textit{Definite Sentencing: An Examination of Proposals in Four States} (Lexington: Council of State Governments, 1976) at 8-9.


\textsuperscript{24} Remembering that both subsections (ii) and (iii) of s. 10(1)(a) of the \textit{Parole Act}, R.S.C. 1970, c. P-2, imply prediction—whether the offender will recidivate or not.
that force in each case. This document gives a history of the individual's criminal record.25

Certain police forces supply us automatically with reports outlining the circumstances of the offence and other details surrounding the commission of the offence.26

In all other cases, we request reports from the investigating force. The Board places great stress on having an official version of the offence. The necessity for police reports becomes clear when it is realized that the inmate (like all humans) generally wishes to place himself in the best possible light and is therefore likely to repress certain of the facts surrounding the commission of the offence.27

Certain types of cases involve additional inquiries. For example, in cases involving drugs, we request a report from the Division of Narcotic Control, Department of National Health and Welfare and inquiries are made of the Department of Manpower and Immigration about the citizenship status of individuals who may be deportable.28

These particular quotations were chosen because they illustrate the resentencing nature of the parole process. For example, presumably the judge was aware of both the prior record of the offender and any mitigating or aggravating circumstances of the offence at the time of the trial. In considering these issues, the Parole Board inevitably must cover ground already considered by the judge. It is clear also that these factors are not relevant to the offender's progress in prison. It is possible that they are relevant in deciding whether release "constitute[s] an undue risk to society,"29 but, presumably, they are as determinable at the time of initial sentencing as at any other. Consequently, the question arises, why examine them again? The relevance of the citizenship status of an offender to parole is obscure, relevant though it might be to a sentencing process.

Two empirical studies of the National Parole Board are particularly pertinent. One argument in favour of parole might be its impact in reducing the traditionally long (relative to European jurisdictions) sentences of Canadian judges. However, Mandel has questioned seriously whether the parole process does, in fact, reduce sentence lengths. Two of his findings are that: (1) the average direct reduction in sentence lengths attributable to parole is probably only about ten percent; and (2) there may be an indirect increase in sentences. "[S]entencers have merely lengthened the sentences they would otherwise have imposed in view of the fact that offenders may be paroled before the entire sentence is served."30 Mandel also found that 63.3 percent of the parole budget is used for selecting parolees, and only 36.7 percent for supervising parolees after their release. In other words, almost two-thirds of the parole budget is spent on a function that is both normatively and empirically suspect. The two important conclusions that can be drawn from these findings are, first, that the overall direct reductions are relatively small given the percentage of the budget allocated to this function and, second, that these direct reductions may, in fact, be offset by indirect increases. While Mandel

25 Street, supra note 13, s. IV at 3.
26 Id.
27 Id.
28 Id.
30 Mandel, supra note 11, at 512.
makes no estimate of these indirect increases, he points out that in Hogarth's sentencing study, 59.2 percent of Ontario magistrates admitted taking into account the possibility of countervailing activity by the Parole Board. Mandel concludes that as long as the correct language is employed, this is legally permissible:

In considering the effect of prolonged incarceration on the possibility of the offender being rehabilitated, the sentencer can consider the fact that the Parole Board is empowered to release the offender in the interests of his rehabilitation before his time is up. Any similarity between this and a delegation of sentencing duties to the Parole Board is purely a product of the reader's imagination and mine as well.  

Finally, and perhaps most importantly, a relatively comprehensive examination of the parole process has been carried out recently for the Law Reform Commission of Canada. Ironically, the authors explicitly claim that "[t]he study does not consider the effectiveness of parole decision-making," while this reader's conclusion is that implicitly they present a severe indictment of the status quo. Their criticisms are directed at two areas: first, that relating to the preparation of documentation for each inmate's file that eventually is reviewed by the Parole Board; and second, the parole hearing itself. Their criticisms of the documentation are that it was: (1) repetitious and disorganized; (2) the information contained was often vague and lacked "clarity"; (3) there were numerous internal inconsistencies; (4) the quality and quantity varied enormously from case to case; (5) the documentation rarely contained information provided by the accused; (6) the documentation usually did not contain input from the inmate; (7) the role of documentation preparer was important in determining parole outcomes, and yet the preparer had wide discretion as to what information to include; and (8) Parole Board members rarely read the documentation completely. Their criticisms of the hearings themselves are equally broad: (1) there is, in fact, no legal requirement for the Board to see or hear the inmate at all; (2) inmates did not understand the nature of the process or the evaluation criteria; (3) there was no transcript or record and any written comments or reasons for the decision in the inmate's file were usually incomprehensible; (4) there were no explicit guidelines or criteria for making the release decision; (5) frequently the inmate had inadequate ("ten minutes") notice of the hearing; (6) frequently the person who had prepared the documentation was not present at the hearing; (7) the hearings themselves were brief; (8) the "decision" conference was extremely brief; (9) the Board appeared to be influenced by inappropriate factors such as publicity; (10) both the decision and the reasons for the decision given to the inmate were vague and frequently misunderstood; and (11) Parole Boards in different geographic locations appear to utilize different criteria. The authors also note some efforts by the Board to clarify its release criteria and these reforms will be discussed below.

In general, then, the present parole process is suspect. The crucial question, however, remains: can the parole process be reformed? This is an issue

31 Id. at 517.
that will be addressed after a consideration of the areas of legislation relating to dangerous offenders and remission.

C. Dangerous Offender Legislation

One area where there is widespread consensus on the inequity of the present system is the dangerous offenders legislation—the only area where indeterminacy in sentencing is mandated formally in Canada.\(^3\) There is considerable evidence that these provisions are both unnecessary and disparately implemented. A working paper of the Law Reform Commission of Canada came to very strong conclusions on the present operation of dangerous offender legislation:

"[T]he consensus is that they are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice. ..." The requirement of consent of the Attorney General to the initiation of habitual criminal proceedings has clearly not served to secure even rough uniformity in practice.\(^3\)

The empirical evidence on the use of preventive detention has been summarized by Evans as follows:

Another imprisoned group whose rights to equity have been ignored are men sentenced to preventive detention. In an analysis of those 80 persons sentenced to preventive detention in federal prisons during February 1968, the Canadian Committee on Corrections concluded that 40 percent did not pose threats to the personal safety of the Canadian public; perhaps one-third were threats; and, for the rest, it was impossible to say. In addition, it was quite clear that many were there primarily because they were nuisances. A geographical lack of equity was also shown by the fact that almost 50 percent of all those sentenced to preventive detention were sentenced in Vancouver.\(^3\)

Even if such penalties could be handed out uniformly, it is not clear that they are justifiable morally. The main rationale for such sentences appears to be that existing sentence ranges are so broad that many serious offenders could, and do, receive obviously inadequate sentences. Most criminal lawyers have seen, during their careers, at least one offender escape with a grossly lenient sentence. Thus, dangerous offender legislation can be seen as an admission of the inadequacies of existing sentence ranges and the lack of differentiation therein.

D. Remission

Since 1961, two types of remission have been available, statutory and earned. Statutory remission represents one quarter of the sentence to be served at the time of incarceration. It is subject to revocation for disciplinary

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\(^3\) The Criminal Code specifies that an accused is considered to be an habitual criminal if, since the age of eighteen years, he has previously, on at least three separate and independent occasions, been convicted of an indictable offence for which he is liable to imprisonment for five years or more, and is persistently leading a criminal life. When all the elements that lie within this definition are proven, the court before which the accused appears may, upon application, declare that he is an habitual criminal and, if it considers it expedient for the protection of the public, sentence him to preventive detention.


\(^32\) Evans, supra, note 2, at 90.
reasons and constitutes an element of parole when it is granted. Earned remissions are regarded as a "means of motivating and encouraging" inmates and obviously play a large part in dissolving the fixed nature of the initial sentencing process. While remission is subject to many of the same criticisms as the Parole Board, it has even more serious failings. The Parole Board is, at least, an independent body, while the remission process places the penitentiary authorities in the position of being both prosecutor and judge. It is not surprising that there is considerable empirical evidence that remission is granted differently depending on location.\(^\text{36}\)

There is near unanimity on the dysfunctional nature of remission. For example, a working paper of the Law Reform Commission of Canada has concluded:

> Because it no longer meets its original objectives, and because penitentiary practices provide other means for motivating inmates, statutory and earned remission should be completely abolished and withdrawn from our penal system.\(^\text{37}\)

Similar conclusions on the dysfunctionality of remission have been reached by the Canadian Criminology and Corrections Association\(^\text{38}\) and Justice Hugessen's Task Force on the Release of Inmates.\(^\text{39}\) Both recommended abolition in 1974 before a Senate Committee that was considering these matters. The Senate Committee itself came to similar conclusions.\(^\text{40}\)

In summation, most features of the Canadian criminal sentencing system have been subjected to severe and telling criticism. Two crucial questions raised by these criticisms are: first, what is proposed to replace the current institutional structures; and second, will the proposed institutional reform actually result in substantive reform? The proposed reforms and their potential impact are analysed in the next section.

II. CANADIAN REFORM PROPOSALS

What should replace the existing sentencing system? Influential bodies, including the Law Reform Commission of Canada, have put forward reform proposals in most of the problem areas outlined in Section I. It is argued in this section that other jurisdictions have already implemented—without notable success—many of the reforms now being proposed in Canada.

The primary focus of reform is on the sentencing process itself and its attendant discretion, and the parole process. There is a consensus that remission and preventive detention simply should be abolished. In terms of reducing sentencing discretion, there are four main proposals: (1) the development and adoption of sentencing guidelines; (2) sentencing councils; (3)

\(^{36}\) Further, this measure is applied very inconsistently throughout the country—a situation that is bound to be prejudicial. Landreville and Carrière, supra note 9, at 97.

\(^{37}\) Id. at 99.


\(^{40}\) Supra note 38.
sentencing conferences; and (4) a mandatory requirement that the judge provide reasons for his sentence. In terms of parole, the proposed reforms are directed toward relatively incremental reform rather than abolition. These two areas will constitute the main focus of this section, although there are problems with the other reform proposals that will be discussed briefly.

A. Sentencing Guidelines

Various working papers of the Law Reform Commission of Canada address the issue of judicial discretion and there are two primary recommendations. First, sentence ranges for given offences should be reduced considerably. In practice, this means reducing the maximum imposable sentence for a considerable number of offences ("[i]n fact, these maximum terms appear to be disproportionately high").41 Second, "[c]larity and uniformity of approach in sentencing should be encouraged by clear and precise sentencing guidelines and express criteria for decision-making."42 The Commission working papers have stressed the importance of both "explicit" principles and "express" guidelines.

When the Commission attempts to define these principles and guidelines operationally, it appears to lose its nerve quickly. For example, it recommends that before imprisonment is imposed two necessary conditions be satisfied:

1. the offender has been convicted of a serious offence that endangered the life or personal security of others; and
2. the probability of the offender committing another crime endangering the life or personal security of others in the immediate future shows that imprisonment is the only sanction that can adequately promote the general feeling of personal security.43

One might agree with the first condition without being any closer to an explicit set of principles or guidelines. Without accompanying definitions of a "serious offence" or "personal security of others," the "condition" is virtually meaningless. Is, for example, breaking and entering a serious offence? Does "endangering life" always mean that the offence was serious? However, it is not obvious why one would agree with the first condition. For example, why is a short prison sentence necessarily inappropriate if the offender did not commit a serious offence but has an extensive criminal record?

There is, however, a series of conceptual problems with the second condition, especially if one also examines the Commission's recommendations as to the factors that should be used to determine the "probability and degree of risk." The Commission recommends that the judge should consider:

1. the number and recency of previous offences that represented a threat to the life or personal security of others;
2. the offender's personality;
3. the police report on the offender's prior involvement with the criminal law;
4. a pre-sentence report;

41 Working Paper No. 11, supra note 8, at 21.
42 Id. at 41.
43 Id. at 18.
(5) all material submissions including expert opinion and research from the behavioral sciences.44

This list is worth examining in detail because only the first factor makes obvious sense in determining sentence and because it is not clear that any of the factors could, in fact, be utilized to determine "the probability and degree of risk" with any accuracy.

Perhaps the major problem is that prediction is a difficult, inherently stochastic process. Stanley has summarized the problem:

The trouble with prediction is simply that it will not work—that is, it will not work for individuals, only for groups. A parole board may know that of a hundred offenders with a certain set of characteristics, eighty will probably succeed and twenty fail in parole. But the board members do not know whether the man who is before them belongs with the eighty or the twenty. Therefore they release some who succeed and some who fail and they keep in the damaging, often destructive, prison environment some who would have succeeded outside as well as some who would have failed. Those potential successes who are kept in prison are called, in research terminology, "false positives".45

It is not that some evidence is not available on the characteristics of recidivists. As Stanley further points out: "[T]he studies demonstrate some things that would seem obvious to anyone: for instance, that people who drink heavily or who have many previous convictions are more likely to return to prison than are offenders who do not have such histories."46 This, however, does not solve the problem of prediction errors.47 The Law Reform Commission is not unaware of the problems with prediction. It points out:

[P]redictions of future risk are likely to be inaccurate. For example, as a result of research it would appear that for every twenty persons predicted to be dangerous, only one, in fact, will commit some violent act. The problem is in knowing which one of the twenty poses the real risk. This should lead to caution in making a finding of risk, and has implications for conditions of sentence and release.48

A judge with the best intentions in the world of implementing the conditions might well throw up his hands in despair at this statement. He is asked to predict future dangerousness after being told that he is likely to be wrong in nineteen out of twenty cases! This pious warning to be "cautious" is unlikely to lend assurance to judges in the real world. The judge is also unlikely to receive much comfort from the proposed "expert opinion and research from the behavioral sciences"49 in assessing the defendant's personality.

44 Id.
46 Id. at 50.
48 Working Paper No. 11, supra note 8 at 18.
49 In the parole area, there is evidence that "experts" (parole board members or psychologists) usually do no better, and often do worse, in predicting recidivism than
The second major problem with prediction is that those variables that do appear to have some predictive validity often have no normative or jurisprudential value. Take, for example, the second factor—the offender’s personality. Should a surly or introverted personality be a factor in rejecting parole? Similarly, the fourth factor—the pre-sentence report—may contain some information on items such as education, work habits and drug usage that have some predictive validity. However, to utilize these essentially socioeconomic factors to determine incarceration is problematic.

The difficulty with most of the Law Reform Commission’s conditions is that they lack both statistical validity and normative appropriateness. Only the third factor—the number and recency of prior offences—can escape this double censure. Commentators such as von Hirsch have argued that prior record can be used justifiably to increase sentences independently of predictive considerations. He argues that prior record affects the culpability of the offence while other predictive elements, such as education and employment, obviously do not. Again, the Commission is not unaware of this problem, recommending that “[i]n determining the probability and degree of risk the court should place considerable weight on the most reliable predictive factors [sic] now available—past conduct.”

From a more narrow, legal perspective, the third factor—the police report—could be the most problematic. The report is likely, for example, to contain details of arrests that were not subsequently prosecuted. A possible rationale for its inclusion is that prior charges or accusations that were not proved should be relevant to the sentence. While there is considerable evidence that parole boards in many jurisdictions do, in fact, utilize such information in the paroling process, the efficacy of codifying such a procedure is doubtful.

In its own proposals, the Commission has made occasional, albeit peripheral, reference to United States model codes, and a comparison of the Commission’s recommendations and these codes suggests that the latter’s influence has been central. For example, in one working paper, the Commission suggested that a sentencing guide might list “factors such as those proposed in


50 As Stanley, supra note 45, at 52, observes:
One California study concluded:
[T]he absence of excessive drinking; the presence of a spouse, legitimate or common law; along with conviction for crimes against persons (as contrasted with crimes against property); are the factors which are associated with (parole) success ....

California research also shows that inmates receiving more visitors while in prison tended to experience less difficulty on parole.

51 Supra note 23.

52 Working Paper No. 11, supra note 8, at 18.

53 See text accompanying note 47, infra.
the New Draft Code (U.S.). An examination of these codes demonstrates, not surprisingly, their great influence on the Commission's formulation of guidelines. For example, the proposed Commission sentencing guidelines paraphrase closely Article 7 of the Model Penal Code. The Commission is not, however, alone in its admiration of these codes.

The Canadian Criminology and Corrections Association came to similar conclusions in its 1973 brief to the Law Reform Commission, recommending that “all offences in the Criminal Code he grouped for sentencing purposes under a limited number of categories,” and that such guidelines be included explicitly in new legislation. The Association cites with approval the American Law Institute's Model Penal Code, the National Council on Crime and Delinquency's Model Sentencing Act, and the National Commission on Reform of the Federal Criminal Law's Study Draft on a New Federal Criminal Code. The National Conference on the Disposition of Offenders in Canada, composed of eminent practitioners and commentators, came to similar conclusions, specifically endorsing the Model Penal Code.

Of course, all of these codes have been criticized recently in the United States on the grounds described above. Certainly the concept that incarceration may have rehabilitative features has been largely discredited. Indeed, in California, the new sentencing Act (S.B. 42), in its preamble, specifically rejects such a view, stating: “[T]he legislation finds and declares that the purposes [sic] of imprisonment for crime is punishment. This purpose is best

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54 Working Paper No. 11, supra note 8, at 18.
59 As we have seen, s. 10(1)(a)(iii) of the Parole Act, R.S.C. 1970, c. P-2 invites the Parole Board to “consider reform and rehabilitation.” Parole boards in both the United States and Canada state that they use such criteria. For example, circulated criteria of the District Offices of the Ontario region of the National Parole Board included “the effort made by the inmate at self-improvement while in prison” and “present attitude and motivation” (described by Carrière and Silverstone, supra note 32, at 124). For similar evidence in the United States (New York State), see Hawkins, Parole Selection: The American Experience (Ph.D. dissertation, University of Cambridge, 1971). In California, one study concluded:

The substantial correlations among the three variables above (institutional progress, discipline, and estimates of likely parole outcome) suggest that parole board members heavily weigh institutional behaviour in forming their estimates of parole risks. If so, this logic is open to question ... [A] random sample of 144 Youth Corrections Act parole releases from fiscal year 1969 was taken in order to examine the relationships between record of prison punishment and parole outcome (two year follow-up) compared with 48 percent of the 60 cases with known prison punishment. The difference is not statistically significant.

served by terms proportionate to the seriousness of the offence. . . ." As we shall see, reforms with predictive elements still are being considered, and in some cases implemented, but even here the predictive criteria, and their weighting, are being articulated much more clearly than in the model codes.

The three main criticisms, then, of these kinds of guidelines—including the Canadian proposals—are that: (1) the predictive criteria utilized are statistically problematic; (2) many of the predictive criteria would be normatively inappropriate even if statistically valid; (3) the suggested criteria are often so vague and elastic that, in practice, they would not assist judges in differentiating amongst offenders. These criticisms suggest that considerably more developmental work needs to be done. It is important to stress that the argument is not that the concept of a sentencing guideline is inherently flawed, but rather that much more consideration needs to be given to the issue. The proposals of the Law Reform Commission, and those like them, should be seen as beginning discussions rather than final codifications.

B. Sentencing Councils

While the federal Law Reform Commission has recommended structuring the discretion of the trial judge via guidelines, others have suggested that more than one person should make the sentencing decision. Further examination of such sentencing councils, or boards, has been endorsed by the National Conference on the Disposition of Offenders in Canada, the John Howard Society, the Canadian Criminology and Corrective Association, and by Evans. The Law Reform Commission has, itself, vaguely endorsed the concept: "[I]t is desirable that sentencing councils or meetings of sentencing judges be held prior to the imposition of sentences in such cases as the judges may determine." The proposals typically mandate that the sentencing decision be made either by the sentencing judge with the assistance of lay assessors who are "experts" in the behavioural sciences, or by several judges acting jointly.

There is considerable experience in the United States with sentencing councils consisting of several judges. In 1960, judges of the Eastern District of Michigan instituted the first sentencing council in the United States. Federal courts in the Eastern District of New York, the Northern District of Illinois and the District of Oregon subsequently adopted the practice.

The structure of these sentencing councils is similar, although there are minor differences. In Michigan, the sentencing judge and at least two fellow judges receive copies of the pre-sentence report. After all have studied the report, each formulates a tentative sentence and they then meet to discuss the details of the case. The presiding judge, however, retains full sentencing power and makes the final sentencing decision. The results of his decision are then communicated to other members of the council.

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61 Evans, supra note 2.
Empirical evidence on the impact of sentencing councils is provided by Levin, and Diamond and Zeisel. Chief Justice Levin of the Eastern District reached the following conclusions about the Michigan Council after 3000 cases and five years: (1) the judges impose sentence on the basis of relatively simple criteria, although initially they did not recognize this; and (2) the court appears to be developing a more uniform sentencing philosophy and consequently more agreement on sentencing policy. Levin’s data, however, do not appear to confirm his conclusion that agreement on general principles is increasing over time. In the first year, there was a change in the original judge’s tentative sentence in 29.8 percent of all cases brought before the Council, while in the fifth year there were changes in 32.7 percent of all cases. In other words, initial disagreement does not appear to be declining over the years.

Diamond and Zeisel examined the operation of sentencing councils in the Northern District of Illinois and the Eastern District of New York in 1973. In general, the authors are pessimistic about the contributions that the councils made to disparity reduction:

In each court the council is able to reduce about 10 percent of the sentence disparity in the cases that come before it. In Chicago, since only one-third of the cases are brought before the council, the reduction in all cases is under 4 percent. They also deal indirectly with the question of the development of sentencing principles by using their own measure of sentencing disparity. They compared the judges of the Eastern District with judges in the Southern District (who did not participate in a sentencing council) and found that “disparity in the Eastern District is not smaller, and is even somewhat larger, than in the Southern District.” They conclude that “the near uniformity of disparity levels suggests that further research may not disclose that the disparity significantly declines over time in a court with a sentencing council.” They also found, consistent with Levin’s observations, that sentencing judges in both courts change their sentences in only about one-third of the cases that they bring before their councils. Diamond and Zeisel did find that there was most likely to be a change where initial disagreement was greatest:

For the 73 percent of the cases in which the sentencing judge does not change his original recommendation, the average deviation in each court is 20 percent. In the 27 percent of the cases in which the judge does change, his original deviation averages 33 percent in Chicago and 36 percent in New York, from which the changes remove 9 percentage points (of 33 and 37 percent, respectively), or about one-quarter of the deviation (27 and 25 percent, respectively).

This, again, is consistent with Levin’s findings, both in that changes occur more frequently when initial disagreement is greatest and in that these changes are often relatively minor.

64 Id.
66 Id.
67 Id. at 620.
68 Id. at 608-09.
One of the serious weaknesses of sentencing councils is that they do not appear to develop sentencing principles. Although Levin suggests that they do in Michigan, there does not appear to be a great deal of empirical support for the claim. Diamond and Zeisel suggest that such a development is unlikely, and their conclusion is not surprising. It would be extremely difficult to develop coherent sentencing principles when each case is decided incrementally and when there is no method of institutionalizing what has been "learned" from previous decisions. Diamond and Zeisel make one concrete suggestion in this respect:

Courts could set up internal reporting systems of all sentences imposed by their judges or the judges of their circuit. Already used in many courts, computers could provide the judges with the distribution of sentences, together with their means and medians for any combination of crime and offender. Eventually, such data could form the foundation for meaningful sentencing guidelines ... One might consider developing such an information system either as a supplement to the council or as a substitute for it.\(^6\)

One other interesting point about the Eastern District of Michigan is that it commits more offenders under the federal indeterminate sentence law than any other district court in the country. This may mean that the group has tended to resolve difficult cases by passing the problem along to the United States Parole Board.

While there has been little overt criticism of sentencing councils, there appear to be several problems with them: first, they are costly in terms of judicial resources—three judges are involved in reviewing all cases; second, because the discussions are informal and unstructured, there is little development of sentencing principles; third, the high number of indeterminate commitments suggests that a small, closely-knit group of judges is likely to have a low tolerance for conflict; and fourth, although disparity is reduced somewhat, there is still a high level of disparity, especially in those cases where initial disagreement is greatest.

C. Sentencing Conferences

Another proposal that appears to have achieved almost total support within the professional criminal justice community is that of the sentencing conference. The endorsement of the National Conference on the Disposition of Offenders is typical:

While an "average" sentence for a particular offence was felt to be a useful guide in exercising sentencing discretion there was general opposition to a legislative enactment of such a "tariff". Rather the group tended to the view that the "average" could better be developed through judges meeting at sentencing conferences . . . Sentencing conferences were felt to be necessary and to be encouraged through some financial assistance from the governments concerned. In Ontario the regional sentencing conferences were favourably commented on, it being noted also that judges in Alberta met regularly but discussed sentencing problems only to a limited extent.\(^7\)

Once again, there is considerable American operational experience with sentencing conferences—"sentencing institutes"—which were first introduced

\(^6\) Id. at 621.

\(^7\) Supra note 58, at 62.
in the federal courts in 1958. The statutes authorize the attorney general and/or the chief judge of each circuit at any time through the administrative offices of the courts “to convene such institutes and joint councils for the purpose of studying, discussing and formulating the objectives, policies, standards and criteria for sentencing.” The statute provides that the agenda of the institutes may include, but shall not be limited to:

1. The development of standards for the content and utilization of pre-sentence reports;
2. The establishment of factors to be used in selecting cases for special study and observation in prescribed diagnostic clinics;
3. The determination of the importance of psychiatric, emotional, sociological and physiological factors involved in crime and their bearing upon sentences;
4. The discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal sex behavior, addiction to drugs or alcohol, and mental or physical handicaps;
5. The formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.

The pilot federal institute was convened in Colorado in 1959, and meetings have been held on a regular basis since that time. Since 1960, the institutes usually have taken the form of “university seminars,” with workshops, discussions of actual cases, and question and answer periods. Initial hopes for the institutes were considerable, if not utopian. James Bennett, Director of the Federal Bureau of Prisons, stated: “The institute program by 1964 had virtually ended the flagrantly disparate sentence.” The Deputy Attorney General, a former district judge, believed that “the institute program also should eliminate the need for further consideration of legislation giving the appellate courts power to modify sentence.”

Frankel, on the other hand, has described succinctly the limitations and weaknesses of sentencing institutes:

The institutes are of some utility. But their worth could easily be overstated. They serve to inform the judges of sentencing options and alternatives that might otherwise be overlooked (at least in the absence of a competent probation officer). They supply occasions for deliberate, connected exchanges of differing premises and attitudes. While that much is worthwhile, it is a small thing after all. The sharp limitations include the infrequency and brevity of these convocations. Without knowing exactly how typical it is, I imagine my own experience cannot be utterly atypical. In six years on the largest of our federal district courts I have

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76 From An Expression of Interest on the Part of the Department of Justice, a paper delivered at the Pilot Institute on Sentencing Proceedings, 26 F.R.D. 231 (1959) at 251.
spent two afternoons at sentencing institutes, one within my own Circuit, the other at a national seminar for "new" judges to which I was invited after two and one-half years on the bench and some hundreds of years of prison sentences imposed.

The subjects treated in the institutes are somewhat random and disconnected. The results of the discussions are quaintly inconclusive. The goals of the statute providing for the institutes include the hope of achieving "a desirable degree of consensus" among the judges. If this has happened, it is not patent. 77

He declares that "sentencing institutes have been, as was foretellable, fairly limited enterprises." 78 They seem to have been most useful in informing judges of tactical rather than strategic issues in sentencing, and this is confirmed by a selected reading of the recent proceedings of the state sentencing institutes, for example, in California. Thus, they tend to be more useful for resolving the first four problems outlined by the statute and not to have made much of a dent in the fifth—the formulation of sentencing principles and criteria.

D. Statement of Reasons

The professional criminal justice community also seems to agree on the desirability of a statement of reasons for the penalty imposed by the sentencing judge. For example, the National Conference on the Disposition of Offenders in Canada thought it “essential that a judge passing a custodial sentence should give his reasons for doing so as part and parcel of the judgment, this being sufficiently important to justify a mandatory requirement to that effect being included in the Criminal Code.” 79 Appellate judges also have, from time to time, stressed the value of the trial judge's reasoning as to sentence.

In general, in the United States, there are no requirements that courts state reasons for their decisions. Indeed, the Supreme Court of the United States has held that the “only purpose of such a requirement would be to facilitate appellate supervision of, and thus to limit, the trial court’s sentencing discretion.” 80 Several judges, however, have suggested that a disclosure of reasons for a sentence would serve other purposes. For example, Justice Marshall has pointed out that other reasons would include “... rationalizing the sentencing process and ... decreasing disparities in sentences.” 81 Ironically, in the United States since Wolff v. McDonnell, 82 this is one of the areas in which an inmate applying for parole is in a better position than the inmate who is before the court for sentencing. In Wolff, the Supreme Court held that

77 Frankel, Lawlessness in Sentencing (1972), 41 U. Cin. L. Rev. 1 at 19.
78 Id. at 18.
81 Id. at 455 (U.S.), 3058 (S. Ct.).
the due process clause requires that the parole applicant be provided with "a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action."\(^{83}\)

However, several critics have argued that sentencing reasons would not have a major impact on sentencing in the United States. As Weigel points out:

The ABA advisory committee and the last few bills in Congress would require the sentencing judge to state reasons for the imposition of each sentence that might later be subject to review. The object of these provisions, of course, is to encourage carefully considered and reasoned sentences by the trial judge and to inform the reviewing court of the factors that led to the particular sentence imposed. However, I doubt that these objectives would be very well served by such a requirement. Most judges do state their reasons for sentences, and these statements are readily available to the courts of appeals.\(^{84}\)

It is possible, however, that a requirement of sentencing reasons would have a considerably greater impact in Canada than that predicted in the United States, as appeal on sentence does lie in Canada. The statement of reasons might conceivably, therefore, assist the appellate courts in their review process. It is submitted, however, that unless the "appropriate" reasons for imposing a given sentence are delineated explicitly beforehand there are likely to be serious weaknesses in a "reasons" scheme. The nature of the weakness is likely to be related to the response of the particular judge. Some judges are likely to respond to this new requirement, as many do now, by discussing in relatively abstract terms the trade-offs between retribution, deterrence and rehabilitation. A reading of appellate cases on sentences suggests that appellate judges tend to place little emphasis on this level of analysis.\(^{85}\) It is almost inevitable that they do so, as these are partially conflicting values about which reasonable men may differ legitimately if there is no \textit{a priori} prescribed standard, whether emanating from legislation or case law. Indeed, it is almost impossible to envision how practical guidelines could be written at this level of abstraction. If judges can meet the requirement for reasons with such statements, they are likely to achieve the quality of perfunctory incantations quickly.

On the other hand, many judges may be a good deal more specific: "I gave two years instead of four years because the offender is young and has no prior record." Here one would ask why guidelines of this nature should

\(^{83}\) \textit{Wolff v. McDonnell}, id. at 564 (U.S.), 2979 (S. Ct).

\(^{84}\) Weigel, \textit{Appellate Revision of Sentences: To Make the Punishment Fit the Crime} (1968), 20 Stan. L. Rev. 405 at 420.

\(^{85}\) Based on a review of \textit{Decisions on Sentencing} in the Criminal Law Quarterly for approximately the last five years. This is not to say that retribution, deterrence and rehabilitation are not mentioned frequently — they are. Rather, it is to suggest that, in general, sentence adjustments are not made in terms of these broad principles, but in terms of more factors. This issue is discussed at length in Section IV of this article.
not be mandated legislatively rather than asking the trial judge to play "blind man's buff" with the appellate courts. Staunch advocates of case law development might well argue that this is as it should be. This would be a more convincing argument if the various appellate courts had held more consistently that their findings on sentence were binding on the lower courts.\(^8\)

The development of sentencing principles through "quasi-caselaw" seems convoluted.

E. Parole Reform

A crucial question, of course, is what is to become of parole once these other changes have been implemented. This is of particular interest because parole boards recently have enjoyed something of a critical revival in the United States. For example, Franklin Zimring has pointed out the possible advantage of parole boards in alleviating disparity in those jurisdictions in which judges have wide discretion:

Reducing the power of the parole board increases the power of the legislature, prosecutor and judge. If the abolition of parole is not coupled with more concrete legislative directions on sentencing, the amount of discretion in a system will not decrease; instead, discretionary power will be concentrated in two institutions (judge and prosecutor) rather than three. The impact of this reallocation is hard to predict. Yet parole is usually a statewide function, while judges and prosecutors are local officials in most states. One function of parole may be to even out disparities in sentencing behavior among different localities. Abolishing parole, by decentralizing discretion, may increase sentencing disparity, at least as to prison sentences, because the same crime is treated differently by different judges and prosecutors. Three discretions may be better than two!\(^87\)

Before discussing the relevance of the United States experience to Canada, it is necessary to point out important differences between the National Parole Board in Canada and the typical American parole board. Most American parole boards operate, or traditionally have operated, in jurisdictions with indeterminate sentence structures. Thus, an offender receiving a prison sentence does not receive a specified sentence as he does in Canada. Rather, he is sentenced for some indefinite period, for example "two years to ten years." Consequently, for all practical purposes, the parole board is the "judge" to a much greater degree than in Canada. The exercise of this broad sentencing authority has come under severe criticism because of its use of the rehabilitative and predictive criteria, because of its use of the release decision as a means of social control,\(^88\) and because of the adverse psychological impacts on prisoners that indeterminacy appears to generate.

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\(^88\) See Prettyman, *supra* note 19.
In the United States, the critical debate has centred on the “reformability” of parole. For some, most notably the United States Parole Board (the federal system), reform has been the strategy while others, such as the states of California, Illinois, and Oregon, effectively have abolished parole.\footnote{See Foster et al., supra note 21.} The progress and viability of these reforms raise two important questions for Canadian reform: have the reforms worked, and, if so, are they transferable to a Canadian environment? These are crucial questions because the thrust of change with respect to parole in Canada appears to be in the direction of reform rather than abolition. Fortunately, there is a recent comprehensive study of the operation of the “reformed” United States Parole Board by a group from Yale University.\footnote{Project, supra note 18.}

In 1973, the United States Parole Board introduced a “Guideline Table” (reproduced in Table 2). Previous to this date, the Board had not articulated its parole standards and had been supported by the courts in this respect. The Guideline Table consists of two indices from which a defendant receives a “score.” His release date is based on this score. One index is the “Offense Severity” index, which measures the severity of the offense, and the other is the “Salience Factor” index, which, to some extent, attempts to measure the likelihood that the defendant will commit further crime. The “Offense Severity” index attempts to rank the defendant’s “offense behaviour” using six ratings: low, low moderate, moderate, high, very high and greatest. The “Salience Factor” score is divided into low risk categories: very good parole prognosis (salience factor score of 9 to 11); good (6 to 8); fair (4 to 5); and poor (0 to 3). The two indices form the axes of a matrix; each cell of the matrix contains a sentence range (the amount of actual time to be served before initial release). Thus, the two indices determine the defendant’s prison sentence.

The “offense severity” rating is not based on the offence for which the offender was convicted, but rather on the parole board’s evaluation of the offender’s criminal behaviour. The salience factor score is based on nine weighted personal characteristics that “were statistically determined to have high predictive power in discriminating between past groups of releases who ‘succeeded or failed’.”\footnote{Id. at 824, from Hoffman and Beck, Parole Decision Making: A Salient Factor Score (April 1974), 13 U.S. Board of Parole Research Unit Report 2 at 9.} The salience factors are: the number of prior convictions, number of prior incarcerations, age at first commitment, whether the crime involved auto theft, prior negative experience on parole or probation, history of drug abuse, high school degree or equivalent, verified prior employment, and a release plan to live with a spouse or children. The number of prior incarcerations and prior convictions can each count for two points; all other factors count for one point each.
Table 2: U.S. Parole Board Guidelines for Decision-Making
Average Total Time Served Before Release (Including Jail Time)

<table>
<thead>
<tr>
<th>OFFENDER CHARACTERISTICS:</th>
<th>Parole Prognosis</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Salience Factor Score)</td>
</tr>
<tr>
<td></td>
<td>Very Good (11-9)</td>
</tr>
<tr>
<td>LOW</td>
<td></td>
</tr>
<tr>
<td>e.g., Immigration Law Violations; Minor Theft (includes larceny and simple possession of stolen property less than $1,000);</td>
<td>6-10 months</td>
</tr>
<tr>
<td>LOW MODERATE</td>
<td></td>
</tr>
<tr>
<td>e.g., Alcohol Law Violations; Counterfeit Currency (Passing/Possession less than $1,000); Drugs: Marijuana Possession (less than $500); Firearms Act, Possession/Purchase/Sale, single weapon - not altered or machine gun; Forgeries/Fraud (less than $1,000);</td>
<td>8-12 months</td>
</tr>
<tr>
<td>MODERATE</td>
<td></td>
</tr>
<tr>
<td>e.g., Bribery of Public Officials; Counterfeit Currency (Passing/Possession $1,000-$20,000); Drugs: &quot;Hard Drugs&quot;, Possession by drug user (less than $500), Marijuana, Sale (less than $5,000), &quot;Soft Drugs&quot;, Possession (less than $5,000), &quot;Soft Drugs&quot;, Sale (less than $500); Embezzlement (less than $20,000);</td>
<td>12-16 months</td>
</tr>
<tr>
<td>HIGH</td>
<td></td>
</tr>
<tr>
<td>e.g., Burglary or Larceny (other than Embezzlement) from Bank or Post Office; Counterfeit Currency (Passing/Possession $20,000 or more); Counterfeiting (Manufacturing); Drugs &quot;Hard Drugs&quot;, Possession by drug dependent user ($500 or more), &quot;Hard Drugs&quot;, Sale to Support Own Habit;</td>
<td>16-20 months</td>
</tr>
<tr>
<td>VERY HIGH</td>
<td></td>
</tr>
<tr>
<td>e.g., Robbery (Weapon); Drugs: &quot;Hard Drugs&quot;, Possession by non drug dependent user (400 or more) or by non-user (any quantity), &quot;Hard Drugs&quot;, Sale for Profit [No Prior conviction for Sale of &quot;Hard Drugs&quot;];</td>
<td>26-36 months</td>
</tr>
<tr>
<td>GREATEST</td>
<td></td>
</tr>
<tr>
<td>Aggravated Felony (e.g., Robbery, Sexual Act, Assault) - Weapon Fired or Serious Injury; Aircraft Hijacking;</td>
<td></td>
</tr>
</tbody>
</table>

As the Yale project group points out, after having studied the operation of the Guidelines in detail, all but two of the nine factors—release plan and

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92 Extracted from Federal Register, 31942-45 (1973).
high school diploma—are known to the judge at the time of original sentencing.\footnote{Supra note 18, at 824, n. 72, and at 896, n. 416.} None (unless one counts getting a high school diploma) represents institutional progress. The project group concludes that the actual decision-making process works reasonably well:

The Guidelines generally seem to structure discretion quite well. Their explicit criteria for determining release dates cause the hearing panel to consider carefully why they think an inmate should be an exception and to provide reasons for the decision.\footnote{Id. at 868.}

However, the Yale study also contains a series of criticisms that are worth summarizing because they raise pertinent issues concerning sentencing in general. First, the Parole Board allows the defendant to think that other—"rehabilitative"—criteria are used in the decision-making process when, in fact, the matrix is relied upon almost completely. Second, the defendant is not informed of his score or his rating, and therefore cannot challenge their factual accuracy. Third, the salience factor scale is based on the behaviour of twenty-five percent of those released from federal prisons in the first six months of 1970. No factor deterministically leads to "success" or "failure;" rather, it is a probabilistic model. Of the fair risk group, for example, 60.8 percent are expected to succeed on parole. Almost certainly, then, some defendants receive a rating that implies recidivism when they would not, in fact, recidivate. Fourth, the Parole Board's classification of offence severity is based on the defendant's actual behaviour rather than on the offence of which he has been convicted. This obviously makes a mockery of charge reduction in plea bargaining. The Yale group puts this somewhat mildly when it points out: "Defendants who believe they are 'getting a break' by pleading guilty to a conspiracy charge with a five year maximum that is lower than the maximum for the substantive offense may revise that opinion upon learning they might not be paroled because the Board may rate the offense severity as if they had committed the underlying substantive offense."\footnote{Id. at 881-83.} Given that the courts have held that judges and prosecutors must inform the accused of the likely consequence of their plea,\footnote{Bye v. United States, 435 F. 2d 177 (2d Cir. 1970).} it would seem that plea-bargaining would be seriously impaired. Fifth, the procedural safeguards (including legal representation) are inadequate, especially as the hearing has, in essence, become a sentencing procedure. Sixth, judges, as well as accused, still believe that the Parole Board primarily reviews the offenders' institutional progress when this is no longer the case. Seventh, the Parole Board's use of offence severity ratings bears no direct relationship to legislative categories of sentence lengths.

The review concludes that the Parole Board has potentially "reformed" itself out of a job. What it now does can be done as well, if not better, by the courts themselves. On the other hand, the courts have possible advantages that it cannot match, for example, procedural safeguards and the potentiality of ensuring equity between those going to prison and those not. As Coburn has put it: "In addition to imprisonment, most states authorize trial judges
to impose other penal sanctions such as fines and probation."\textsuperscript{97} Disparities in the use of these alternative modes of punishment are "at least as important" as the length of imprisonment because they 'allow [a] defendant to remain in the community without imprisonment' while his codefendant may be incarcerated for the maximum period authorized by statute."\textsuperscript{98}

Not surprisingly, the Yale Project concludes:

The courts should assume primary responsibility for eliminating disparities in sentencing. The Board's attempt to do so cannot fully remedy systemwide disparities, and results in a seemingly senseless disregard of the favorable sentencing decisions some inmates receive. The Guidelines might serve as a model for such judicial action. The Guideline system reasonably addresses the dual needs of minimizing disparities and preserving opportunities for individualized consideration. However, any "sentencing guideline" system would have to provide substantive criteria to structure the decision whether to impose probation, as well as a mechanism to clarify the purposes served by particular types of sentences in order to guide later post-conviction decisions.\textsuperscript{99}

The Yale analysis provides a framework with which to analyze Canadian proposals on parole reform. The Law Reform Commission of Canada has proposed that a Sentence Supervision Board should replace the present Parole Board,\textsuperscript{100} and that this Board should have, among others, the following duties:

(a) to consult with prison officials, courts and police and formulate and publish policies and criteria affecting conditions of imprisonment and release;
(b) to automatically or upon request review important decisions relating to conditions of imprisonment and release;
(c) to hear serious charges and determine the process for such charges against prisoners arising under prison regulations.\textsuperscript{101}

Obviously, from the perspective of analyzing this proposed new institution, the two most important tasks are the formulation of "criteria affecting conditions of imprisonment and release," and the review "automatically or upon request ... [of] important decisions relating to conditions of imprisonment and release."

It is conceivable that the proposed Sentence Supervision Board would avoid the errors of its United States counterpart. However, the elimination of institutional rehabilitation factors and predictive factors would also eliminate the need for such a Board. The Board would, following the Yale reasoning, have reformed itself out of a job.

Another, more incremental, perspective on parole reform is suggested by the Law Reform Commission report on parole.\textsuperscript{102} The authors suggest a series of changes that are consistent with the emphasis of "pro-parole" reform in the United States. Briefly summarized, their proposed reforms include:

\begin{itemize}
  \item \textsuperscript{97} Coburn, \textit{Disparity in Sentences and Appellate Review of Sentencing} (1971), 25 Rutgers L. Rev. 207 at 209.
  \item \textsuperscript{98} Id. (Footnote omitted.)
  \item \textsuperscript{99} Project, \textit{supra} note 18, at 81.
  \item \textsuperscript{100} Working Paper No. 11, \textit{supra} note 8, at 41-42.
  \item \textsuperscript{101} Law Reform Commission of Canada, \textit{Dispositions and Sentences in the Criminal Process: Guidelines} (Ottawa: Information Canada, 1976) at 46.
  \item \textsuperscript{102} Carrière and Silverstone, \textit{supra} note 32.
\end{itemize}
legal representation, or at least some form of third party representation, for
the inmate at the hearing; "better" preparation of parole hearing documenta-
tion; an explicit set of criteria for release; a written statement of the reasons
for a decision; and more and better information for inmates on the criteria
to be utilized. The authors make an eloquent plea for clear, consistent
parole criteria, yet they seem to believe that the problem is one of declara-
tion—stating a set of criteria, rather than developing a workable (prac-
tically and normatively) set of criteria. Thus, they never ask whether the process
is flawed inherently, and their efforts are an attempt to "clarify" something
that cannot be clarified under the present circumstances.

The Hugessen Report is somewhat more explicit in both its criticism
of the existing parole procedures and its version of a new, improved parole
system. With respect to the status quo, the Task Force concluded:

At present, the criteria on which the National Parole Board bases its decision
to grant or refuse parole are unclear. Neither inmates nor members of the Board are
able to articulate with any certainty or precision what positive and negative fac-
tors enter into the parole decision.

To overcome this lack of clarity, however, the Task Force essentially recom-
mends the adoption of the parole principles laid down in the U.S. Model
Penal Code. Some of the factors that the Task Force explicitly suggests
should be adopted from the Code include "the inmate's ability and readiness
to assume obligation and undertake responsibilities," the inmate's "mental
or physical makeup," and the inmate's "attitude toward law and authority." These are obviously intrinsically vague factors. Indeed, the Parole Board
might justifiably claim that they are attempting to use these factors at present.

In summation, then, the proposed reforms on parole are not as extensive
as reforms already implemented in the United States, where even those re-
forms have been subjected to severe criticism.

F. Other Reforms—Pre-trial Diversion and Dangerous Offenders

The Law Reform Commission of Canada has argued for the increased
use of diversion in the criminal justice system:

[T]here is a need to examine diversion at this time if only to discover again that
there is much value in providing mechanisms whereby offenders and victims are
given the opportunity to find their own solutions rather than having the state
needlessly impose a judgment in every case.

The Commission, however, appears to have ignored the potential normative
inconsistencies of attempting to reduce discretion at the sentencing stage
while increasing discretion at the arresting and prosecutorial stages. Revision-
ists increasingly have become concerned about the power thus placed in the
hands of police and prosecutors. Ericson, for one, has cogently criticized

103 Id. at 138-39.
104 Hugessen, supra note 39.
105 Id. at 32.
106 Id. at 33.
107 Law Reform Commission of Canada, Diversion, Working Paper No. 7 (Ottawa:
Information Canada, 1975) at 23.
the Law Reform Commission's recommendations on diversion. He concludes, after reviewing the evaluative literature on diversion, that "the liberals who advocate diversion are themselves engaged in myth-making. While giving the appearance of change toward deinstitutionalization, they are in fact changing us in the direction of retributive punishment without legal safeguards."\(^{108}\)

Empirical research in the United States is now beginning to document some of the biases introduced by diversion, in terms of the income, occupation and education of those who are diverted.\(^{109}\) Others have suggested that diversion is ineffective as a means of reducing recidivism and controlling delinquency.\(^{110}\)

The Law Reform Commission of Canada, in another report,\(^{111}\) comments favourably on both probation and restitution, claiming that it expects future innovations. However, after an extensive review, Boyd concludes that "[t]he official justifications of probation are without support. Probation does not primarily exist as an alternative to incarceration; it has no demonstrated corrective efficacy."\(^{112}\) Klein is equally skeptical concerning restitution.\(^{113}\)

While the Commission's recommendations with respect to dangerous offenders—abolition of the provisions—are straightforward, they seem inadequate. The Commission believes that these offenders can be handled adequately by the normal sentencing procedures, but as we have seen in the section on sentencing guidelines,\(^{114}\) the proposed differentiation criteria are exceedingly vague.

Whatever the merits of the Commission's proposals, the legislature has reacted differently. In response to the criticisms of the Law Reform Commission, and others, Parliament recently amended habitual criminal legislation. These amendments are to be found in the \textit{Criminal Law Amendment Act}.\(^{115}\) Cynics might claim that the primary contribution of the new legislation is a labelling change—from "habitual criminal" and "dangerous sexual offender" to simply "dangerous offender."

In brief, the Act attempted to deal with reported abuses in three ways: (1) by limiting the penalty to offences that are considered to be a "serious

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\(^{112}\) Boyd, \textit{An Examination of Probation} (1977-78), 20 Crim. L.Q. 355 at 380.

\(^{113}\) Klein, \textit{Revitalizing Restitution: Flogging a Horse that may have been Killed for Just Cause} (1977-78), 20 Crim. L.Q. 383.

\(^{114}\) See text accompanying notes 41-60, supra.

personal injury offence"116 and where "the offender constitutes a threat to
the life, safety or physical or mental well-being of other persons ..."117; (2) by requiring that the Attorney General of the province in which the offender
was tried has consented to an application to impose this sentence;118 and
(3) by requiring that the National Parole Board review the case after three
years for the purpose of determining whether parole should be granted.119

These restrictions obviously represent an attempt to reduce discretion
and to curb some of the abuses described earlier.120 It is not clear that they
will actually do so. Previously, the legislation was, at least partially, based on
an extensive prior record, namely "he has previously ... on at least three
separate and independent occasions been convicted of an indictable offence
for which he was liable to imprisonment for five years or more and is leading

116 Criminal Code, R.S.C. 1970, c. C-34, s. 687 as am. by S.C. 1976-77, c. 53, s. 14,
says, in part:
"serious personal injury offence" means
(a) an indictable offence (other than high treason, treason, first degree murder
or second degree murder) involving
(i) the use or attempted use of violence against another person, or
(ii) conduct endangering or likely to endanger the life or safety of another per-
son or inflicting or likely to inflict severe psychological damage upon another
person,
and for which the offender may be sentenced to imprisonment for ten years or
more, or
(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an
offence or attempt to commit an offence mentioned in section 146 (sexual inter-
course with a female under fourteen or between fourteen and sixteen), 149 (in-
decent assault on a female), 156 (indecent assault on a male) or 157 (gross in-
decency).

117 Criminal Code, R.S.C. 1970, c. C-34, s. 688(a) as am. by S.C. 1976-77, c. 53,
s. 14. The evidence for such an assessment is based upon:
(i) a pattern of repetitive behaviour by the offender, of which the offence for
which he has been convicted forms a part, showing a failure to restrain his
behaviour and a likelihood of his causing death or injury to other persons, or
inflicting severe psychological damage upon other persons, through failure in
the future to restrain his behaviour,
(ii) a pattern of persistent aggressive behaviour by the offender, of which the
offence for which he has been convicted forms a part, showing a substantial
degree of indifference on the part of the offender as to the reasonably fore-
seeable consequences to other persons of his behaviour, or
(iii) any behaviour by the offender, associated with the offence for which he has
been convicted, that is of such a brutal nature as to compel the conclusion
that his behaviour in the future is unlikely to be inhibited by normal standards
of behavioural restraint, or ....

118 Criminal Code, R.S.C. 1970, C. C-34, s. 689(1)(a) as am. by S.C. 1976-77,
c. 53, s. 14.
119 Criminal Code, R.S.C. 1970, c. C-34, s. 695.1(1) as am. by S.C. 1976-77,
c. 53, s. 14.
(1) Subject to subsection (2), where a person is in custody under a sentence of
detention in a penitentiary for an indeterminate period, the National Parole Board
shall, forthwith after the expiration of three years from the day on which that
person was taken into custody and not later than every two years thereafter, review
the condition, history and circumstances of that person for the purpose of deter-
mining whether he should be granted parole under the Parole Act and, if so, on
what conditions.

120 Supra notes 34-35.
sentently a criminal life,” or, “he has been previously sentenced to preventive detention.” Admittedly, under the current law, the penalty is restricted to serious personal injury offences in which there was “the use, or attempted use, of violence” or conduct endangering or likely to endanger the life and safety of another person, but the evidence to be utilized in such an assessment is considerably more vague and subjective than an extensive prior record. To cite only a few examples, section 688(a) now refers to “a likelihood of his . . . inflicting severe psychological damage upon other persons,” “a pattern of persistent aggressive behaviour by the offender,” and “any behaviour . . . that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.”

The review requirement by the Attorney General is likely to produce even greater disparity, both between provinces and, over time, in any particular province. The Attorney General’s consent is likely to be determined by both political pressure and moral principle; refusal to consent to the application becomes a form of clemency with its attendant problems of disparity.

The requirement for periodic sentence review obviously has a humanitarian motivation, but will have dysfunctional consequences. Yet, again, it effectively transfers the sentencing authority to the Parole Board.

This brief review of other reforms has necessarily been cursory. Its purpose was to suggest that these kinds of reforms offer no solutions to the basic sentencing reform questions. Indeed, it could be argued that their piece-meal introduction reduces the chance of fundamental reform.

G. Conclusion

This analysis has argued that the empirical evidence from the United States suggests that the currently proposed sentencing reforms for Canada will be unsuccessful. Most of the proposed reforms—some reduction of maximum sentences, some explicit, although primarily vague, sentencing criteria, the adoption of sentencing councils and sentencing institutes, and modified parole—already have been rejected in the United States. The conclusion must be that, in general, the proposed reforms would have only a marginal impact on the present exercise of sentence and parole discretion, and on the inequities that inevitably flow from that system.

It is appropriate to make a more general point here about the pro-

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121 Section 688(2) previously read:
(2) For the purposes of subsection (1), an accused is an habitual criminal if
(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or
(b) he has been previously sentenced to preventive detention.


pensity of Canadian reformers to use American models: because of important differences between the United States and Canada, an imitative posture could likely lead to serious mistakes. This cautionary note may be illustrated with one example.

In *Guerara v. United States*,125 the U.S. Supreme Court pointed out: "If there is one rule in the federal criminal practice which is firmly established it is that the appellate court has no control over a sentence which is within the limits allowed by a statute."126 Only a very small number of federal cases—including *U.S. v. Wiley*,127 *North Carolina v. Pearce*,128 and *U.S. v. Daniels*,129—indicate any willingness to review sentences except on the narrowest due process grounds. Those cases where sentences have been overturned show that where there is technically no "abuse of discretion," a sentence must be highly aberrant. At the state level, the situation is generally the same, although approximately half the states have some degree of appellate review of sentence. Given this situation, it is hardly surprising that the drafters of the various model codes came up with such vague guidelines. They did not have a rich vein of accumulated judicial case law to mine. On the other hand, consider the situation in Canada. The *Criminal Code* explicitly mandates appeal on sentence.130 Although, in percentage terms, there are relatively few appeals against sentence,131 the courts of appeal generally have interpreted their mandate broadly. For example, the Chief Justice of British Columbia has stated that "the court does not intervene only in cases where there has been an error in principle."132 It is not the objective here to analyse these cases in detail, but rather to suggest that such an analysis is vital in developing sentencing guidelines and principles in Canada. Those commentators advocating the adoption of the U.S. *Model Penal Code* consequently ignore the comparative advantage of Canada—namely, that the courts themselves have provided considerable guidance on relevant sentencing principles. On the other hand, the argument is *not* that sentence appeal abrogates the need for further development of sentencing principles, but rather that future reform should be based on existing knowledge.

III. RECENT SENTENCING DEVELOPMENTS IN THE UNITED STATES

A. Introduction

In the last section, the reforms presently being proposed in Canada were

125 40 F. 2d 338 (8th Cir. 1930).
126 Guerara v. United States, id. at 340-41.
127 278 F. 2d 500 (7th Cir. 1960).
130 Criminal Code, R.S.C. 1970, c. C-34, s. 603(1)(b).
131 Out of approximately 40,000 persons convicted of indictable offences in 1973, only 1,457 (about four percent) appealed against sentence. Out of the appealed cases, approximately 550 (thirty-seven percent) were modified. Data from *Statistics of Criminal and Other Offences* (Ottawa: Statistics Canada, Ministry of Industry, Trade and Commerce, 1973) Tables 1, 2 and 20.
132 Citation not available.
analysed. It was demonstrated that these reforms have already been tried in the United States, and have been found to be unsuccessful. In this section, some of the most recent reforms and proposed reforms in the United States will be examined.

It is clear that sentencing reform is one of the most topical areas of criminal justice reform in the United States. Many state legislatures have abolished, or are considering abolishing, their indeterminate sentence laws. However, while there is emerging a consensus on the undesirability of the indeterminate systems, there are differing perceptions as to the causes of their failure. Consequently, there is much less agreement on appropriate replacements. Some legislatures are emphasizing the substitution of punishment for rehabilitation; others, certainty for uncertainty; still others, fairness and uniformity for disparity and discretion; and still others, “long” sentences for “short.” Ambitious legislators in some states appear to be attempting to change on all of these dimensions. It is not the intention here to address all of these issues, but rather to analyse these changes in terms of their impact on the exercise of sentencing discretion (including parole).

Briefly, the following is attempted in this section: first, a broad classification of the American proposals in terms of their objectives, structure and normative framework. It should be cautioned that taxonomy is illustrative rather than exhaustive; new legislation is pending in several states, and each bill has many idiosyncrasies. Second, an analysis is made of the success of these reforms in achieving their objectives. This, again, is obviously a tentative enterprise, given the recency of the reforms and the fact that empirical evaluation is, at present, premature. Although the primary vehicle for this analysis is the new California determinate sentence law—S.B. 42—chosen because, in many respects, it is the most adventurous and radical (in terms of change of direction) of the new laws. The proposed federal sentencing bill—S. 1437—is also examined.

Most of the legislative reforms, both proposed and enacted, share a superficial similarity: they transfer sentencing authority from parole boards to judges. If we posit that the great dichotomy in sentencing schemata is be-

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133 There is no universally accepted usage of the terms “determinate” and “indeterminate.” By and large, “indeterminate” sentence systems are those where the primary release decision is made subsequent to the initial sentencing — in other words, after the offender is already incarcerated. Typically, the judge simply decides whether the offender will be incarcerated, while a “parole board” decides the length of incarceration. In some states, the judge decides the length of incarcerative sentences that are not longer than one year (i.e., jail sentences are determinate, while prison sentences are indeterminate). Determinate sentences are those in which the judge has the primary decision regarding the length of incarceration. According to this definition, Canada has a “hybrid” system because, although the judge sets the sentence, the Parole Board has considerable discretion as to the actual time served. See Mandel, supra note 11.


135 S. 1437, 95th Cong., 1st Sess. (1977). A large number of bills on sentencing reform have been introduced in the last several years; also see S. 1540, 90th Cong., 1st Sess. (1967); S. 2722, 89th Cong., 1st Sess. (1965); S. 823, 88th Cong., 1st Sess. (1963); S. 2879, 87th Cong., 2d Sess. (1962). S. 1437 was chosen for examination because of its recency, its typicality, and the prominence of its sponsor, Senator Edward Kennedy.
between determinate and indeterminate structures, most of the reforms opt unequivocally for determinacy; that is, at the time of incarceration the prisoner knows the length of the sentence.

It is clear, however, that the similarity of determinate schemes is, in many cases, more apparent than real. The critical factor is whether the sentencing authority that is returned to the judge is "structured" or not. Conceptually, then, there is a continuum of proposals ranging between those legislative models that transfer to the judge a great deal of unfettered discretion to those that provide detailed, mandatory sentencing instructions. This continuum needs to be analysed in terms of both the legislative intent and the probable legislative impact. This highlights the fact that the legislative intent may be to introduce structured discretion, but, as so often happens, legislative mechanisms alone are not sufficiently powerful actually to bring about such structuring. It is not simply that the implementers are recalcitrant; it may be that they have been asked to do something that they cannot do—because nobody knows how to do it. The reforms will be categorized and described in terms of their intent, but analysed in terms of their probable impact, that is, the probability that they will actually reduce disparity.

One group of states has returned sentencing authority to the judge, attaching almost no conditions to the exercise of discretion, while a second group has made a serious attempt to deal with the problem of disparity. In neither case have the consequences of these reforms been analysed empirically. Consequently, an analysis of these reforms must consist largely of extrapolation. While some of the consequences seem reasonably foreseeable, others are more problematic—for example, how a given sentencing commission will interpret a mandate to develop sentencing guidelines. Those states that are at the unstructured end of the continuum—for the sake of convenience, they are labelled as "maximalist"—are examined first. Indiana and Maine fall within this category. Those proposals that are at the other end of the continuum—the "structuralist" proposals—are examined next. Finally, the federal bill, which is neither clearly maximalist nor clearly structuralist, is considered.

B. The Maximalists

Maine and Indiana recently have enacted sentencing statutes that can be described as maximalist, although only the former's state law is explicitly so. Previous to May 1, 1976, the Maine criminal code called for the judge to set minimum and maximum terms; the minimum could not be more than one-half the maximum. An inmate was eligible for parole after serving the minimum term less good time. It appears that under the old de jure indeterminate sentence system, the Maine board of parole operated a de facto determinate sentence system by releasing ninety percent of all prison inmates upon completion of their minimum term. It also appears that, in Maine, primary

136 Wildavsky has written brilliantly about the gap between aspiration and reality in a wide range of social programs; see Wildavsky, The Strategic Retreat on Objectives (Summer 1956), 2 Policy Analysis 521.

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concern centered around short sentences rather than offender uncertainty or disparity.

Under the new Code, there are five broad classes of crime encompassing all crimes except murder, which is treated separately. Only the maximum sentence for each class of crime is specified. The judge may impose any sentence length up to the maximum for that class. An examination of Table 3 shows that sentence ranges are large, especially as the judge retains discretion to impose a fine or probation in lieu of a prison sentence (except in the case of murder). One assessment of the new Maine law concluded: “Even though it abolished indeterminate sentences, the Maine legislature did not choose to address the issue of disparity in sentencing, and judges are left with total discretion to impose any sentence up to the maximum.”

<table>
<thead>
<tr>
<th>Class of Crime (with examples)</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>Life</td>
</tr>
<tr>
<td>Class A (armed robbery, rape, armed burglary)</td>
<td>20 years</td>
</tr>
<tr>
<td>Class B (aggravated assault, arson, theft over $5,000)</td>
<td>10 years</td>
</tr>
<tr>
<td>Class C (breaking and entering a business, perjury, unarmed escape, bad checks)</td>
<td>5 years</td>
</tr>
<tr>
<td>Class D (incest, forgery, possession of heroin or LSD)</td>
<td>1 year</td>
</tr>
<tr>
<td>Class E (possession of burglary tools, prostitution, gambling)</td>
<td>6 months</td>
</tr>
</tbody>
</table>

Superficially, in terms of its language and terminology, the Indiana law appears to be further along the continuum toward structuralism. The language of the statute is that of “presumptive sentences” and “aggravating and mitigating circumstances,” phrases typically associated with an approach that structures discretion. Upon close inspection, however, there is less substance to this law than appears at first glance.

The new law is based loosely upon the work of a special state commission that recommended a purely maximalist strategy with forty, thirty, twenty, and ten years being the maximum sentences for the various classes of crime. Under these recommendations, the judge would have had complete discretion up to the maximums. The legislature, however, opted for “presumptive” sentence language. Crimes other than murder are divided into four categories of seriousness. Table 4 summarizes the presumptive sentence for each class as well as the potential range. If a judge deviates from the presumptive sentence, he must state his reasons on the record. Thus, under the Indiana statute, an offender convicted of forgery with no mitigating or aggravating circumstances must be sentenced to five years in prison (see the presumptive sentence for a class C offence in Table 4).

138 Id. at 1.
139 Gettinger, supra note 137.
140 Supra note 137.
Table 4: New Indiana Penalty Structure\textsuperscript{141}

<table>
<thead>
<tr>
<th>Class of Crime</th>
<th>Presumptive Sentence</th>
<th>Range in Aggravation</th>
<th>Range in Mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>40 years</td>
<td>+20</td>
<td>-10</td>
</tr>
<tr>
<td>(non-capital)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class A</td>
<td>30 years</td>
<td>+20</td>
<td>-10</td>
</tr>
<tr>
<td>(child molesting, kidnapping, major narcotics)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class B</td>
<td>10 years</td>
<td>+10</td>
<td>-4</td>
</tr>
<tr>
<td>(rape, forcible robbery with injury, narcotics dealing under 10 grams)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class C</td>
<td>5 years</td>
<td>+3</td>
<td>-3</td>
</tr>
<tr>
<td>(armed robbery, forgery, promoting prostitution, drug possession)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class D</td>
<td>2 years</td>
<td>+2</td>
<td>none</td>
</tr>
<tr>
<td>(simple burglary, credit card deception, non-support)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Sentences can be varied from the presumptive sentence if there are either mitigating or aggravating circumstances. The degree of alteration in sentence length that can result from such circumstances is very large. This range could well be described as a virtue if the factors that the judge should consider in determining the presence of mitigation or aggravation were defined and described. However, the decision as to whether a circumstance should be considered as aggravating, mitigating, or irrelevant is entirely within the discretion of the judge. Effectively, then, the only serious limit placed upon the judge is the upper bound of aggravation. This essentially transmits presumptive sentences into maximalistic sentences. The conclusion of one commentator is that “the law in Indiana is the harshest” and “ample opportunities for disparities in sentencing and time served remain.”\textsuperscript{142}

The conclusion must be that neither Maine nor Indiana has placed much emphasis on the elimination of disparity. The only potential for improvement in both states lies with the respective appellate courts. In Maine, the appellate courts might redefine “excessive,” while, in Indiana, the appellate courts might develop principles relating to mitigation and aggravation. In general, however, these states have moved in the direction of the existing Canadian sentencing system.

C. The Structuralists

California, Minnesota, and Illinois,\textsuperscript{143} among other states, not only have developed new criminal codes that transfer considerable sentencing respons-

\textsuperscript{141} Gettinger, Indiana: A Harsh Compromise (June 1977), Corrections Magazine repr. at 1.
\textsuperscript{142} Id.
\textsuperscript{143} For a review of state activity, see Foster et al., supra note 21, at 14-28.
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sibility from administrative parole boards to the judiciary, but they also have developed extensive sentencing guidelines to structure judicial decision-making. Although each code has unique features, the new California statute S.B. 42 will be treated as illustrative of reform in this group of state codes, and, accordingly, will be considered in detail. The section below essentially is organized as follows: (1) a description of S.B. 42; (2) the role of the Judicial Council; (3) the role of sentence review; and (4) an analysis of the weaknesses of S.B. 42 in terms of its ability to reduce disparity.

Under S.B. 42, which went into effect in California on July 1, 1977, the length of stay in state prison is no longer decided by the Adult Authority. There are three possible state prison terms for each offence; the middle, or “normal,” term must be applied except when the prosecution or defence files a motion before the court and proves, upon a preponderance of evidence, the existence of a mitigating or aggravating circumstance. Thus, for robbery, the state prison sentences are two, three, and four years. In the absence of either mitigation or aggravation, the prison term is three years; if mitigated, it is two years; and if aggravated, four years. The term that is imposed (either mitigated, normal or aggravated) is known as the “base” term. The judge must impose either the mitigated or aggravated sentence if the alleged circumstances are found by the trial judge to be true based on the evidence introduced at the hearing on the motion. Once a motion has been made, the trial judge may consider any evidence previously heard at the trial. If the judge holds that either the mitigated or aggravated sentence is applicable, he must set forth, on the record, both his factual findings and supporting reasons.

Additionally, sentences are liable to “enhancement” upon the motion of the district attorney. Any one of the following factors can lead to an enhancement: (1) a prior record of imprisonment; (2) “excessive” taking or damage; (3) being armed with a deadly weapon; (4) use of a firearm; or (5) the infliction of great bodily harm. Under the original terms of S.B. 42, a prior prison term would lead to a one-year enhancement; taking or damage between $100,000 and $500,000 to an enhancement of one-half the base term; taking or damage above $500,000 to an enhancement equal to the base term; being armed with a deadly weapon to a one-year enhancement; use of a firearm to a two-year enhancement; and finally, the infliction of great bodily harm to a three-year enhancement. The aggregate of all enhancements relating to prior imprisonment and consecutive terms could not exceed five years, and the court could impose only one enhancement from among the offences of being armed with a deadly weapon, use of a firearm or causing great bodily harm. There apparently is some discretion as to which enhancement will be imposed. Finally, the aggregate prison term (base term plus enhancements) is limited to double the base term, except where the enhancement relates to being armed with a deadly weapon, using a firearm or causing grievous bodily harm.

Several of the penalties associated with these enhancements now have been increased by an amending Act, and proposed amendments could increase penalties even further. A prior prison term now can also give rise to a three-year enhancement when both the previous crime that led to imprisonment and the present offence are defined as “violent” crimes. A violent crime
includes any felony resulting in great bodily injury or involving the use of a firearm. The amendment also provides for a separate one-year enhancement for each prior prison term, unless the defendant has been free of felony convictions for the last five years. In addition, where the charge is robbery, rape or burglary, the court may now impose both the enhancement for weapons and the enhancement for great bodily injury. Thus, the amendment increased sentences for accused with serious prior records, especially for violent prior records and for persons charged with crimes involving the threat or use of physical violence.

Under S.B. 42, “If the court determines that there are circumstances in mitigation of the punishment prescribed, the court may strike the additional punishment, provided that reasons therefor are stated on the record.” The statute does not describe what these factors in mitigation are, or how they relate to the “mitigating circumstances” that may be used to impose the lower base term. This discretion not to impose an enhancement is the only overt discretion that the judge retains once he has decided to imprison an accused.

The new law also provides the Judicial Council (the chief administrative body of the courts in California) with an important role. First, the Judicial Council is required to develop mandatory guidelines for the exercise of judicial discretion in the granting of probation. Second, the Council has the responsibility of developing criteria for the imposition of mitigating or aggravating circumstances and enhancements. Third, it is to “collect, analyze, and quarterly distribute and publish ... relevant information to trial judges relating to sentencing practices in this state and other jurisdictions.” Fourth, the Judicial Council is charged to “continually study and review the statutory sentences and the operation of existing criminal penalties and shall report ... to ... the Legislature its analysis regarding this matter and as to all proposed legislation affecting felony sentences.” Section 1170.6 specifically mandates that such review and analysis shall take into account: (a) the nature of the offence and the degree of danger that the offence presents to society, (b) the penalty of the offence as compared with penalties for offences that are in their nature more serious, (c) the penalty for the offence as compared with penalties for the same offence in other jurisdictions, and (d) the penalty of the offence as compared with recommendations for sentencing suggested by national commissions and other learned bodies.

Thus, at least on paper, the Judicial Council is to play a very important role in both the daily implementation of sentencing practice via the guidelines and the development of broad sentencing policy via its advisory/analytic role for the legislature. This, in itself, is a major departure from past practices—no state has had continuous monitoring of sentencing practices. The switch from “not-so-benign neglect” to “activism” is perhaps one of the most re-

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145 The responsibilities of the Judicial Council are laid out in The Penal Code of California 1872, c. 4.5, Art. 2, §1170.3, §1170.4, §1170.5, and §1170.6 (a), (b), (c), and (d). This section is unaffected by A.B. 476.
The first set of guidelines for the exercise of judicial discretion in the granting of probation was adopted by the Judicial Council on May 13, 1977. Because of the centrality of these guidelines in the actual implementation of the new law, the next step is a description and analysis of the sentencing rules prepared by the Judicial Council.

The Judicial Council has interpreted the Act to mean that it has the authority to develop criteria only for the grant or denial of probation and not for the imposition or length of jail sentences. It held that:

The operative portions of section 1170 deal exclusively with prison sentences; and the mandate to the Judicial Council in section 1170.3 is limited to criteria affecting the length of prison sentences and the grant or denial of probation. Criteria dealing with jail sentences, fines, or jail time and fines as conditions of probation, would substantially exceed the mandate of the legislation.146

Thus, whether a jail sentence should be 30 days or 12 months is not dealt with by the guidelines, although in practice jail sentences are an important intermediary sentence between probation and state prison. For most prisoners in California, the length of their jail sentence is the most important sentencing decision.147

The Judicial Council also interpreted the Act to mean that the Council's criteria for both the grant or denial of probation and mitigating and aggravating circumstances are non-exclusive, and that the stated criteria may sometimes be irrelevant. Thus:

Enumerations of criteria in these rules are not exclusive. The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all inclusive. (Cf., Evid. Code, § 351.) The relative significance of various criteria will vary from case to case. This, like the question of applicability of various criteria, will be decided by the sentencing judge.148 Relevant criteria are those applicable to the facts in the record of the case; not all criteria will be relevant to each case. The judge's duty is similar to the duty to consider the probation officer's report.149

The judge, therefore, must apply his own criterion or ignore a stated criterion if he believes it to be irrelevant. The relative weighting of the various criteria is also discretionary.

The Judicial Council re-emphasized the discretionary nature of the probation decision by noting:

The decision whether to grant probation is normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community. Each criterion points to evidence that the likelihood of success is

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146 Judicial Council, California Rules of Court, West's Annotated California Codes, Vol. 23, Pt. 2, Div. 1-A, Rule 403, Advisory Committee Comment.


148 Judicial Council, supra note 146, Rule 408, Advisory Committee Comment.

149 Id., Rule 409, Advisory Committee Comment.
great or small. A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.\textsuperscript{160}

There are four main categories of factors that are relevant to the probation decision: (1) existing statutory provisions relating to the grant or denial of probation, (2) the likelihood that, if not imprisoned, the defendant will be a danger to others, (3) facts relating to the crime, which include great provocation or taking advantage of a position of trust, and (4) facts relating to the defendant, which include whether the defendant is remorseful and whether a financially able defendant is willing to make restitution to the victim. Altogether the Council lists eight “non-exclusive” criteria relating to the offence and ten criteria relating to the defendant.

The factors to be considered in the probation decision are both highly subjective—the extent of remorse, for example—and highly speculative—for instance, the danger of addiction to drugs or the likely impact of imprisonment on a defendant's family. The Judicial Council also expressly states that “willingness and ability” to comply with probation terms include both “apparent sincerity”\textsuperscript{151} and “the defendant's work environment and primary associates.”\textsuperscript{152} The Council even lists criteria for the grant of probation in “unusual cases” where probation normally is prohibited by law.\textsuperscript{163}

The Council also has published a set of criteria related to the finding of mitigating or aggravating circumstances. To some extent, these circumstances overlap with the criteria to be applied in the probation decision. For example, demonstrated criminal sophistication is a factor to be considered both in the probation decision and in aggravation. However, the factors to be utilized in determining aggravation and mitigation generally appear to be less subjective and speculative than those included in the probation decision. In addition, they must be demonstrated at a hearing.

It is clear that the Judicial Council does not limit its definition of aggravation to factors relating to the crime itself:

By providing that the defendant's prior record and simultaneous convictions of other offenses may not be used \textit{both} for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases. This resolves whatever ambiguity may arise from the phrase, “circumstances in aggravation ... of the crime”. The phrase, “circumstances in aggravation or mitigation of the crime” necessarily alludes to extrinsic facts.\textsuperscript{164} (Emphasis added.)

An examination of the aggravating circumstances reveals that they include all of the factors that could also lead to an enhancement of sentence.\textsuperscript{166} The Council has concluded that there is a prohibition only against imposing a double sentence for the same fact,\textsuperscript{166} and that therefore each enhancement

\begin{itemize}
  \item \textsuperscript{150} Id., Rule 416, Advisory Committee Comment.
  \item \textsuperscript{151} Id., Rule 414, Advisory Committee Comment.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id., Rule 416, Advisory Committee Comment.
  \item \textsuperscript{154} Id., Rule 421, Advisory Committee Comment.
  \item \textsuperscript{155} Id. See The Penal Code of California 1872, c. 4.5, Art. 1, §1170.1 (a),(c) (1977).
  \item \textsuperscript{156} California Rules of Court, supra note 113, Rule 441.
\end{itemize}
could alternatively be held to be an aggravating circumstance—"The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used in aggravation."\textsuperscript{157} This is an important interpretation for, as noted, there are different penalties for aggravating circumstances and enhancements.

S.B. 42 introduces two separate modes of sentence review, although not for sentencing appeal.\textsuperscript{158} The sentencing court may, upon the recommendation of the Director of Corrections, the Community Release Board (the replacement of the Adult Authority)\textsuperscript{159} or at its own discretion, resentence a defendant committed to state prison within 120 days of commitment to the custody of the Director of Corrections. The Act states that "the resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing."\textsuperscript{160} The Community Release Board is charged with a separate review process. It must review the sentence of all convicts within the first year of their respective imprisonments and may recommend resentencing if it determines that "the sentence is disparate."\textsuperscript{161} Once again, the Board, in making its decision, will "apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing."\textsuperscript{162}

How effective will the new determinate sentence law be in reducing or eliminating disparity? It will be argued that while the new law is likely to reduce disparity in some areas, it has serious weaknesses.

The major and probably fatal weakness of the determinate sentencing law in terms of eliminating disparity is that it ignores the central role of prosecutorial discretion and plea bargaining in the sentencing process. Considerable empirical evidence from California demonstrates that there are large sentence differentials between those defendants who plead guilty and those who go to trial.\textsuperscript{163} This partially reflects the fact that in most cases the district attorney (and judges) wish to avoid trials and thus penalize those who go to trial and reward those who do not. The new law increases the bargaining ability of district attorneys substantially because, while "charge bargaining" remains, it is now joined by "mitigating bargaining," "aggravating bargaining" and "enhancement bargaining." It is of course very unlikely that the defence will introduce evidence on aggravating circumstances and enhancements; it will only result from motions of the prosecution. It is very likely that these additional features will not be "alleged" when a defendant pleads guilty. Alternatively, the prosecution may agree to a "mitigated" (that is, lower bound) sentence in exchange for a guilty plea, even though there

\textsuperscript{157} Id.
\textsuperscript{158} Vining, \textit{supra} note 147, at 286, describes these procedures.
\textsuperscript{159} The Adult Authority was the "paroling" or release body.
\textsuperscript{160} The Penal Code of California 1872, c. 4.5, Art. 1, §1170(a)(2)(d).
\textsuperscript{161} The Penal Code of California 1872, c. 4.5, Art. 1, §1170(a)(2)(f).
\textsuperscript{162} The Penal Code of California 1872, c. 4.5, Art. 1, §1170(a)(2)(f).
\textsuperscript{163} See Vining, \textit{supra} note 147, c. IV, which also reviews other empirical evidence.
are in fact no mitigating circumstances. Under the new law, then, the district attorney cannot directly offer a reduced sentence in exchange for a guilty plea. Indirectly, however, especially in serious cases, there are excellent opportunities to offer a reduction in sentence. Indeed, such plea-bargaining opportunities are much more extensive than under the old law. The source of the problem is that the legislation does not control any of the behavioural incentives that lead to plea-bargaining. Two of the reasons for such “deals” are scarce resources\(^6\) and weak cases,\(^7\) neither of which is addressed by the legislation. The result is likely to be that district attorneys will remain more interested in guilty pleas than in congruence between the offender’s actual behaviour and statutory labels. Consequently, district attorneys probably will offer normal (middle) sentences in exchange for a guilty plea even where there were, objectively speaking, aggravating circumstances that “should” have resulted in an upper bound sentence.

The evidence on the pervasiveness of plea bargaining in the United States is plentiful. Unfortunately, in Canada, empirical research on the topic is relatively sparse.\(^6\) There is considerable impressionistic evidence, however, that plea bargaining is fairly common and leads to the same kind of inequities as in the United States.\(^7\) Indeed, the availability of prosecutorial appeal against sentence perhaps results in even greater inequities in Canada. The Crown has appealed against sentence on occasion, even though the original sentence was the result of an agreement between the Crown and the accused. This places the appellate court in a difficult position, as it can either abandon the responsibility of ensuring the appropriate sentence or it can participate in a “broken promise” to the accused. Several decisions of the appellate courts highlight this dilemma. In \(R. \text{ v. Kirkpatrick}\)\(^8\) and \(R. \text{ v. Mouffe}\),\(^9\) the Quebec Court of Appeal increased the sentences in spite of the Crown’s original bargain as to sentencing. This is obviously a very unfortunate outcome in terms of basic justice. On the other hand, in another Quebec case, \(A.G. \text{ Can. v. Roy}\),\(^10\) the Court of Queen’s Bench refused to


\(^{168}\) [1971] Qué. C.A. 337.

\(^{169}\) Unreported, Sept. 4, 1971 (Qué. C.A.).

\(^{170}\) (1972), 18 C.R.N.S. 89 (Qué. Q.B.).
increase the sentence because of the Crown’s bargain. Courts of appeal in other provinces also have refused to revise sentences in these circumstances, while at the same time stating that they believe the bargained sentence to be inappropriate. One commentator has concluded: “The above solutions to the ‘broken bargain’ cases are unsatisfactory, because one solution ignores the public interest in an appropriate sentence and the other solution is manifestly unfair to the accused.” The sentencing proposal described in section IV suggests one procedure for dealing with these problems.

Additional problems arise from the sentence review process. Under the first process, the sentencing court may review the sentence of any accused receiving a state prison sentence. This review also may be initiated by the Director of Corrections or the Community Release Board. Two problems with this process are: first, the review is purely discretionary, and second, it applies only to offenders receiving state prison sentences. The latter review process—to be conducted by the Community Release Board—is mandatory. There are also several problems associated with this process. It applies only to offenders receiving state prison sentences. In addition, while the review by the Board is mandatory, it may take place up to a year after incarceration and seems to be defined as a purely administrative process rather than a quasi-judicial function. Thus, it is not clear that the prisoner would be able to present evidence on the presence of disparity and enforce implementation of Judicial Council guidelines.

A third problem arising from those described above is that, given charge bargaining and mitigating bargaining, how will a review agency be able to detect the presence or absence of disparity? The problem is that, superficially, the data that either the court or the Release Board examines will suggest uniformity. For example, in jurisdiction A, because of scarce resources, the district attorney does not file a motion to secure an aggravated sentence, although the facts would support such a motion. In jurisdiction B, the district attorney does file and prove such a motion. To a review process these will seem like different defendants. Given differential bargaining, the “reality” with which the Release Board will be dealing will be a paper reality. It is somewhat like the reality of indeterminate sentence uniformity where the argument was that because everyone received the same sentence range there was no disparity!

If the Board simply follows the convicted offence, the proved mitigating or aggravating circumstances and any enhancements, there will be no evidence of disparity. For example, all those convicted of burglary without mitigating or aggravating circumstances and with a one-year enhancement (say, for a prior prison term) will receive the same sentence. On the other hand, if the Board goes behind the formal record (as the Federal Parole Board does) and examines the actual behaviour of defendants, a different set of problems will arise. It might emerge that a given jurisdiction, say Los Angeles, is routinely dropping enhancements in exchange for guilty pleas, while other jurisdictions are not. What should the response of the Board be?

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It is highly unlikely that it can send Los Angeles offenders back for resentencing, as they have received determinate sentences, and this would clearly be a case of double jeopardy. They have not waived this constitutional protection because they have not appealed their sentence. Equally, to send back the prisoners from other jurisdictions would be inappropriate; there, the courts had followed both the letter and the spirit of the new law. Given this dilemma, an educated guess is that the Board will confine itself to insuring against errors on the record. This “data reality” problem is also likely to bedevil the Judicial Council’s mandate to analyse relevant sentencing information.

The next problem is also a major one, as the new Act does not address directly the issue of when an offender should be sent to state prison. Once the decision has been made to send an offender to state prison, the considerations of mitigating and aggravating circumstances and enhancements come into force. However, if the offender is not sent to state prison, they are not explicitly relevant. As was seen, the Judicial Council has used its discretion to the full in its interpretations. It also appears to have reintroduced some concepts explicitly rejected by the legislature. S.B. 42 states that “the legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.”

The Act, therefore, explicitly rejects the rehabilitative ideal. On the face of it, this statement thus would seem to be a clear “just deserts” argument along the lines proposed by von Hirsch, one that eschews both rehabilitative ideals and predictions of future dangerousness. According to Johnson and Messinger, however, the Judicial Council has introduced into its guidelines criteria that “are directly contrary to the spirit many proponents hoped was built into S.B. 42, namely criteria which permit the court to decide the issue on the basis of its judgement of the offender’s ‘dangerousness.’”

One further area where the decision of the Judicial Council has emphasized discretion is in the relationship of aggravating circumstances to enhancements. The Council has held that circumstances that lead to an enhancement may also be treated as aggravating circumstances. As the penalties associated with these two conditions are usually different, the judge and district attorney are provided with added discretion. Thus, the court can either treat great bodily injury as an aggravating circumstance leading usually to one extra year in prison, or as a great bodily injury leading to a three-year enhancement. The Judicial Council notes this, but suggests that it “may work to the defendant’s benefit, when the enhancement would carry an added term to 3 years or more, as aggravation cannot increase the term more than 1 year.” It seems equally likely, however, that it will work against the de-

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172 The Penal Code of California 1872, c. 4.5, Art. 1, §1170(a)(1).
173 Von Hirsch, supra note 23.
174 Johnson and Messinger, California Determinate Sentence Statute: History and Issues (Berkeley: unpub. draft, April 1977) at IV-5.
175 California Rules of Court, supra note 146, Rule 441, Advisory Committee Comment.
fendant's interest. As we have seen, in most circumstances, use of a firearm and great bodily injury both could not be filed as enhancements. However, now one could be utilized as an aggravating circumstance while the other could be filed as an enhancement. More important, perhaps, the Council's interpretation once again does not appear to conform with the spirit of S.B. 42.

The Judicial Council's interpretation that it has no power to develop criteria for the imposition of jail sentences highlights an important anomaly. The length of the jail sentence is the most important sentencing decision that many offenders face. However, because jail sentences in many cases can be imposed only as a “condition” of probation, they are formally an addendum. In practice, of course, from the defendant's perspective, this is his “real” sentence. While the court may formally sentence an offender to probation with “jail as a condition,” the offender sees it as jail with some probation “thrown in.” It is worth noting that if the percentage of convicted offenders going to state prison remains approximately as at present in California, only a relatively small percentage of all accused will be sentenced under these detailed provisions. The great majority of offenders, for crimes such as burglary, receiving stolen property and forgery, would continue to receive county jail and probation sentences and will be sentenced under the Council guidelines.

It may well be, however, that prison commitments will increase. The lowest mitigated sentence provided by the new law is sixteen months, which, given “good time,” would result in eleven months of incarceration. If a district attorney wants to send an offender to state prison, he now has a good bargaining “counter.” Under the old law, the accused would have had considerable incentive to go to trial if the district attorney insisted upon state prison. Now the district attorney would simply threaten to oppose a plea of mitigation if the accused went to trial. As Johnson and Messinger put it, “the increase would easily be very large indeed in view of the fact that currently only 10 percent or so of those the court could imprison are sent to state prison.” Alschuler adds that one consequence of these “intermediate” offers “may be an increase—perhaps even a dramatic increase—in the population of California’s state prisons.” Finally, it should be pointed out that whatever the failings of S.B. 42 in relation to uniformity, it is likely to have an important, beneficial impact in terms of the highly excessive sentence.

S.B. 42 has been analysed in detail because, on several levels, it is archetypically “new” reform—in terms of source, orientation, and substance.

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176 In California, all incarcerative sentences up to one year in length are in county jails; incarcerative sentences greater than a year in length involve confinement in a state prison.

177 Vining, supra note 147, at 296.

178 Johnson and Messinger, supra note 174, at IV-3.

The new sources are generally legislative, in contrast to the reforms cited in the last section, which were advocated by elements within the criminal justice system, and which were often achievable by relatively narrow case law development or administrative fiat. The whole orientation of reform consequently has switched from incrementalism to synopticism. Substantively, the aim of reform has moved from viewing the problem as one of incrementally improving procedural safeguards to viewing it as one of wholesale elimination of indeterminacy and rehabilitative goals, thereby resulting in a much greater attempt to structure sentencing discretion.

Weaknesses in the California scheme also illustrate the emerging problems of such an approach, and all appear to have relevance for Canada. Perhaps most importantly, an S.B. 42 model might greatly increase plea bargaining incentives, for the reasons discussed above. Second, as the role of the Judicial Council demonstrates, ongoing pressures to maintain, or revert to, discretion are enormous, regardless of legislative intent. Third, an S.B. 42 solution ignores the "incarceration/no incarceration" decision while concentrating on the decision as to the length of incarceration, thereby removing many sentences from the reformed process. Overall, it may be concluded that primary reliance on a legislative approach potentially presents problems if procedures are not included for ongoing change. Current Canadian proposals demonstrate little concern with providing for such flexibility.


The federal bill is of particular interest because of the difficulty in predicting, from its current draft form, whether the sentencing structure will be maximalist or structuralist—the outcome is almost totally dependent on the approach taken by a proposed Sentencing Commission.

At first glance, the federal bill is almost purely maximalist. In terms of sentences, the bill would create five classes of felonies. The authorized terms of imprisonment are: (1) for a Class A felony, the duration of the defendant's life or any period of time; (2) for a Class B felony, not more than twenty-five years; (3) for a Class C felony, not more than twelve years; (4) for a Class D felony, not more than six years; (5) for a Class E felony, not more than three years.180 Thus, for each class of offence, there is a maximum sentence, but no minimum. Additionally, for all classes of offences except a Class A offence, the court may impose a sentence of probation or fine. In sentencing an offender, the court has to consider the following factors itself: (1) the nature and circumstances of the offence and the history and characteristics of the defendant; and (2) the need for the sentence imposed: to afford adequate deterrence; to protect the public from further crimes; to reflect the seriousness of the offence; to promote respect for the law; to provide just punishment; and to provide the defendant with needed educational training or medical care.181 These statements are obviously very broad and would not provide specific guidance to judges.

180 Supra note 135.
181 Id.
The crucial additional factor that might change this vague, maximalist approach is the inclusion of a sentencing commission with the responsibility of developing mandatory sentencing guidelines. The bill lists a series of factors relating to both the offender and the offence that are relevant—although not exhaustively so—in the development of guidelines. Once again, these factors are very broad, including "public concern" over the offence and the offender's "community ties." Furthermore, the commission's guidelines are overtly "presumptive." Under section 2003(a), the judge retains independent discretion and could, for example, go outside the guidelines to "afford adequate deterrence to criminal conduct" or "to provide the defendant with needed educational or vocational training."

While a great deal would depend upon the make-up of the commission, the factors that the bill suggests should be considered would appear to make it unlikely that the guidelines would be very structured. The bill distinguishes seven factors associated with the crime and eleven associated with the accused that the commission "shall consider." Legally, however, there does not appear to be a bar to the development of mandatory sentencing principles. For example, the commission might utilize the eighteen listed factors to develop a scale with various levels of mitigation and aggravation; most of the factors can, without much strain, be linked to mitigation or aggravation. The main problem in implementing such an approach are those factors specifically relating to the defendant's education, skills, prior employment record, and family and community ties. One possibility is that the commission could argue that these factors are not usually relevant, but may be under specific circumstances. As the listed factors are not exhaustive, the commission could include prior record and criminal status in a relatively sophisticated manner.

Let us consider two alternative hypotheticals. The first assumes that the sentencing commission guidelines are broad, vague, discretionary, and non-exhaustive. As in California, a critical factor is that the legislation does not address directly the issue of plea bargaining. Thus, if this hypothetical were operational, it would be predicted that the new federal law would lead to similar results as in California; that is, extensive mitigating and aggravating negotiation. However, this kind of bargaining potentially could be more controllable at the federal level because, in California, S.B. 42 effectively allows the prosecutor to control the filing of aggravating circumstances and enhancements. The decision as to filing motions on these matters is entirely within the prosecutor's discretion. There is no equivalent prosecutorial discretion on this issue in the federal bill—it is the judge who would make any findings of mitigation or aggravation. He could refuse to accept pleas that did not

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182 See Appendix II, infra.
183 A potential problem with the federal bill is the multiplicity of factors that can be taken into account. The Act distinguishes seven factors associated with the crime and eleven factors associated with the criminal. The first problem simply relates to their number. The second relates to those factors that relate to the characteristics of the defendant. The federal Act retains a considerable emphasis on rehabilitation and the potentiality for recidivism. This can be contrasted with the California statute which, at least in the Act, relies almost exclusively on a "just deserts" rationale.
specify aggravating circumstances when the facts suggested the presence of such circumstances.

In the second hypothetical, overt sentence bargaining may or may not be permitted. Assuming, first, that the judge allows specific bargains as to sentence length, this would provide almost infinite flexibility, given the wide range of offence classes. In the case of a Class C felony, for example, the prosecution and defence could negotiate any sentence length between probation and twenty-five years' imprisonment. The result is likely to be even greater disparity than under the present Parole Board system. An offender who accepts a sentence offer which he later believes to be (comparatively) excessive would have no recourse, as the bill does not allow sentence appeals where there has been a plea bargain.

If federal judges did refuse to allow overt sentence bargaining, charge (or, more correctly in this case, "class") bargaining would become even more important than under an indeterminate sentence system. If an accused wished to minimize his greatest possible loss (a minimax regret strategy), he would plead guilty to a lower class felony. The maximum sentence for each class varies greatly in magnitude. A person convicted of a Class C felony faces a maximum twelve-year sentence, while one convicted of a Class D felony faces a maximum sentence of six years. An accused charged with a Class C felony, then, has considerable incentive to plead guilty to a Class D felony, especially if he believes that the guidelines would place him in a high sentence category. The consequences of either version of the second hypothetical, in terms of disparity, will be particularly serious, given the limitations of appeals to accused who go to trial.

The kind of reform now being proposed at the federal level in the United States may well be more likely in Canada than the S.B. 42 model. It is the "logical" step to follow model code developments. Again, the analysis suggests serious weaknesses: primarily broad, vague, normatively objectionable predictive criteria, increased incentives to plea bargain, and great uncertainty as to the actual operation of the sentencing process. In summation, it is quite possible that the proposed Act would have only a minimal impact on disparity.

IV. A MODEL STRUCTURE FOR SENTENCE REFORM

A. Requirements for Effective Sentencing Reform

Section III suggested reasons why a number of recently proposed or implemented reforms in the United States are unlikely to move substantially toward uniformity (although they probably will eliminate the most highly aberrant sentences), while Section II argued that currently proposed Canadian reforms are unlikely to eliminate, or even substantially reduce, disparity. Implicitly, the foregoing analysis also has suggested several necessary features of a scheme that realistically aspires to reduce disparity. It is suggested that any reform should be evaluated in terms of the following criteria. First, the reform should provide for the classification of offenders according to the offence and its characteristics, and the relevant characteristics of the offender. In other words, the reform must incorporate the principle of selective uni-
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formity explicitly. A sample schema for such a differentiation of offenders is described below. Second, the reform should state explicitly the grounds upon which the length of incarcerative sentences are determined, as well as the reasons why incarcerative, as opposed to non-incarcerative, sentences are imposed. Thus, the schema should provide guidelines as to the sentences of all, or at least the great majority of, convicted offenders. Third, the reform must develop explicitly a method of dealing with plea bargaining arising from limited prosecutorial and trial resources, and take into account plea bargaining that arises from “weak” cases. The reason for distinguishing this type of plea bargaining from “limited resources” plea bargaining will be made clear below. Fourth, the proposal should provide for temporal flexibility. This criterion represents an attempt to recognize that both societal and judicial values change over time. Fifth, the reform should allow for some provincial flexibility. While provincial variation does present greater normative problems than temporal variation, there are some arguments on its behalf. For example, a given province may be experiencing a rapid increase in the occurrence of a particular crime. This kind of variation obviously requires strict controls and very limited usage. Sixth, the scheme should also allow judges some flexibility in especially “hard cases.” Once again, this would require strict safeguards.

The crucial question becomes: can institutional mechanisms be developed that satisfy all of these criteria? It is submitted that such institutional mechanisms can be designed and implemented, but that it will require somewhat more complex arrangements than those being designed or implemented in the current round of reforms in either Canada or the United States. To demonstrate the feasibility of such institutional arrangements, a model sentencing structure is described below that would reduce substantially the disparity in sentencing. Necessarily, several of the elements are tentative, while others are undoubtedly controversial.

B. A Model Sentencing Structure

The sentencing proposal envisions the creation of two new entities: first, a sentence setting and revising body called, for convenience, the “sentencing commission”; and, second, an appellate and review body labelled, for convenience, the “review tribunal.”

The sentencing commission would have the following responsibilities: (1) to develop the method of differentiating sentences among offenders convicted of the same offence (a sentencing “matrix”); (2) to assign sentence lengths to the sentencing matrix outlined above; (3) to assess the necessity of changing sentence lengths in any given cell of a matrix; and (4) to grant “dispensations” for fixed time periods to provinces requesting that sentence lengths be altered in their jurisdiction. The jurisdiction would have to show reasonable cause for such alterations. Generally, then, the sentencing commission would have the responsibility of fixing sentence lengths and altering them as circumstances require. It would not have responsibilities relating to findings of either law or fact in individual cases. In this sense, its functions would not be judicial. Rather, its role would be to formulate the appropriate sentences for different categories of offenders. Legislative guidance should be
Once the sentencing commission had assigned "numbers" to the cells, its role would be intermittent. This is based on the assumption that, once sentence lengths have been fixed, alterations and dispensations would be relatively infrequent. The format of this body might well follow that proposed for the sentencing commission under the U.S. federal bill (S. 1437), where nine commission members are appointed by the Judicial Conference of the United States.

The review tribunal, on the other hand, would play an overtly judicial role, performing the following tasks. It would hear appeals on findings of fact and law by the lower court relating to the assignment of an offender to a particular matrix cell. The tribunal would hear appeals on the correctness of the offence on which the conviction was based. It would be required to dismiss charges where it found that the offence in question was materially different from the criminal behaviour of the offender. Such a dismissal would be necessary even where the offence for which the conviction was made carries a lesser penalty than the penalty expected for the observed behaviour. Any convicted offender would be allowed to appeal on this ground. The tribunal would review automatically the sentence of any offender where the sentencing judge made a finding that the sentence should vary from that prescribed by the matrix. Finally, it would examine a random sample of cases to check for practices or findings that violate the principle of selective uniformity.

The procedure for differentiating among offenders involves assigning each offender to an appropriate "cell." The crucial question is, therefore, what variables are used in cell determination?

The example here uses six variables in allocating an offender to a particular cell. The sentencing "matrix" would take into account the following factors: (1) prior record—five levels of prior record ranging from "no prior record" to "previous incarcerations exceeding thirty months in length"; (2) aggravation or mitigation—five levels of aggravation or mitigation ranging from "highly mitigating circumstances" through "some mitigation" and "no mitigation or aggravation" and "some aggravation" to "highly aggravated" (those factors in aggravation and mitigation would be related directly to the objective characteristics of the crime); (3) the number of offences—three levels of offence number, ranging from "one offence" through "several offences" to "multiple offences"; (4) criminal status—two levels of criminal status, either "no criminal status" or "some existing criminal status"; (5) moral culpability—two levels of moral culpability, either "low" or "high"; (6) guilty plea differential—two types of plea, either "guilty" or "not guilty."

The fifth and sixth of these variables are normatively controversial, while the first four variables can be related plausibly to a "just deserts" model based on the nature of the offence and prior record. Elements of moral culpability that are not related to the offence itself are much more problematic. The distinction is between mitigating or aggravating factors, such as duress or leadership role in the offence, and other factors, such as age, do

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184 A "model" set of factors is suggested, infra.
not have a direct impact upon the nature of the offence. The guilty plea differential is also highly controversial. It is included to stress that plea bargaining must be dealt with explicitly in order to develop uniform sentencing. This model deals explicitly with plea bargaining, as either its inclusion or exclusion would have a major impact on the nature of the criminal justice system.

It is proposed that the various levels of prior record and circumstances in mitigation or aggravation form the "basic" matrix for each offence. There are several different ways in which prior record, and mitigation and aggravation, can be treated. One way of using prior record is in a "seriousness index" based on the number of months previously spent incarcerated. There are many levels of prior record for reasons of both equity and pragmatism—pragmatism because, as shown below, the Canadian criminal justice system already attempts to differentiate amongst offenders to this degree in spite of the institutional difficulties, and equity because this degree of differentiation appears to be normatively appropriate.

The critical problems in mitigation and aggravation include determining what factors should be considered, how "highly mitigating circumstances" should be distinguished from "some mitigating circumstances," and how these determinations should be made. It is suggested that the factors to be considered mitigating or aggravating should be developed by the sentencing commission. Then, if the court finds that any one factor in mitigation is present, the offender would be placed in the "same mitigating circumstance" category. If two or more mitigating circumstances are present, the offender would be placed in the "highly mitigating circumstances" category. The same principle would apply to aggravating circumstances.

The factors for determining mitigation or aggravation should be described explicitly by the sentencing commission. There is a Canadian model for such factors (to be described below), as well as potential American models—for example, some of the criteria developed by the Judicial Council in California for granting or denying probation. For instance, a finding that the defendant acted as the result of great provocation would be a mitigating circumstance, while a finding that the defendant took advantage of a position of trust, or that the victim was particularly vulnerable, would be a relevant factor in aggravation. Generally, those criteria described by the Judicial Council as relating to the nature of the crime would be relevant, but the criteria that the Council describes as relating to the accused generally would not be relevant. Thus, such factors as the likely effect of imprisonment on the accused and his dependants would be excluded.

On the other hand, the factors proposed under S. 1437 would not be very useful in determining mitigation or aggravation. However, they might provide useful guidelines for the sentencing commission in the granting of jurisdictional dispensations, as they include the community view of the gravity of the offence, and the current incidence of the offence in the community and

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185 See Appendix I for these criteria.
186 See Appendix II, infra.
in the nation as a whole. They would also be useful guidelines to a sentencing commission considering increasing or decreasing penalties for a given offence over a number of years.

There are two primary reasons for the proposed degree of differentiation in mitigating and aggravating circumstances. First, it reduces the probability of "hard cases." Where, for example, there is only one level of mitigation, offenders who are considerably different in their criminal behaviour are grouped together. Second, when there is not considerable differentiation, the prosecution has incentives to file less serious charges believing the penalties associated with the actual offence to be too severe. This approach attempts to steer between the Scylla of broad discretion and the Charybdis of broad mandatory sentences.

Under this scheme, the main fact-finding task of the judge at the sentencing stage would be the determination of the level of mitigation or aggravation. The judge would make a factual determination on this issue regardless of whether the offender pleaded guilty or not guilty. It is hoped that the preceding analysis of S.B. 42 has made it clear why it should not be within the discretion of a prosecutor to decide on the level of mitigation or aggravation. To summarize briefly the argument made in the last section, if these "levels" can be plea bargained, it would make the monitoring of disparity impossible. This is one of the reasons why the review tribunal would have the responsibility of examining a sample of non-appealed cases. In this way, it could ensure that the designated level of seriousness truly corresponds to the actual behaviour of the offender.

Additionally, the review tribunal would have the responsibility of reviewing appeals on either fact or law, from either prosecution or defence, concerning the judge's findings on the level of mitigation or aggravation. The review tribunal, therefore, would have the responsibility of developing sentencing principles relating to mitigation and aggravation. It is worth repeating that the review tribunal would also hear appeals on the relationship between the offence on which the conviction was based, and the actual behaviour of the offender. These safeguards are included to eliminate plea bargaining that manifests itself in the form of charge bargaining or "mitigating-bargaining."

The rationale for the inclusion of such a guilty plea differential is mainly pragmatic. Given that Crown attorneys do not have the resources to try all cases, something has to "give." It is submitted that a uniform, explicit sentence reduction is preferable to variable, hidden sentence reductions. How large should the differential be? If the differential is the "price" paid to clear the "market," it is apparent that it should be variable over time. This is why the differential should be set by the sentencing commission rather than by the legislature. First, the price (or sentence discount) required to clear the market may change over time and, second, the definition of a well-functioning market may change. Thus the commission might set a target of twenty-five percent trials and seventy-five percent guilty pleas. Its first differential may result in too few trials, requiring a lowering of the differential. Thus, it might be necessary to review the offered reduction every few years. In addition, the commission may wish to revise its trial and guilty plea targets as fiscal
circumstances change. An alternative procedure is to exclude this variable and determine sentences irrespective of plea.

The reasons for the inclusion of criminal status and the number of offences are fairly straightforward. There is impressionistic evidence that offenders who have committed multiple offences—if they are prepared to plead guilty—are not punished adequately.\textsuperscript{187} This procedure would place some check on the “undercharging” practice. Once again, this would require a finding of fact by the judge. In practice, however, this would be the easiest kind of evidence for a prosecuting attorney to “hide.” Criminal status is included because empirical evidence has shown that it does have an independent impact,\textsuperscript{188} and there appears to be no normative reason for eliminating it.

The six variables that have been described would result in 600\textsuperscript{189} potential sentences for each offence. This is not as “mind boggling” as it might first appear. In its most complex manifestation, the proposal would require twenty-four basic matrices for each offence (of course, many offences would have very similar sets of matrices). The 600 cells would be halved if one of the dichotomous variables was eliminated or transferred into a flat increase or reduction.

Table 5 illustrates two different versions of a basic matrix. The numbers in the cells represent months to be served. In example A, the increases, holding either factor constant, are in straight three-month increments; in example B, the increases, holding either factor constant, are mostly geometric. The examples illustrate how a flat reduction for guilty pleas might serve appropriate public policy goals. Obviously, a flat reduction for all offenders convicted of the same offence offers relatively better deals (in terms of percentage reduction) to those offenders with less serious prior records and with mitigated circumstances. This can be illustrated with reference to example A, where a flat four-month reduction for guilty pleas would lead to a sixty-six percent reduction for an offender with a level 2 prior record and some mitigation. On the other hand, the offender with a level 4 prior record and some aggravation would receive only a twenty-two percent reduction. It would seem appropriate that “worse” offenders be offered worse, rather than better, deals. This would also counteract the apparent fact that more experienced criminals and their lawyers learned how to plea bargain more effectively.\textsuperscript{190}

C. Comparison of the Proposed Model with the U.S. Reforms

Conceptually, the approach adopted here is not much different from that adopted by the United States Parole Board in its guidelines for decision-making. As described in Section II, there are, nonetheless, some important

\textsuperscript{188} See, for example, Vining, supra note 147, ch. IV.
\textsuperscript{189} Five levels of prior record x five levels of seriousness x three levels of charge x two levels of moral culpability x two levels of criminal status x two levels of guilty plea differential. However, some of the cells are “empty,” e.g., an accused cannot have “no prior record” and “some criminal status.”
\textsuperscript{190} Vining, supra note 147, ch. V.
Table 5: Sample Sentencing Matrices

**EXAMPLE A**

<table>
<thead>
<tr>
<th></th>
<th>Mitigation</th>
<th>Aggravation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Record</td>
<td>1 2 3 4 5</td>
<td>6 9 12 15 18</td>
</tr>
<tr>
<td>(None)</td>
<td>0 3 6 9 12</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3 6 9 12 15</td>
<td></td>
</tr>
<tr>
<td>(Extensive)</td>
<td>12 15 18 21 24</td>
<td></td>
</tr>
</tbody>
</table>

**EXAMPLE B**

<table>
<thead>
<tr>
<th></th>
<th>Mitigation</th>
<th>Aggravation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Record</td>
<td>1 2 3 4 5</td>
<td>8 16 32 64</td>
</tr>
<tr>
<td>(None)</td>
<td>0 2 4 8 16</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2 4 8 16 32</td>
<td></td>
</tr>
<tr>
<td>(Extensive)</td>
<td>16 32 64</td>
<td>? ?</td>
</tr>
</tbody>
</table>

differences that are worth summarizing. These differences are: (1) the matrix proposed here is multi-dimensional, thereby allowing for much greater differentiation of offenders than do other schemes. The U.S. Parole Board methodology does not take into account the seriousness of the offence within a given offence category. Mitigating or aggravating circumstances play no part in determining either the severity of offence level or the salient factor score. By including a basic matrix for each offence, this approach also allows for marginally different increases for different offences as the level of seriousness or prior record worsens. Under the Parole Board scheme, once the offence is determined, the marginal increases (as the salience factor score worsens) are uniform for all offences. (2) It is proposed that all offenders would be assigned a cell in the matrix even if they did not receive an in-
carcerative sentence. Thus the "non-incarceration/incarceration" decision is structured as well as the "length of the incarceration" decision. Schemes that structure discretion only where the offenders already are being sent to prison (the situation in California under S.B. 42 and under the U.S. Parole Board guidelines) only partially deal with disparity. (3) This scheme explicitly incorporates the reality of plea bargaining, unlike the Parole Board matrix. Indeed, it would be impossible for it to do so for, under the existing federal scheme, the bargain is made before the sentence is decided. Apparently, this does not deter plea bargaining, but leads to its manifestation through charge bargaining. (4) All of the variables included in this proposal are known at the time of sentencing and can be determined relatively objectively—they are not related to predictions of future offender success or failure. The Parole Board salience score, on the other hand, was developed overtly with a predictive bent.

It is also worth contrasting the proposal presented here with some of the features of S.B. 42 and the proposed federal bill. Looking first at S.B. 42, there are several important differences: (1) S.B. 42 does not integrate the "incarcerative/non-incarcerative" decision and the "length of incarceration" decision; (2) S.B. 42 provides the same increments of aggravating circumstances, although the seriousness of the offences varies considerably. The consequences of this approach can be shown by a comparison between robbery and first degree burglary. The base term for both offences is three years with a one-year increment where the offence is aggravated. Yet one would expect that the marginal "social damage" in moving from a normal or "base" robbery to an aggravated robbery was greater than that involved in moving from a normal burglary to an aggravated burglary. The new California law makes all of these aggravated increments one year in length. Ironically, when one compares the increment for aggravated robbery with the increment for aggravated second degree burglary, it is found that, in percentage terms, the incremental penalty is lower. The base penalty for second degree burglary is two years with a one-year increment, or a fifty percent increase. The base penalty for robbery is three years (also with a one-year increment for aggravation, which represents a thirty-three percent increase). Given that the incremental harm of an aggravated robbery is likely to be greater than the incremental harm of an aggravated burglary, this is an unfortunate result. The outcome highlights two desirable characteristics of the present proposal. First, it highlights the desirability of developing sentence structures for each offence. Second, it highlights the desirability of a temporally flexible system.

One of the most important differences from the proposed U.S. federal legislation is that the sentencing criteria in this proposal are relatively objective and known at the time of sentencing, while the criteria proposed in the U.S. legislation are intrinsically subjective and vague, and are not known at the time of sentencing. More generally, though, this proposal makes a serious attempt to structure discretion, while S. 1437 would, under most circumstances, have only a minimal impact on existing discretion, especially for those accused who plead guilty.

D. Comparison of the Proposal with Existing Canadian Law

While this proposal may seem radical, it is in many respects a codifica-
tion of existing Canadian case law. As the *Criminal Code* allows appeal on sentence, the courts here have built up an extensive case law on the factors to be considered in sentencing, and mitigating and aggravating circumstances. While the existing case law cannot be laid out fully, the similarities can be summarized briefly.

The first similarity is that the courts have stressed the primacy of the offence. As Ruby has put it:

> Of all these factors the nature and gravity of the offence is, properly, the most often stressed. In *R. v. Lemire and Gosselin*, the Quebec Court of Appeal stated that it was the “first rule that prompts the magistrate.” The concern behind this consideration is that there should be a “just proportion” between the offence committed and the sentence imposed.¹⁰¹

The proposal to develop a unique matrix for each offence stems from such a principle. The courts also have recognized the relevance of the other factors that have been suggested. They have recognized the importance of prior record in numerous cases:¹⁰² Indeed, the courts have described in some detail the relevance of a prior record, including those exceptional cases where the lack of a prior record should not lead to a sentence reduction.¹⁰³ For example, the courts have stressed that the prior record—no matter how serious—has to be seen in the context of the current offence. Again, Ruby has summarized the principle:

> [I]t is submitted that the true principle is that the appropriate range of sentence for the offence is first to be determined and that the higher part of that range might well be appropriate for someone with a lengthy criminal record; but that the range is not to be exceeded solely by reason of the criminal record or for that matter by reason of any factor peculiar to the offender as distinct from the offence.¹⁰⁴

This suggests that the preferred approach is to structure the impact of prior record for each offence—it would be inappropriate to have a single prior record index across all offences. The matrix described above adopts such an approach.

It was suggested that the sentencing commission develop the mitigating and aggravating circumstances to be used in the matrix. It should be kept in mind, however, that the courts already have substantially—although, it is submitted, not exhaustively—laid out these factors. A perusal of the subheadings of Ruby's chapters on aggravating factors¹⁰⁵ and the plea in mitigation¹⁰⁶ shows some of the issues addressed by the justices. Some of the aggravating factors are: premeditation,¹⁰⁷ continuance over a lengthy period of time,¹⁰⁸ extensive profits,¹⁰⁹ a

¹⁰⁴ *Supra* note 191, at 89.
¹⁰⁵ *Id.* at ch. 6.
¹⁰⁶ *Id.* at ch. 7.
breach of trust,\textsuperscript{201} leadership role,\textsuperscript{202} and the use of weapons.\textsuperscript{203} Mitigating circumstances have included: the use of drugs or alcohol (although under certain specific conditions it may be an aggravating circumstance),\textsuperscript{204} provocation,\textsuperscript{205} and role as an informant.\textsuperscript{206}

The courts also have included under mitigating and aggravating factors other factors which have been included in the matrix separately (under the assumption that the terms “mitigation” and “aggravation” should be used only in relation to the commission of the offence). For example, the courts have recognized that youth usually is a mitigating circumstance,\textsuperscript{207} although perhaps not where the offence involves serious violence.\textsuperscript{208} In addition, the courts have recognized explicitly the existence of a “guilty plea differential,” even though they have been somewhat uneasy with its implications.\textsuperscript{209} They also have recognized explicitly that the existing criminal status of the offender—whether on parole or probation—will result in a sentence increase.\textsuperscript{210} Finally, the courts have recognized that there may be reasons for an increased sentence in specific jurisdictions—usually “the prevalence or increasing prevalence of a crime in a particular locality.”\textsuperscript{211}

There is empirical evidence that judges actually use these kinds of factors in the sentencing process. Hogarth has found that the factors that influence Ontario magistrates in sentencing fall broadly into two “discriminant functions”:

It would appear, therefore, that the choice of sentence among alternatives available is influenced by (a) whether or not the background and history of the offender reveal a pattern of criminality, and (b) whether the facts surrounding the commission of the offense suggest a high level of culpability or moral blameworthiness on the part of the offender.\textsuperscript{212}

Given the prevalent use of such factors, it might be argued that there is no need for reform. However, reform is still needed for the following reasons: (1) inter-provincial variation; (2) the lack of institutional, as opposed to individual, “learning”; (3) the small percentage of offenders who currently have their sentences reviewed; and (4) the lack of sentence differentiation among offences.


\textsuperscript{202} R. v. Seguin (1953), 105 C.C.C. 293 (B.C.C.A.).

\textsuperscript{203} R. v. Major, supra note 200.


\textsuperscript{206} R. v. James (1914), 9 Cr. App. R. 142.


\textsuperscript{211} R. v. Erdlyn (1956), 117 C.C.C. 207 (Ont. C.A.).

\textsuperscript{212} Hogarth, supra note 1, at 346.
The first point can be handled quickly. There is considerable variation between provinces in sentencing outcomes because the Supreme Court of Canada consistently has refused to entertain appeals concerning fitness of sentence. The second point is less obvious. The main problem is that in most circumstances it is virtually impossible for judges, sentencing and appellate alike, actually to implement uniform sentencing principles. The problem is one of "bounded rationality," and can be illustrated dramatically by a comparison of two cases, R. v. La Sorda and Cirella and R. v. St. Laurent and Derose.

In La Sorda, the accused, aged twenty-one years, pleaded guilty to robbing and assaulting a seventy-five-year-old man. Cirella sold insurance and was in the home of the victim in connection with his employment, at which time he saw that money in a substantial amount was kept in a chest of drawers. On the following day, Cirella returned with La Sorda, bringing with them a starter's pistol which La Sorda brandished upon entering the house. The victim was bound after being threatened, and the accused left the house with the money. La Sorda, missing the starter's pistol, returned to the house in order to recover it and, by that time, the elderly victim had almost freed himself. La Sorda severely beat the victim, who was still hospitalized, due in part to his advanced age, at the time of the appeal. The two accused each were sentenced to eight years' imprisonment. Neither had any prior record. The Ontario Court of Appeal held that, given their age and lack of criminal record, their sentences should be reduced to four years.

R. v. St. Laurent and Derose was decided on the same day by the same justices. The victim, L, closed a building and placed the day's receipts in a safe in the general office. At about 4:30 in the morning, he saw the two accused in the process of opening the safe. They beat L into unconsciousness and took over $1,100 from the safe. L was hospitalized for three days for an operation on his skull. The accused were sentenced to fifteen months' definite and nine months' indeterminate in a reformatory. Derose had six convictions for theft, three convictions for breaking and entering with intent and one conviction for common assault several days preceding the robbery. St. Laurent had a criminal record involving three convictions for theft. The court increased their sentences to three years each in the penitentiary, pointing out that neither had been dealt with severely by the courts in the past and that it was time for the court to try deterrence.

Thus, in the first case where the accused were young, with no prior record, the court's express goal was rehabilitation, and the sentence imposed was four years. In the second case, where the accused had considerable prior records and the court's express goal was deterrence, the final sentence was three years. Both cases were heard on the same day by the same justices. The result should not be surprising. First, appellate judges tend to react to the initial sentences rather than to employ a more broad criterion of uniformity. Second, being only human, judges cannot keep all these variables in

mind, and they have no data on other defendants that would break down
their sentences by offence, prior record and mitigating or aggravating circum-
stances. They necessarily proceed in an *ad hoc*, sequential manner. In other
words, there is no institutional learning as to appropriate sentences.

This lack of institutional learning has meant that an overt criterion of
achieving uniformity has been, in practical terms, impossible. Indeed, it is not
surprising that the courts have displayed a great deal of ambivalence when
defence counsel have used such an argument, on some occasions appearing
to endorse the principle while, on others, rejecting it. The most consistent
application of the principle appears, not unnaturally, to be in cases where
there are co-accused.\textsuperscript{216} The courts have, on occasion, increased a sentence
where one co-accused received a more lenient sentence than his partner in
crime. Thus, it is submitted that uniformity could not become a central
criterion, given existing information.

The third problem is that disparity cannot be eliminated when the sen-
tences of only a small proportion of all offenders are examined. The appeal
process is initiated either by the Crown or the accused. Naturally, it is only
initiated when one party or the other feels aggrieved, and this does not neces-
sarily lead to the “optimal” number of appeals or to a broad overview of
sentencing policy.

The final difficulty with the existing system is the wide range of potential
sentence lengths and the lack of attention that they have received. This issue
has been dealt with at length elsewhere; suffice it to say that much greater
attention needs to be given to formulating sentences for each category of
offence. For example, it seems clear that the kinds of factors that are relevant
to mitigation or aggravation are different for crimes against property as
opposed to crimes against persons. These factors need to be considered in
detail for each offence.

\section*{Summary}

One advantage of the structure outlined here is that it will allow for the
continued input of judges and prosecutors in the development of sentencing
principles. A great weakness of a legislatively defined set of sentencing prin-
ciples is that they become “frozen”—Parliament is unlikely to make further
changes for a considerable period of time. Thus, a further advantage of this
proposal is that it does not saddle the legislature with detailed, and ongoing,
sentencing changes. Indeed, the prospect of such a responsibility would in-
hit any tendency to reform that Parliament might have.

One non-legislative arena for such ongoing input might well be sentenc-
ing institutes. It was pointed out that, while there was great optimism initially
that these institutes would play an important role in improving uniformity,
they have largely failed in this respect. Nevertheless, they might well be used
by the sentencing commission to put the sentence lengths in the matrices. It
might prove extremely valuable to have judges, for example, utilize a Delphi
approach in filling in sample matrices for given offences. Sentencing institutes,

under these circumstances, really might become a device for the sentencing commission to "learn" which number should be placed in each cell.

Several criticisms might be levelled at the sentencing model proposed here. A likely criticism is that the judge will require a "readers' digest" to hand out sentences. The simple response is that this procedure is only complex in the sense that looking up a number in the telephone book is complex—conceptually, the approach is simple. Also open to criticism are the variables used to distinguish among offenders. There are no easy answers here, as it is a complicated and unpleasant task to delineate these variables. Our chief spur should be the realization that implicitly judges and prosecutors already are making such decisions every day—the issue can be avoided, but not the process. Fortunately, in Canada, we have the guidance of the courts, whose accumulated wisdom should provide us with the broad outlines for a truly rational sentencing policy.
APPENDIX I: CRITERIA TO BE UTILIZED IN THE GRANTING OR DENIAL OF PROBATION UNDER JUDICIAL COUNCIL GUIDELINES—ADOPTED MAY 13, 1977, TITLE TWO, CHAPTER II, RULE 414
(source: Judicial Council)

a) Statutory provisions authorizing, limiting or prohibiting the grant of probation.

b) The likelihood that if not imprisoned the defendant will be a danger to others.

c) Facts relating to the crime, including:
   (1) The nature, seriousness and circumstances of the crime.
   (2) The vulnerability of the victim and the degree of harm or loss to the victim.
   (3) Whether the defendant was armed with or used a weapon.
   (4) Whether the defendant inflicted bodily injury.
   (5) Whether the defendant planned the commission of the crime, whether he instigated it or was solicited by others to participate, and whether he was an active or passive participant.
   (6) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.
   (7) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant.
   (8) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

d) Facts relating to the defendant, including:
   (1) Prior record of criminal conduct, including the recency and frequency of prior crimes, age at which first convicted as an adult or adjudicated to have committed a crime as a juvenile, age at which first confined for prior crimes, and whether the record indicates a pattern of regular or increasingly serious criminal conduct.
   (2) Prior performance on probation or parole and present probation or parole status.
   (3) Willingness and ability to comply with the terms of probation.
   (4) Age, education, health, mental faculties, and family background and ties.
   (5) Employment history, military service history, and financial condition.
   (6) Danger of addiction to or abuse of alcohol, narcotics, dangerous drugs, or other mood or consciousness-altering substances.
   (7) The likely effect of imprisonment on the defendant and his dependants.
   (8) The possible effects on the defendant's life of a felony record.
   (9) Whether the defendant is remorseful.
   (10) Whether a financially able defendant refuses to make restitution to the victim.
APPENDIX II: PROPOSED FACTORS TO BE UTILIZED BY THE UNITED STATES SENTENCING COMMISSION IN THE DEVELOPMENT OF SENTENCING GUIDELINES UNDER S. 1437 (PROPOSED NEW CHAPTER 58 OF TITLE 28 UNITED STATES CODE)

The relevant characteristics of the offense are:
(1) the grade of the offense;
(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense;
(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the nation as a whole.

The relevant characteristics of the defendant are:
(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history, including prior criminal activity not resulting in convictions, prior convictions, and prior sentences; and
(11) degree of dependence upon criminal activity for a livelihood.