Criminal Law, Procedure & Evidence Seminar
National Judicial Institute
Vancouver, March 13-15, 1996

New Directions In Sentencing
Is Punishment Working?

Daniel C. Préfontaine, Q.C.
Executive Director,
International Centre for Criminal Law Reform
and Criminal Justice Policy,
Vancouver, B.C.

and

Yvon Dandurand,
Director
Policy Development and Human Rights
International Centre for Criminal Law Reform
and Criminal Justice Policy;
Faculty, Department of Criminology and Criminal Justice
University College of The Fraser Valley, Abbotsford, B.C.

Most of you are much closer than we are to the daily reality of punishment and sentencing in Canada and we asked ourselves what we could contribute to today's discussion on punishment and sentencing that you have not already heard many times before. Because of our work at the *International Centre for Criminal Law Reform and Criminal Justice Policy*, based in Vancouver, we frequently have the privilege to travel to other jurisdictions and to participate in discussions such as this one. You will perhaps allow us to share with you the growing sense of frustration that we have gained from such discussions.

First, our remarks should be prefaced by explaining briefly that *The International Centre* is affiliated to the United Nations as one of a network of criminal justice institutes working together on a range of international programs and initiatives. The *Centre* is currently involved in, among many other projects, a broad international initiative to build on existing regional and international co-operation in the field of sentencing and corrections. As part of this initiative to promote renewal in sentencing and corrections, the *Centre* has a unique opportunity to make comparisons between jurisdictions and to identify some emerging trends.

Some Fundamental Dilemmas

Clearly, the fundamental problems facing criminal justice systems in most of the Western World are so similar that there is much agreement as to the likely outcome of adhering to the present discredited policies and practices. However, in spite of numerous appeals for restraint, most countries are still busy creating new offences and increasing both the reach of the criminal law and their reliance on penal sanctions, particularly incarceration.

Most nations recognize that there are some serious and persistent problems in their criminal justice systems and that significant changes must take place quickly, before gloomy predictions of a complete breakdown of these systems become a reality.

It is also true that in some unfortunate countries the criminal justice system has very nearly broken down already. The social, economic and human costs of such a massive failure of political and legal institutions have been horrendous. Notwithstanding the frequent criticisms of criminal justice institutions, the sad and scarring example of these "nations without laws" is a constant reminder of how totally dependent our other social and economic institutions are on the presence of a strong and effective criminal justice system. The United Nations is assigning a high level of priority to multilateral interventions to assist these so-called "states without laws" in restoring local justice systems. For those of us who are perhaps a little closer to these initiatives, the experience of these countries serves as a vivid reminder of how fragile social peace really is and how foolish it is, for anyone, including perhaps Canadians, to complacently take it for granted.

Everywhere we travel, we hear about how citizens are demoralized and angered by the perception that those who break the law are not held accountable for their behaviour and for the harm done to their victims. In fact, we hear this during formal meetings of experts which we attend and we hear it in spades from the taxi drivers, the waiters and the other people we have the pleasure to meet in these countries. A very strong sentiment of insecurity is certainly present in most countries, but so is a growing public outrage about what is perceived as the relative "impunity" enjoyed by criminals.

The general feeling of insecurity is acknowledged or denied to varying degrees by local officials, depending on their own persuasions. For example, at a recent Central American seminar on citizen security, in Costa Rica, participants heard about how impunity (*impunidad*) was identified as the number one obstacle to peace and social development in the region. A joint statement had earlier been made by the Heads of States of all seven countries of the Central American Isthmus to the effect that social development was not possible without a "frontal assault against impunity".

In such appeals for a clear, determined and unambiguous "punitive policy", one hears more than a call for punishment as "a mean toward an end". There is a deep seated belief that state-administered punishment on behalf of the community, is an essential pre-requisite to social harmony. Such a belief is perhaps particularly puzzling in countries where recent history has provided the citizenry with many good reasons, if not to fear state intervention, at least to doubt the state's ability to administer punishment with fairness and equity.

Public Expectations

Clearly, a general trend which is perceivable almost everywhere is that the credibility of criminal justice institutions is greatly affected by the public's perception of sentencing, correctional and release decisions as being unresponsive to community expectations and to the plight of the victims. The Maclean's/CBC Year End News Poll[1], last December, asked a sample of Canadians whether in their opinion, looking ahead over the next five years and the start of a new millennium, the crime rate in their community would be higher. Fifty-eight percent of the respondents were prepared to assume that it would be (63% of respondents from British Columbia and Ontario). When asked whether they thought that "sentencing and punishment in the justice system would be harsher" in the next five years, 51% of the respondents thought it would be. In other words, the majority of respondents expected crime to rise and punishment to become harsher over the next five years.

In many jurisdictions, including Canada, there has been a tendency by authorities or by what one might call a "justice elite" to underestimate or disregard these public expectations as simply dictated by a desire for vengeance, fear or ignorance. Although the public's distrust for criminal justice officials is noted almost every day by the media, what is rarely acknowledged is that the feeling is mutual. It is as if both justice officials

and the public had resigned themselves to remain caught in a "*dialogue de sourds*", each side apparently remaining confident that they can still yell the loudest and the media fueling both sides to their ultimate glee. It is, as we think that you will agree, a most unfortunate and unproductive situation. It is also a most dangerous one in that it leaves more than ample room for demagogues who, for obvious self-serving reasons, would have us reduce such complex social issues to their smallest common denominators: fear and distrust.

The perceived lack of response to public expectations and concerns is resulting almost everywhere in a back-lash of anger and distrust in the institutions normally entrusted with sentencing and release decisions. In many jurisdictions, particularly in the U.S., successful moves have been made by legislation to withdraw the authority to make these decisions from the courts and the correctional systems themselves, and to impose statutory minimum sentences and other forms of automatic decisions. In some cases, there is a clear intention on the part of significant segments of the population to "commandeer" the whole justice system if they can and to impose a new direction to it.

We believe that these developments confront criminal justice professionals with some of the greatest and most immediate challenges they have ever faced. It is also a situation which forces legislators and criminal justice professionals to revisit a question for which, it would seem, many of them have little taste: the question of punishment. For all of us, it is a question which, in the words of one author, Ernest van den Hagg, is both a "very old and a painful question ". It should be obvious that the "justice elite" has, in most Western countries, attempted to distance itself and the criminal justice system from the fundamental, traditional purpose of that system: punishment. Over the years, other purposes, such as incapacitation, rehabilitation or risk management, have been suggested, but all of these seem to have failed to convince the public that they could be valid alternatives to punishment. For the last twenty years, at least as far as this continent is concerned, there has been a strong movement to reassert punishment as the main aim of the criminal sanction and yet, for the most part, this movement has been resisted by criminal justice officials.

Ms. Lorraine Berzins claims that "{t}here is no doubt that punishment <u>is</u> our official policy". The question that she raises, however, is "{w}hat has made us think this is right?". Or, is it simply that, as she puts it, "we can't imagine the world differently"? In her presentation, she expressed the view that the infliction of pain and punishment "cannot be an acceptable foundation for any government's criminal justice policy, in the light of contemporary knowledge and scientific evidence"[2]. The broader point that she makes, of course, is that denunciation is an important social response to wrongdoings, but that it does not have to take the form of punishment.

Judge Jeremy Nightingale's presentation[3] on community-based sentencing and sentencing circles is a reminder to us all of some of the other expectations communities have of the sentencing process. These expectations go beyond punishment or even denunciation of wrongdoing. There is a growing sense for many of us that the

sentencing process, not the one we know, but the one we can begin to imagine, could play an important healing role for communities whose life is being disrupted and wounded by crime. However, it is increasingly clear that a pre-requisite to the renewal of the sentencing process is the clear articulation of the fundamental purpose we wish to pursue, and that includes becoming a lot clearer about our collective position towards punishment.

Does Punishment Work?

The organizers of today's seminar are challenging us to reflect on "whether punishment works". We would suggest, however, that the obvious answer to that question is: "It better work, because we have not yet invented anything that can replace it as a credible response to wrongful and harmful social behaviour". If punishment does not work, then we surely have to abolish our whole criminal justice system, because the whole system is predicated on the assumption not only that punishment does work, but also that it is necessary to restore and maintain peace and harmony in the community.

As David Garland[4] points out, sociologist and philosophers, including Emile Durkheim, have argued that punishment is not only a moral process which preserves the shared values of a society by restoring the moral order, but "also a sign that authorities are in control, that crime is an aberration, and that the conventions that govern social life retain their force and vitality". A society's ambivalence about using punishment might indeed weaken the symbolic effect of the intended signal.

Part of the purpose of state administered punishment, as any student of the history of criminal law would likely tell us, is also to provide **discipline** to the way in which a society responds to harmful and undesired behaviour. That "discipline" is a tool of civilization and social stability. It prevents private vengeance and it actually serves also to protect offenders and suspected offenders against unofficial retaliation.

In 1982, in *"The Criminal Law in Canadian Society",* the Canadian Government certainly seemed to be more straightforward about what it saw as the purpose of sentencing and criminal sanctions: that purpose was punishment.

> "First, criminal law, for all the efforts and rhetoric expended over the past century, is primarily a punitive institution at root. (...) So, whether the question of the purpose of the criminal law is approached from a retributive or a utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive"[5]

Five years later, the Canadian Sentencing Commission, although it itself went to great lengths to avoid recognizing punishment as the main aim of the criminal sanction, nevertheless stated that:

> "Any attempt to show that criminal law is not a punitive institution would be abortive and ultimately irresponsible. It would so contradict the public perception of the thrust of the criminal justice system, that it would be met by outrage and could only exacerbate punitive feelings"[6]

New Sentencing Law in Canada

After a process of policy review that lasted more than ten years, *Bill C-41*[7] now brings us a new sentencing law. Should we be celebrating? Have the issues been resolved? Are Canadians emerging out of this long and costly exercise with a renewed sense of shared purpose and direction? Many don't think so. Why not?

If the purpose of the criminal law is essentially punitive and if the Canadian public is unanimous in expecting criminal sanctions to be punitive, why is the legislator offering us, after ten long years of policy review, we can only be described as a confusing and ambiguous statement of the purpose of sentencing. Did anyone listen to the warnings of the Sentencing Commission? Are we prepared to continue to ignore the public's expectation and to further exacerbate, as the Commission rightly predicted, the punitive feelings that we fear to acknowledge?

Why is it, we may ask ourselves, that the only ones who seem to be confused about the aims of the criminal law and the purpose of sentencing are apparently the professionals, the experts? Do they know something about punishment that the Canadian people does not?

This reminds us of the thesis recently advanced by Peter C. Newman in his latest book, "The Canadian Revolution -1985-1995". He argues that during that decade, "Canadians were seized by a highly uncharacteristic sense of betrayal and distrust"[8]. Is it simply a coincidence that, during that very same decade, our professional law reformers kept themselves busy, as they put it, "rationalizing our sentencing process". Newman describes the "Canadian revolution" as follows:

> "The nation's defining institutions first lost their credibility, then their authority and finally their followers. Nothing and no one was sacred any more. With few icons to command their loyalty or their service, Canadians abandoned their traditional sense of duty and feelings of trust"[9]

Is he right? A similar view was very persuasively expressed by Carsten Stroud in his book "*Contempt of Courts*", in which he described the deep feeling of betrayal that many Canadians have about the Canadian courts and the judiciary.

Newman adds that: "[t]he power of the elites failed to impose its political agenda (...). The dirty little secret is out: the policies of the elites no longer reflected the public will"[10]. To what extent does that statement not reflect also the attitude of most Canadians towards the new sentencing law?

According to Newman, it was precisely such a "breach of faith" that was the underpinning of the "revolution" he describes. At the root of this "deconstruction of authority", he argues, is the realization by most Canadians that it was precisely the advice of the experts which had led to the problems in the first place.

Does the new sentencing law reflect the aspirations of the average Canadian? If it did, it would likely start with a statement along the lines of that which was found in the California *Uniform Determinate Sentencing Act* (1976) and which stated quite unequivocally that "[t]he purpose of imprisonment for crime is punishment".

In contrast to such a clear statement, we might ask "is there a clear sense of direction (or shared purpose) emerging from the statement of the purpose of sentencing found in new section 718 of the *Criminal Code* as introduced by *Bill C-41*?". Clearly not, and such a blatant lack of clarity of purpose is only reflected and compounded by statements of purposes found in the *Corrections and Conditional Release Act* and in Bill C-45.

The statement of purpose contained in the new sentencing law was supposed to provide a clear direction to the courts from Parliament on the purpose and principles of sentencing. Did this mean that Parliament had finally come to grip with the fundamental objectives to be pursued by the criminal justice system? Well, not exactly. What is presented as a "compromise" between a multiplicity of ideals and conflicting objectives is in fact not a compromise as much as an "agreement to disagree". In practice, Parliament is simply re-stating its intention to charge the courts with the responsibility of achieving an impossible balancing act between competing objectives. This is precisely what the Sentencing Commission had warned us against when it emphatically stated that the requirement for unambiguous legislation is a pre-requisite to an enlightened use of discretion by the courts.

This whole approach is very much like the one adopted in the *Young Offenders Act* eleven years ago. The explicit ambiguity of the objectives of the *YOA*, as you will recall, was then defended on the basis that it was required because the Act involved the "balancing of goals". This argument is as hard to accept today as it was eleven years ago. Every piece of legislation necessarily involves a balancing of goals. That balance should be reflected in a clear statement given to those involved in interpreting and enforcing the law. The legislator did not do so in the case of the *YOA* and we

know some of the consequences of that decision. It took nearly ten years for the Supreme Court to begin to clarify the ambiguity introduced by the Act and the credibility of the law and the youth justice system has suffered greatly. The recent amendments dealing with violent youth and transfers to adult court are helpful but still leave some ambiguity as to the clear direction to be taken in all matters.[11]

About Judicial Discretion

The need for discretion in pursuing the objective set by a law should not be confused with what is now being promoted: a discretion in interpreting the objectives of the law.

Legal theorists as well as political scientists and philosophers have of course reflected on the question of the essentially ambiguous nature of authority in modern and post-modern societies[12]. Frederick Schauer, in his article on "Authority and indeterminacy"[13], argues that when intentional indeterminacy is employed in the law, "we increase the law-*making* authority of those whose function is ostensibly limited to law-applying"[14] or law interpreting. As result, that author observed, "the intentional deployment of vagueness is a way of increasing the authority of some class of officials" or experts. Vagueness is strengthening the "authority" of a certain elite.

A Missed Opportunity

When the Sentencing Commission recommended the adoption of a fundamental goal that was appropriate to the specific functions of sentencing within the overall criminal justice system, it did so explicitly on the basis of the principle that an offender who has been formally identified should not be seen by his or her fellow citizens to be "getting away scot-free". Whenever this happens, that is when the offender is not held accountable in a punitive and also whenever possible in a restorative manner for his behaviour, it is the very legitimacy of the rules, embodied in the criminal law, which is seriously undermined. The approach recommended by the Commission would have ensure that the just imposition of sanctions through the sentencing process would promote general respect for the criminal law and the community values it upholds. The approach adopted by Parliament does not appear to hold the same promise of success.

There were many other sound recommendations included in the Sentencing Commission's Report. Not the least of which were those concerning "real time sentencing", the abolition of parole and the introduction of sentencing guidelines. Together, these recommendations were offered as practical means to ensure that sentences would be more proportionate, more equitable, more understandable and more predictable, and that sentences of incarceration would be used with restraint. These were and still remain valid objectives for a serious reform or renewal of the sentencing process.

As a reform package, how likely is the “new and improved”, rationalized sentencing process introduced by *Bill C-41* to deliver on any of the above objectives of sentencing reform? Is there a lesson to be learned from this missed opportunity to truly renew our sentencing law?

We did not mean to suggest that there are not many features of the new sentencing law which will significantly improve the sentencing process. For instance, the new law contains enhanced provisions for victims of crime which were long overdue, including new provisions concerning restitution. However, one can easily refrain from too much enthusiasm about these provisions, when one is reminded that the restitution provisions enacted in 1987 have yet to be proclaimed into force due to provincial concerns regarding the costs of implementation. The dispositions concerning the collection of fines and concerning the information to be provided to the courts when probation is being considered are also welcome. However, they are largely administrative in nature and do little to meet some of the concerns Canadians, including many judges, continue to have about sentencing. Resources will have to be made available to turn some of these reforms into a meaningful reality, but is there a commitment to do so. Finally, we doubt that the new “conditional sentences” provisions are responding to anything that the public has ever asked for. The introduction of yet another sentencing alternative with little credibility and little public support is probably not a very wise move. The former President of the American Correctional Association, made the point that so-called community sanctions “too often amount to no more than benign neglect. Offenders are given freedom without responsibility, sanctions without accountability”[15]. He suggested that guidelines should be developed to make sure that criminal penalties in those programs are about as stringent as incarceration would be. In the absence of such guidelines, most community sanctions, he argued, amount to an evasion of real punishment and “the public and everyone in law enforcement knows it”[16].

We would argue, in conclusion, that both the Legislator and the criminal justice officials from whom it received advice have missed an important opportunity to respond to the concerns of the public. In many ways, and in particular by failing to address the question of punishment, they bear the responsibility for treating these concerns with a measure of contempt. The consequences of having missed this rendezvous with the Canadian public are easy to predict, but they will not be pleasant. What is also easy to predict is that we have not seen the last of sentencing reform in Canada. Indeed, it would be extremely surprising if major reforms were not brought to the law within the next five years, this time as the expression of the exacerbated punitive feelings that are not being addressed.

What is the alternative? We will not pretend to have the right answer to this question. However, we think that you will agree, particularly after today's discussion, that the onus is on judges, lawyers and other criminal justice experts to understand the urgency of the problem and to engage, together with their respective communities, in a creative

dialogue about alternatives to existing practices and the broader project of renewing our criminal justice institutions.

As we mentioned earlier, the *International Centre*, has launched an international initiative to facilitate this kind of dialogue both within and between countries. The challenge of renewing sentencing and correctional institutions is taken seriously by many colleagues from other countries and there are significant opportunities for international cooperation. Today, part of our purpose in making this presentation was to take this opportunity to extend to you an invitation to become familiar with the Centre's initiative and to consider ways in which you may contribute to our efforts.

---

[1] McDonald, Marci (1995). "Towards the Year 2000 - Canadians are Facing the Approach of The Third Millennium in The Grip Of Unprecedented Despair", Maclean's/CBC News Poll, *Maclean's, Vol. 108*, no 52, Dec. 25, 1995/Jan 1, 1996, pp. 28-33.

[2] Berzins, Lorraine (1995). *Is Legal Punishment Right?*, Criminal Law, Procedure and Evidence, Nov. 8-10, 1995, Toronto. National Judicial Institute, p. 3-19.

[3] Nightingale, Jeremy (1995). *Some Thoughts On Community-Based Sentencing*, Criminal Law, Procedure and Evidence, Nov. 8-10, 1995, Toronto. National Judicial Institute.

[4] Garland, David (1991). "Sociological Perspective on Punishment", in *Crime and Justice: A Review of Research*., vol. 14., edited by Michael Tonry. Chicago: The University of Chicago Press, pp. 115-165, at p. 127.

[5] Government of Canada (1982). *Criminal Law in Canadian Society,* p. 39).

[6] The Canadian Sentencing Commission, (1986) *Sentencing Reform - A Canadian Approach* , Canada: Ministry of Supply and Services, p. 109).

[7] S.C. 1995, c. 22, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof.*

[8] Newman, Peter C. *(1995) "The Canadian Revolution: From Deference to Defiance",* Toronto: Viking, p. 69.

[9] *Ibidem*

[10] *Idem,* p. 5.

[11] Bill C-37, 1995. An Act to Amend the Young Offenders Act and the Criminal Code, Came into force December 1, 1995.

[12] For example, see: Connoly, W.E. (1987). "Modern Authority and Ambiguity", in Pennock, J. R. and Chapman, J.W. (Eds.)(1987). *Authority Revisited - Nomos XXIX*. New York: New York University Press, pp. 9-27.

[13] Schauer, Frederick (1987). "Authority and Indeterminacy", in Pennock, J.R. and Chapman,J.W. (Eds) (1987), *Authority Revisited*. New York: University of New York Press, pp. 28-37.

[14] *Ibidem, p. 34*

[15] Johnson, Perry (1993). "Just and Reasonable Punishment", *Second International Symposium on the Future of Corrections*, Popowo, Poland, October 1993, p. 6.

[16] *Ibidem,* p. 9.