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Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada



## studies on sentencing



**Law Reform Commission of Canada**

**studies on sentencing**

**1974**

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**foreword**

Following its policy of making available to the public not only its working papers but also some of the major background studies, the Law Reform Commission of Canada issues in this volume its working paper on *The Principles of Sentencing and Dispositions*, as well as background papers by Professor John Hogarth on *The Alternatives to the Adversary System* and by Professor Paul Weiler on *The Reform of Punishment*. These papers represent only the beginning work in the area of sentencing and dispositions and will be followed by further more detailed work in areas such as restitution and compensation, fines, diversion, imprisonment and release. The working paper on principles does, however, represent a framework for our future studies and the attitudes expressed in the work of Professor Hogarth and Professor Weiler set out the basic tensions that have to be understood and mastered in a contemporary re-evaluation of the criminal process.

Professor Hogarth's basic position is expressed in the title of his paper and calls on us to re-examine the adversary system and to seek alternatives to it. He describes the underlying assumptions in this system and its limitations and develops criteria for a re-evaluation. On the basis of these criteria he critically examines the criminal process in the light of present social needs and the function of institutions in the criminal justice system. Professor Hogarth then develops various conceptual models, opting primarily for a social-educative model of criminal justice. Finally he attempts to describe a working model which shows the interaction of concepts, institutions, the public and the community.

Professor Hogarth's paper seems to go beyond the question of sentencing, dealing with the function of the criminal process as a whole. However, his work on sentencing as a human process is well known and this work as well as the work on Diversion (the East York Project which will be described in a further Commission publication) have led him to the kind of conclusion he presents here. The Commission has also clearly accepted that the question of dispositions in the criminal process go beyond the traditional concerns about sentencing and involve any disposition from the reception of the complaint by the police to the release and after-care of offenders.

Professor Weiler, somewhat as a contrast and pursuing the theme from its end, as it were, concerns himself with unflinching directness



to the question of punishment. Unflinching, because for some time now there has been almost a collusion to hide this uncomfortable fact of punishment under euphemistic words and devices. Professor Weiler re-examines the philosophical and moral justifications of punishment, the varieties of punishment and their relation to concepts such as moral persuasion, reward, treatment and correction. He then addresses himself to the range of prohibited conduct and reasons for prohibitions as well as the societal reactions which are expressed in the choice of penal instruments and the selection of persons to whom they are applied. This raises the question of the nature of legal authority and concerns about standards of due process.

Having laid this groundwork, Professor Weiler examines the justifications which have been given traditionally and historically, such as deterrence and retribution. He also relates the apparent logic of criminal sanctions to the institutional framework and the nature of responsibility and liability. He finally examines the practice of corrections and the rehabilitative ideal and attempts to de-mystify these late-comers to punishment.

Thus, Professor Hogarth calls on us for imaginative developments and Professor Weiler reminds us that behind the intents and attempts to humanize the criminal justice system may lurk even greater injustices. Clearly both are right and clearly a body such as the Law Reform Commission of Canada has to find its way in this very real tension.

**Law Reform Commission**

**Working Paper No. 3**

**the principles of sentencing  
and dispositions**

## **Preface**

This is a general introductory paper on the subject of sentencing and dispositions. It does not purport to be an academic treatise or a detailed analysis of all the issues in the area but rather seeks to identify the major issues while leaving further analyses for individual follow-up papers. For example, other papers will examine issues relating to imprisonment, deterrence, probation and compensation to victims of crime. Similarly, while the need for diversionary procedures are outlined in this paper it is contemplated that subsequent papers will examine such alternatives in more detail. In addition, other Commission papers will examine topics related to sentencing and dispositions such as the classification and definition of offences.

The purposes of this paper are to raise what are seen to be core issues in sentencing and dispositions, to indicate a general approach or position on these issues, to suggest that fairness and rationality in sentencing would be encouraged by a legislative statement of principles and criteria and to invite public discussion on these points. Consequently, the paper is not laden with detailed references to academic writings or scientific reports. Such writings and reports have been taken into account in formulating the paper. Supporting material and references are available at the Commission.

In drafting this paper, terminology has been an ever present problem. Words such as "punishment" and "treatment", for example, are used by different people in different ways. In addition, "retribution", "rehabilitation", "deterrence" and "incapacitation" have various meanings that may not be clear even to those who use them. They, nevertheless, imply ideological approaches to the question of sentencing. Today, changing values and concerns over the purposes of criminal law and sentencing suggest not an abandonment of the old terms but a decreased emphasis on them. Accordingly, in this paper rather than define "punishment" to mean any imposition by the state in the name of criminal law including medical or other treatment, the word "sanction" has been used.

In this sense, "*sanction*" means a penalty imposed; it may be imposed for purposes of punishment, protection, restitution, or treatment. The notion of "sanction" is wide enough to include such orders as conditional or absolute discharge: orders which can hardly be described as either punishment or treatment. Sanctions may be consensual as in restitution, or they may be imposed without the consent

of an accused as in the case of imprisonment. In the sense that they take note of the wrong done, sanctions have a value in themselves.

*Punishment* is used in the narrow sense of a sanction imposed for the purpose of giving adequate expression to the seriousness of the offence and concern over damage done to individual rights and social interests. In reflecting a need to right the wrong and to relate the disposition to the seriousness of the offence, punishment may contain elements of a limited retribution and emphasize the common good and the need for public protection.

*Deterrence* as used in this paper, refers both to "general deterrence", sanctions imposed for the purpose of threatening or "educating" potential offenders to stay within the law; it also includes "specific deterrence", sanctions imposed for the purpose of restraining a specific accused from repeating his offence.

As used in the paper, *rehabilitation* relates less to the common good and more to specific offenders. It refers to those procedures that are used in favour of offenders. In a sense, these procedures are by way of mitigation of sanctions.

*Sentencing* is used to refer to that process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence. As the sentence is carried out, it may be necessary from time to time, as in probation, to change or amend conditions relating to the sentence.

*Disposition* is used to refer to the actual sanction imposed in sentencing, whether this be at a pre-trial diversionary procedure or following conviction at a regular trial.

The organization of the working paper shows that we do not consider "sentencing" as a function which begins at the end of the trial and ends at the beginning of the sanction but as a process related to all stages of the administration of justice. The pronouncement of an amount of money to be paid or of a time to be served in an institution or even the imposition of such measures as probation, do not provide sufficient grounds to re-evaluate and to re-shape what many consider to be the cornerstone of the criminal process.

## **Introduction**

The purposes of the criminal law and of sentencing and dispositions are closely tied together. Unless we know what the purposes of the criminal law are, or ought to be, we will not know how to formulate a consistent and rational sentencing policy. How a society defines those purposes and aims tells us a great deal about the kind of people who live in that society and what their values are. Quite clearly, in a fast changing society, such as ours today, it can be expected that the criminal law may be regarded differently than in a stable society which saw the enactment of the present criminal code over seventy years ago.

In those days, men were confident that they had the answers to a whole range of social problems including criminal law; today men are not so confident, for many of the assumptions of Victorian morality have been abandoned under the impact of rapid social and technological change.

This rapid and accelerating change in values is one of the most dramatic developments in the history of man. Many people grappling with the problems of drug use, of increasing petty theft or death and injury caused by automobile drivers or the risk to life and health posed by industrial and urban pollution, may agree with Alvin Toffler when he says that changes in values are now so rapid that the identity between one generation and the next is shattered. Should this generation presume to use the criminal law to bind the values of future generations?

Since the criminal law is only one of the ways in which society attempts to promote and protect certain values respecting life, morals and property, it becomes important, if we are to avoid unnecessary social conflict and alienation, that the criminal law be used with restraint. We may choose to be tolerant of different life styles and values rather than rigidly repressive.

As to certain core values respecting the dignity and well-being of the individual or the ultimate authority of state power, there may be a wide measure of agreement and support. In respect of other values relating to life style and morality, including the use of alcohol and drugs, obscenity or certain kinds of sexual conduct, there may be a wide measure of disagreement as to which values should prevail.

Where conflict arises in an area in which values may be changing or uncertain, or where the injury to the protected value is small, we may not wish to resort to the full force of the criminal trial, conviction and sentence. Within the criminal law, is there not room for settlement and arbitration as well as for adversary court room trials? Is there not room in a large number of cases for recognizing the injury to the victim as well as the injury to society? The least damaging intervention by the state and the most satisfying intervention as far as the victim is concerned may often be encouragement of restitution or other settlement or an arbitration at the consent of the victim and the offender, again with a view to restitution and compensation.

Such an approach draws from historical experience indicating the inevitability of crime and the futility of trying to stamp out conflict between individuals. It recognizes the need to protect, support and make clear core values without assuming that offenders are sick and in need of treatment. Nor does it assume that simple vengeance is an appropriate response to crime generally. Rather, it is suggested that society's interest in having certain values upheld and protected can often be met by giving primary attention to the injured victim and by promoting a fair and just reconciliation between the offender and the victim.

In framing a criminal law and sentencing policy for the next few years, can we do better than to recognize the limitations of criminal law and corrections? Can we do better than to insist that whatever state intervention is taken through the criminal law in the lives of individuals, it should be justifiable as serving some common good, and that the intervention be limited by considerations of fairness, justice and humanity?

## **Purposes and Principles**

In the sentencing and disposition of offenders, a prime value ought to be the dignity and well-being of the individual. It is self-evident that criminal law and social change in Canada seek to articulate, distribute and protect this and other values important to society. Laws protecting inviolability of the person and sanctity of life are simply illustrations of the prime value placed on individual dignity and well-being. This value commands that attention be paid not only to the interests and needs of the collectivity but to the offender and victim as well.

Enhancement, re-alignment and protection of community values justifies intervention by the state in the benefits or rights enjoyed by an offender. Such intervention, however, cannot be justified where there is no net gain to the interests of the community, including the victim and his family.

Thus, there are two bases upon which to justify an initial intervention by criminal law and sentencing: the common good and the sense of justice which demands that a specific wrong be righted. In other words, state intervention to deprive offenders of their property or freedom may be justified on a theory of justice according to which the wrong done ought to be righted. It would seem, however, that as a preliminary justification, it should be shown that state intervention would serve the common good; otherwise it could be said that men should be subject to sanctions, even though such sanctions appear useless.

No matter which of the two bases is used as a justification for initial state intervention, it is important, in deciding questions of sanctions, that state intervention be limited so that (1) the innocent are not harmed, (2) dispositions are not degrading, cruel or inhumane, (3) dispositions and sentences are proportional to the offence, (4) similar offences are treated more or less equally, and (5) sentencing and dispositions take into account restitution or compensation for the wrong done.

The above criteria offer a place for deterrence and rehabilitation in a sentencing policy but a place that has limitations. The common good provides a means whereby deterrence, particularly through the educative aspect of sanctions, may be used, along with incapacitation, to underline the wrong done to common values and to re-affirm or protect those values. Justice, on the other hand, in focussing on the wrong done and

the need to restore the rights of the victims, provides an opportunity to individualize the sentence and to emphasize the need for reconciliation between the offender, society and the victim. Thus, within the context of a sentence which reflects the gravity of the harm done and is humane, there is room for restitution and rehabilitation.

Rehabilitation, in the sense of improving the offender's ability to cope with life, may not be an unimportant factor in sentencing. Too frequently, rehabilitation is measured only in terms of reduced recidivism, a measure that has repeatedly demonstrated the limited capacity of treatment or rehabilitation to control crime. Yet, to improve an offender's life skills or to reduce his personal suffering are simple, humane gestures that should have a proper place in sentencing policy. Such rehabilitative efforts, indeed, may even have indirect benefits in reducing recidivism in particular cases.

This indirect benefit, however, is at present tenuous and difficult to achieve. First, there is the problem of proven treatment programs. It is very difficult to point to any particular treatment program and claim proven results in terms of crime reduction. The reports are equally disappointing whether the program was designed to change attitudes and outlook or develop educational and job skills. Secondly, in selecting those offenders appropriate for treatment, science constantly confesses an inability to predict accurately who is in need of treatment. This problem of inadequacy in prediction is common to bail and parole applications as well but takes on special significance with respect to treatment of allegedly dangerous or violent offenders. If it is not possible to identify accurately those in need of treatment, nor to run programs successful in preventing crime, it would be unwise to base sentencing policy on rehabilitation and treatment. Nevertheless, as indicated above, a sentence determined on the basis of what is fair and just may well provide for rehabilitation within its confines.

Ignorance and uncertainty respecting deterrence likewise raise deep moral and practical problems for the legislator or judge who bases dispositions on the false assumption that a bigger stick is the answer to crime. While criminal laws, arrest and trial procedures, sentencing and the experience of jail probably do have a collective deterrent effect for some classes of persons in respect of some types of crimes, the deterrent effect of sentences *per se* is problematical. Longer terms, generally, do not appear more effective than shorter terms in reducing recidivism and prison appears no more effective than release under supervision in preventing recidivism.

When a judge sentences an offender to jail "to protect the community" what does he mean? Does he mean that the jail term will reduce the likelihood of this particular offender committing another



crime, or does he mean that while the offender is locked up the community will be free of his depredations, or does he mean that the sentence of imprisonment will deter others from committing similar crimes? Of these three possible meanings, only the second can be fully accepted and even then the security offered by imprisonment is short lived: the average term of imprisonment for break and enter, in Canada, for example, is fourteen months. Since the law remits one-third of the sentence as a reward for good behaviour and permits release on parole at an early stage of the sentence, the actual time spent in the institution, on the average, is less than ten months for this offence.

The first of the three possible interpretations, above, is definitely unfounded by the evidence; if anything, it is said, jail is likely to strengthen recidivism rather than reduce it. As to imprisonment serving as a general deterrent to the rest of us, the evidence is highly uncertain. Professional criminals probably are deterred by a real risk of being put out of business for a year or two. Other persons who have previously been imprisoned probably are not greatly deterred by the knowledge that the court has imposed a term of imprisonment on someone else. For the vast majority of law abiding people, arrest and trial and the shame and stigma of conviction probably are a greater deterrent than imprisonment. But even these are becoming less effective deterrents as an over-extension of the criminal law in drugs, drinking, gambling and other crimes affects greater and greater numbers of otherwise "law-abiding" citizens. In addition, for a marginal group, whose conduct is not dominated by passion or sub-conscious drives who live on the borderline of crime, imprisonment may have some deterrent effect, but how much greater it is than the deterrent effect of arrest or trial is not known.

Some further light on the probable deterrent effect of sentencing and dispositions can be gained by taking a look at what is actually happening in respect of selected crimes. It stands to reason that if the chances of being charged and convicted are very low, the deterrent effect of the threatened sentence is probably low as well. Studies show that greater deterrence is more likely to result from increased certainty of apprehension rather than increased severity of sentence.

This being the case, it is instructive to note that, among the most common offences, various crimes against property, most are not cleared up by police. In 1970, in respect of theft over \$50.00, charges were laid only in ten cases out of every one hundred reported. In break and enter, charges were laid in sixteen cases out of one hundred. In addition, another six to twelve per cent of cases were cleared up in some other way than by laying a charge. If the risk of charges being laid is only about one out of ten in theft and break and enter, there is a limit to

what sentencing can do to measurably increase the deterrent effect of the law. Needless to say, if unreported thefts and break and enters were taken into account, the risk of being charged would be even lower. Indeed, certainty of apprehension in respect of some of the most common crimes in Canada is so low that it is unreasonable to expect harsh sentencing laws to compensate for this weakness.

To a lesser extent the same point may be made with respect to the most common crimes against the person: assaults (assaults constitute almost 70 per cent of offences against the person) robbery and rape. The percentages of such cases cleared by charge in 1970 were 34.5, 26.8, and 47.8 respectively, although when clearance by other modes were taken into account, it can be said that approximately seven out of ten reported assaults, woundings and rapes were cleared by charge or otherwise and one out of three robberies.

While the ability of criminal law and sentencing in particular to deter or treat offenders is obviously limited, this does not mean that nothing should be done. Without the criminal law, one could imagine that crime would flourish with impunity. From the scholarly research and examination of practices, however, we can draw some better understanding of what the criminal law cannot do very effectively; we can get some insight into what ought to be the primary purposes and emphasis in sentencing and dispositions. Is it realistic to expect the law to do more than to take note of the gravity of the offence and, through a range of dispositions, to affirm, uphold and protect core community values?

## **An Alternative Procedure: Diversion**

Crimes brought to the courts under the Criminal Code in rank order of frequency are (1) thefts and possession of stolen property, (2) automobile offences including impaired driving, (3) being drunk or causing a disturbance, (4) assaults, and (5) break and enter. Many of the thefts involve property values of less than \$50.00 and even in break and enter, in general, the average value of property stolen is less than \$150.00. In short, the bulk of the work of the courts in Criminal Code offences involves rather minor violations of property values or such problems as impaired driving or being drunk in public, some of which could, perhaps, be dealt with more informally and economically as regulatory offences. The luxury of an adversary battle in the criminal courts and the stigma of criminal conviction and sentence may not be necessary in all of these offences.

To protect property values, particularly in minor cases, or to protect the value of inviolability of the person as it arises in cases of assault, the criminal trial, again, may not be all that effective. Rights of possession and dignity of the person are protected by tort law as well as by criminal law. Family law protects and enhances fundamental values arising out of domestic disputes, including assaults. In family law, juvenile law or labour law, for example, the values that are protected and supported by law are not necessarily fought out in an adversarial court setting, but in a settlement or conciliation procedure. This mode of proceeding appears to be effective in underlining and clarifying interests and community values. Moreover, unlike the adversarial setting, conciliation encourages full recognition of the interests of the victim and the need for restitution and compensation. At the same time, the issue of responsibility is not evaded but worked out with fairness, humanity and economy. Settlement and conciliation procedures might well be used in a range of rather minor offences, many of them property offences, where neither justice nor utility warrant the full exercise of the state's criminal law power through arrest, trial, conviction, sentence and custodial detention.

Provision for some consistent and rational means for diverting minor criminal cases from the court and into settlement procedures is also demanded on the basis of fairness: similar types of conduct should be treated more or less equally. Yet one of the most disturbing criticisms about sentencing and dispositions is that they tend to fall heaviest

on the young, the poor, the powerless and the unskilled. It is a fact that the greatest number of persons appearing in magistrates' courts charged with offences against property or causing a disturbance or assault are young people, either unemployed or working at low paying jobs. In addition to the purely economic factors, it may be agreed that the life styles of the young and the poor are more likely to bring them to the attention of police than is the case with business or professional classes. Discretion in law enforcement tends to divert business or professional classes from the criminal courts. Business frauds or thefts may often be dealt with by way of private settlement or restitution. On the other hand, people without money or influence, when caught in petty theft or shoplifting frequently are given no opportunity to make redress, and large numbers of them are prosecuted directly in the courts. These ordinary people, frequently, do not have the prestige, possess the bargaining skills, nor command the psychiatric, educational or economic resources to enable them to enter into settlements that result in a diversion of cases from the criminal courts. One of the most important things sentencing and dispositions can do is to attempt to overcome this inequality. To allow it to continue undermines the legitimacy of law itself.

Hence the importance of procedures that permit a consensual settlement of minor cases involving restitution, work, education or the taking of treatment where necessary. Where the accused is unemployed or without economic resources, he should be provided the opportunity to do work in private industry or the public service at no less than a minimum wage, paid by the state, if necessary. Educational opportunities already exist, many at state expense, as do psychiatric or general medical treatment. That is to say, the services necessary to make diversion operational are already available in many areas. What is needed, is not necessarily more services but a means whereby the services are made equally available despite social and economic differences among alleged offenders.

As already indicated police, prosecutors and judges now engage in diversionary practice on an *ad hoc* basis. A policeman will induce a thief to restore the goods and the victim agrees to drop the complaint. A Crown prosecutor agrees to stay proceedings providing the accused seeks psychiatric treatment. A judge adjourns a case *sine die* on condition that the accused be of good behaviour and finish his year's education. Indeed, in juvenile cases, family disputes and, to a lesser extent, in shoplifting cases, police in some cities and towns have developed a policy of diversion. In some centres, special units of the police are set aside with skilled personnel trained in handling these special kinds of disputes. In the United States, projects conducted by the Vera Institute

for Justice and others have demonstrated the value of court employment projects and other types of diversion schemes both before and following conviction. In certain Canadian cities, various judges and crown prosecutors have run informal diversion schemes over the years. More recently, in various provinces, the Native Peoples' Court Communicator Projects are trying out the feasibility of diversion schemes integrated with intensive follow-up services. Experience to date tends to show not only that diversion is feasible but that it reduces costs and offers a satisfying disposition without encouraging impunity.

As an alternative to the full adversary contest in the magistrates' courts, then, certain cases could be diverted for settlement or conciliation before a justice or other official. The settlement would result in a court order embodying the terms of the settlement and subjecting the offender to recall in default of performance. The justice would then have a discretion to vary the terms of the settlement or refer the case for trial in the usual way. References to alternative procedures will also be found in future Working Papers relating to criminal procedure and further reference to the functions of judge and prosecutor will be found later in this paper.

While there would be no conviction or sentences as such involved in the settlement, the process itself would have a deterrent effect in that it would be a valuable learning process for the offender. This would stem from his having to appear in answer to a charge, face the victim, acknowledge responsibility or partial responsibility for the alleged wrong and meet the challenge to come forward with some concrete undertaking to restore the wrong done. The settlement process itself would underline the values that society insists be respected. The settlement or conciliation procedure in its educative effect would thus promote the protection of core community values.

For the offender, such an experience may have an additional positive value. To see the victim as a person whose rights have been violated, paves the way for expiation. This incidental effect of settlement procedures may be especially helpful to some offenders. Unfortunately, the adversary nature of the criminal trial, where positions are polarized and where the psychological effect is such that the offender might well begin to believe himself blameless in a winner-take-all situation, is not conducive to an acceptance of responsibility or a recognition of the rights of others.

For the victim, the criminal trial may be equally unrewarding and destructive, whereas, the proposed settlement process restores him to the centre. What was his role in the alleged offence? What does he demand by way of satisfaction? We should not overlook the fact that,

historically, before the king took collection of fines for revenue purposes, compromise and settlement were commonly used. Now that Her Majesty is no longer dependent upon fines in order to balance the budget fresh consideration should be given to using diversionary or settlement processes as an alternative disposition.

### **Intake Service: Criteria**

A diversion program such as is proposed here assumes an Intake Service to screen cases as they come in. The precise details of the screening service remain to be worked out but presumably a magistrate or some other person with experience and training, working according to certain standards and criteria, would make an initial determination whether a case should be sent on to trial in the ordinary way or diverted for settlement. In keeping with the philosophy already expressed, serious cases would not be appropriate for diversion. For these, the adversary contest of the criminal trial and the emphasis on a just and fair sentence should be retained. At the other extreme, there are cases where diversion clearly ought to apply, and in the middle, a range of cases where diversion might be appropriate depending upon the circumstances. For example, petty theft or having possession of stolen property under \$200.00, common assault, homosexual offences, bestiality or exhibitionism, family disputes, mischief to property, joy riding, minor break and enter cases or cases involving certain types of mental illness, probably should be diverted unless there are strong factors pointing to the desirability of a trial. Other factors that might well affect the decision to divert would include whether or not it is a first or second offence, whether or not the offender is a juvenile or youthful offender, and whether there are community agencies or services available to assist in a satisfactory settlement of the case. Another consideration should be that the facts of the case make it reasonably clear that the offender committed the alleged act. Where there is a great uncertainty as to the facts, the case should be referred for trial with the option of having it sent back for settlement at the discretion of the trial judge. Needless to say, the consent of the victim and the offender are pre-conditions to diversion, settlement or mediation. A working paper on diversion procedures should also be concerned with who is to make the decision to divert, and on what kind of evidence.

To ensure justice, the decision whether or not to divert should be made in an open hearing. This also means there must be some record of the decision and the reasons for it. Without such protection, the intake officer would be open to charges of influence and bias that might be difficult to refute.

### **Custodial or Non-Custodial Disposition: Criteria**

Although a diversion procedure may provide an alternative disposition for certain kinds of cases, more serious cases would still be dealt with by way of trial with imprisonment as a possible sanction. Because of the doubtful effectiveness of imprisonment in reducing recidivism, however, and the high costs of imprisonment, both economic and social costs, as well as direct and indirect costs, economy demands that imprisonment be used with restraint. This is not to say that complete deprivation of liberty may not be a deterrent in some cases. After all, it is estimated that from 35 per cent to 60 per cent of those imprisoned as first offenders do not return. It may well be, however, that had they been placed on probation or fined they may not have returned either. No one really knows much about the effectiveness of sanctions. Because there is some reason to think that one sanction may be as effective as another, however, the principle of restraint may be a wise one. To assist the courts in deciding whether a custodial or a non-custodial sentence is proper, a Sentencing Guide should contain a statement of priorities and criteria to be considered in reaching such a decision. It is suggested that as a rule, the priority should be to impose a non-custodial sentence unless otherwise indicated upon consideration of the following criteria:

- (1) the gravity of the offence;
- (2) the number and recency of previous convictions; and
- (3) the risk that the offender will commit another serious crime during his sentence unless he is imprisoned.

In applying the foregoing criteria it is suggested that a Sentencing Guide list factors such as those proposed in the New Draft Code (U.S.) that ought to be accorded weight in favour of withholding a custodial sentence:

- (a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;
- (b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person nor his property;
- (c) the defendant acted under strong provocation;



- (d) there were substantial grounds which, though insufficient to establish a legal defence, tend to excuse or justify the defendant's conduct;
- (e) the victim of the defendant's conduct induced or facilitated its commission;
- (f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;
- (g) the defendant has no history of prior delinquency or criminal activity, or has lead a law abiding life for a substantial period of time before the commission of the present offence;
- (h) the defendant's conduct was the result of circumstances unlikely to recur;
- (i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;
- (j) the defendant is particularly likely to respond affirmatively to probationary treatment;
- (k) the imprisonment of the defendant would entail undue hardship to himself or his dependants; and
- (l) the defendant is elderly or in poor health.

There may also be need in a Sentencing Guide for extended terms of imprisonment for selected offenders such as habitual offenders and sexual offenders. Whether the so-called dangerous offender should also be dealt with by way of an extended term or by way of civil commitment, following completion of his ordinary term, will be the subject of another paper. In all such cases standards and criteria should be clearly spelled out in a Sentencing Guide as an aid to the court.

Where a court decides that a sanction involving complete deprivation of liberty is necessary, it should not, at the same time, ignore the question of treatment. The Commission will want to consider whether or not custodial sentences, in some cases, for humanitarian and rehabilitative reasons, should be served in a treatment institution. In such a case, the sentence ordering deprivation of liberty may be combined with a hospital order, permitting treatment on consent.

In addition, neither punishment nor public security demand that all custodial sentences involve absolute deprivation of liberty. There is room for week-end detention or detention in community hostels or work camps with varying degrees of control over residence requirements.

## **Release Procedures**

Where imprisonment is imposed, a further problem arises in release procedures. Should the prisoner be detained until his full sentence has expired or should the sentence be shortened for various reasons? At present, sentences of imprisonment are almost always shortened either through remission for good behaviour or by parole. Under provisions of various statutes, a prison sentence is reduced by one-third if the prisoner behaves himself. In addition, prisoners can be released even earlier on parole supervision. Do these release procedures make sense or should the law be straight and simple, so that a two year sentence means that the prisoner walks out a free man only when the two years have expired, no more, no less? Is remission for good behaviour essential to good discipline in the prisons? Can parole still be justified on the ground that it reduces recidivism? If parole cannot be shown to be effective in this respect, and there is some evidence to show that it cannot, should parole continue to be an integral part of sentences that deprive offenders of their liberty? Does common humanity or a desire to save public expense suggest an amelioration of loss of liberty by release under supervision where such release does not pose any substantial risk to the community?

One of the problems associated with release procedures involving remission and parole is that of fairness. Remission and parole decisions as well as those involving probation increase greatly the amount of administrative control over the prisoner. Is such increased control justifiable in terms of the purposes to be achieved? If increased administrative control over the offender can be so justified, is the power exercised fairly and according to criteria that the offender knows and understands? If remission and parole release procedures are not effective in achieving agreed-upon goals and if they increase the dependency and frustration of prisoners why should they be retained? These questions and others related to the need for standards of fairness in release procedures will be examined independently in a forthcoming paper.

## **Supervising the Execution of the Sentence**

Once the judge has passed a sentence of imprisonment, the offender passes into the hands of the correctional system which supervises the carrying out of the sentence. The prison system may classify the offender according to various criteria and transfer him from one institution to another: work, educational or therapeutic programs may be made available to the offender, or denied him for various reasons. While in prison, he is subject to the rules governing the institution and may be punished for their breach. Such punishment no longer involves corporal punishment but it does run, for example, from isolation cells to loss of remission time, loss of work or recreational privileges, refusal to grant parole or revocation of parole. In addition, the prisoner may be subjected to brutality and degradation at the hands of guards or other prisoners.

Until very recently, the courts and Parliament have taken the view that what happens to the prisoner within the correctional institutions is entirely a matter of administrative discretion and not an area in which the traditional rules of fairness must apply. There is now some evidence that the courts, at least, are not willing to continue to turn their backs on abuses and unfairness within the prison and parole systems.

With minor exceptions, an unchecked and unstructured discretion runs throughout dispositions and sentencing down to and including parole hearing and release, and dispositions within the prison Warden's court. It is important to the credibility and legitimacy of the administration of justice that decisions taken within that system be perceived to be fair and rational. It is no longer sufficient to excuse correctional law from the usual standards of fairness that prevail in other areas involving discretion. For this reason, a Sentencing Guide should contain a part setting forth standards that should prevail in key areas of correctional decision-making.

Clearly, in evaluating the quality of justice in the execution of the sentence, some considerable emphasis should be given to devising techniques that render decision-making more open, more visible and more accessible to the community. Various techniques other than judicial review and legislative guidelines can be suggested for further analysis including the concept of an ombudsman for prisoners, the French and Italian institution of "*le juge de l'exécution des peines*", a Visitors' Committee along the English model or the provision of legal aid services within the institutions.

## **Roles and Functions within the Sentencing Process**

### *The Victim*

In the administration of justice, concern for protection of core values or protection of the community as it is sometimes called, means that one of the goals of the system should include satisfaction of the victim's needs. This in turn means that fresh consideration should be given to the role of the victim in sentencing and dispositions. The alleged offence, having injured a protected community interest, finds its origins in the infringement of the victim's rights and expectations. The extent of the injury to the community and the victim will depend, in part, upon the circumstances, including the role of the victim in relation to the offender. Was the assault, for example, the result of a long standing feud over landlord-tenant relations? Did the victim share some responsibility in precipitating the alleged offence? If so, can the victim's interests, society's and the offender's be met through a settlement or an arbitration, or is the injury so serious that a criminal trial is the best way of protecting the community interest?

In any event, the need for the victim's active and informed participation in settlement and arbitration are self-evident. Even at trial, concern for the violation of the victim's interests should manifest itself in several ways including (1) respect for the convenience of the victim in granting requested adjournments, (2) an opportunity for the victim to express a view as to the appropriate sentence, and (3) priority in sentencing and dispositions to restitution and compensation for the loss or injury suffered.

The increased role of the victim may give rise to fears of disparity in sentences. However, such disparities, if they do occur will be within the moderating confines of legislative principles and criteria applied by a court. Similarly, the risk of intimidation of victims cannot be overlooked and must be provided for.

### *The Offender*

At the same time the role of the offender ought to be viewed differently. Rather than the passive role he is now encouraged to assume in denying total guilt and seeking acquittal on legal grounds, the offender ought to be encouraged to meet directly with the victim in minor cases where the facts are not in dispute, and to accept his share

of the responsibility for the wrong done by proposing a fair and equitable settlement. In giving the offender some control over the decisions that affect his life, rehabilitation may be truly effected. Even at trial, the sentence should as far as possible encourage the offender's active participation and encourage him in restoring the harm done. To encourage the offender to accept responsibility and to exercise some power over his own destiny not only enhances respect for individual life and well-being but in encouraging a reconciliation of the offender, the victim and the community, greater community protection may result.

### *The Prosecutor*

To protect the social interest in fair and equitable settlements or dispositions, the crown prosecutor may be expected to play an active role. Already the prosecutor under existing law enjoys a wide discretion in screening charges, withdrawing charges, suspending prosecutions and negotiating pleas. In a system where greater emphasis is placed on pre-trial settlement procedures or on arbitration, with the trial reserved for more serious cases, the functions of the prosecutor take on added importance. First, the prosecution would serve as a back-up to absorb those cases not settled voluntarily by the parties or by the police. Secondly, the prosecutor, presumably, would always be available to receive a complaint or information in those cases where the victim for one reason or another is unwilling to settle the case at the police level and wishes to proceed either to mediation or trial. The prosecutor in such cases would exercise a discretion whether the complaint should be proceeded with, and, if so, in what manner.

If the case proceeds to mediation, the functions of the prosecutor would come to an end, for it is not contemplated that the prosecutor should also serve as the mediator. If the case proceeds to trial, the prosecutor again ought to represent the state's interest. Traditionally, the Crown prosecutor, unlike his American counterpart, was supposed to have a benign disinterest in the outcome and disposition. Indeed in some provinces, this has been carried so far that it is considered to be improper for the Crown to make a recommendation as to sentence. Another view, however, is that the state, through the prosecutor, has a very real interest to protect through the trial, conviction and sentence. It is not the function of the judge to represent the state's interest or to reflect community desires in particular cases. Rather such interests can best be put forward by the prosecutor.

The judge at sentencing, however, has a prime function to see that justice is done with fairness and humanity. Where imposing a sanction would appear to serve no purpose in protecting societal values or in giving fair satisfaction to the victim's needs, the judge should have

authority to determine that justice and the common good would both be served by passing a sentence that clarifies the conflict but does not involve a sanction. The function of the judge, then, ought not to be to represent the state's interest in sentencing or disposition but, having listened to the victim, the prosecutor and the offender, to determine, with reason and compassion, what sentence is just and equitable within a framework of sentencing policy.

### *Judges or Sentencing Boards*

At present, the trial judge makes the sentencing decision. In other countries, the jury or the sentencing board may pass sentence. Still other variations provide for lay assessors to sit with the judge and to assist in sentencing. More recent proposals in the United States stemming from a strong concern over inequalities in prison terms suggest, that when a judge decides to impose a sentence of imprisonment, the term should not be within his discretion but should be a mandatory term provided by statute.

Very few people in Canada, at least, seriously suggest that the sentencing power be taken from judges and given to juries. There is some support, however, for the notion of sentencing boards. This support derives from several motives. First, there is a recognition of the complexity of sentencing, particularly where rehabilitation is the primary aim. Accordingly, sentencing boards are looked to by some people as devices whereby the expertise of the social sciences may be brought to bear in support of the criminal law. Secondly, there is a discontent with wide disparities in sentencing: boards are looked to as devices whereby consistent policies and practices may be followed by a handful of men and women, thus bringing a greater uniformity to the administration of the criminal law.

The desire to bring expertise to the sentencing process, as indicated, stems from a belief that, in sentencing, the disposition must fit the offender rather than the offence. It reflects a faith in rehabilitation and treatment and an assumption that the means to treat and cure are at hand if only we have the wit to use them. It has already been said that this paper rejects this approach to sentencing as mistaken and unfounded. Where the basic approach reflects a just but humane sentence, there is no need for the special knowledge of the social scientist to displace the common sense of the judge.

The social sciences should rather be used in testing assumptions in a sentencing policy and providing evaluation to the effects of sentencing practices, thus contributing to improved sentencing options and policy.

As for greater uniformity in sentencing, it seems reasonable to suppose that a board might be able to proceed with less disparity and greater consistency than one thousand or more individual provincial court judges and magistrates spread across half a continent. Logistically, however, one board could not begin to handle the almost one hundred thousand convictions recorded annually, under the Criminal Code. There would have to be many boards, one in each judicial district, for example. Even then, it is not likely that the Boards would be expected to deal with anything other than the more serious cases. As between the boards there would still be need for coordination and consistency.

Where sentencing boards are in operation, in California and in the state of Washington, their function is limited. Neither of the Boards in those states has jurisdiction unless a judge first passes a sentence of imprisonment. Thus one area of disparity remains even with those boards, and that is in the initial decision to impose a custodial as opposed to a non-custodial penalty.

In the state of Washington, once the judge decides that imprisonment is called for, he must impose the maximum sentence set out in the statute; the judge may, however, set the minimum term to be served before release on parole. The Board may then re-examine and re-determine the term of the sentence that must be served. The California Board has similar powers, but in addition, the Board, not the judge, sets the minimum term. In addition, both the Washington and California Boards serve as the state parole authority.

The experience with the California Board has given rise to persistent criticism both by prisoners who resent the uncertainty of the indeterminate sentence and writers who point to the long terms of imprisonment served in California and the inequality and disparities that have resulted from the Board's work. Incidentally, the California Board has not lived up to its expectation of providing social science expertise in the sentencing process. Most Board members, until recently at least, were former policemen or correctional personnel.

From the above, it can be seen that sentencing boards offer no panacea to the problems of expertise or uniformity. Indeed, the elusive goal of justice in sentencing has given rise to legislation where discretion in determining the length of the terms of imprisonment to be imposed is removed altogether. The disparity problem, however, is not cleared up, it is simply removed to the parole release stage. The disparities are not so visible but may be even greater at that level. As yet another level, sentencing boards may promote disparities. The Washington Board, for example, leaves power with the judge to set a minimum term

before the parole board can release. This discretion can give rise to disparities, albeit on a reduced scale.

If discretion is removed altogether as to the length of the prison term, judges may respond by increasing the proportion of cases disposed of by non-custodial sentences. While this may have the desirable consequence of reducing the number of offenders sentenced to imprisonment, it ought not to be achieved at the expense of justice. In addition, where judges or Crown prosecutors wish to avoid a term of mandatory imprisonment, there may be attempts to alter the charge or accept a plea to a lesser offence. It goes without saying that plea bargaining can nullify the purposes of sentencing and reduce dispositions to a level of bargaining devoid of justice or fairness.



## **Structuring Discretionary Power in Sentencing**

Rather than resort to drastic curtailment of discretion in sentencing and dispositions, attempts have been made in other jurisdictions to promote uniformity through structuring and channelling discretion. One important means of doing this is through a legislative statement of basic policy setting forth the philosophy, the purposes, standards and criteria to be used in sentencing and dispositions. These provide a common starting point, common assumptions and common goals. Discretion remains in the sentencing judge to apply the policy to particular cases. In so doing and in weighing the various circumstances and factors, individual values and beliefs of the judges will inevitably influence the final outcome. It is unavoidable. The most that can be hoped for is that such subjective influences do not produce results markedly different from agreed upon objective criteria.

As another device to develop uniformity in application of criteria and in weighing circumstances, sentencing councils have been used. Judges, within a particular area, study and discuss cases coming up for sentence. Each judge retains responsibility for ultimately imposing sentence in his own court but through the council "the moral solitude of the sentencing decision is lifted from his shoulders" and he is put to the test of defending his sentencing decisions in the face of an honest and rational appraisal by equals. Such an approach is currently being taken in various forms by judges in Ontario and New Brunswick, for example. In different cities and regions in Canada, judges are involved in sentencing seminars or regular sentencing councils. Indeed, various jurisdictions have used sentencing councils to some advantage and the expanded use of sentencing councils has been recommended in recent years by several law reform bodies.

Sentencing Institutes, such as those used in British Columbia, are yet another institution whereby information can be brought to judges respecting the availability or effectiveness of various sentencing options. Unlike the sentencing council which provides for a weekly discussion, institutes may be annual conferences drawing on a larger body of judges and others with interests in sentencing and dispositions with a view to discussing a wide range of issues including objectives of sentencing, current services in corrections and statistical feedback on current practices. Such meetings should help to foster a common understanding and

a common perspective with respect to purposes and dispositions in different types of cases.

Another aid to structuring discretion in sentencing is the requirement for written reasons for sentence. It would be an impossible administrative burden and quite unnecessary to require reasons in every case. At the crucial point of determining that a custodial sentence is required however, written reasons would help promote uniformity in application of criteria and in weighing various factors. Written reasons are also an aid to greater rationality in sentencing and a guide for judges on appeal. In addition, not only may written reasons have therapeutic values for the offender, but they should be of help to correctional authorities.

It goes without saying that justice demands that sentencing procedures, particularly in serious cases, should require specific findings on all disputed issues of fact relevant to the question for the sentence. This record along with the stated reasons for the sentence and the precise terms of sentence should not only promote greater uniformity of approach in sentencing but also increase the feeling that justice is being administered openly and impartially.

Essential to sentencing and dispositions is an adequate information base. This is particularly important where the conviction results from a guilty plea. In such cases, the facts may be only partially known and the wider surrounding circumstances may never come before the court. To a certain extent, this is true even in a contested trial. The rules of evidence and the demands of the trial are such, that, frequently, the situation that gave rise to crime is presented to the court within the narrow restrictions of legal issues and relevant evidence. The background of the case may never clearly emerge.

Where the offender is represented by counsel, and if counsel is conscientious, the judge should be able to get considerable assistance from the defence counsel's presentation. Too often, unfortunately lawyers view their function as all but terminated as soon as the conviction is entered. A Canadian study, for example, showed that Crown counsel spoke to sentence in 72 per cent of the cases while defence counsel spoke in only 24 per cent of the cases. The more recent diversion techniques, especially those that are operational in New York City and elsewhere indicate the important role that defence counsel can serve, not only in bringing information before the court, but also in arranging for community support services to assist in the supervision of a non-custodial sentence or in arranging for pre-trial diversion.

Currently the pre-sentence report is commonly relied on as an information base where the judge is not certain in his own mind as to the proper disposition. Studies on pre-sentence reports raise questions as to

the effectiveness of these reports and point to conflicting views as to their purposes. There is some evidence to suggest that the contents and recommendations of a pre-sentence report are not solely determined by sentencing policy but by what the probation officers think the judge wants. As in police work, interests in professional advancement and the perceived expectations of others influence dispositions. Since a great deal of the professional probation officer's time is spent in preparing pre-sentence reports, consideration should be given to the best use of pre-sentence reports as an information base in sentencing and dispositions.

## **Community Input in Dispositions**

Throughout this paper, emphasis has been placed upon the need to keep open contact between the administration of justice, the victim and the community. In comparison with social controls arising from the community, law is a frail last defence of fundamental values. Thus community support and resources to enhance family life, individual physical and mental health, satisfying economic opportunities, decent housing and sound social relationships are the best investment people can make in protecting core values against attacks by others. Where individuals and agencies within the community do not provide the police and the courts with helpful alternatives to conviction and imprisonment, justice suffers. At the pre-trial level, especially in connection with diversion programs, there is room now for much help from volunteers to assist in providing counselling, friendship, work, guidance, education and jobs for many young offenders. Following conviction, the need for a sustained relationship between the community and the offender remains paramount. To reduce the criminalizing and injurious effects of conviction and imprisonment, there is need for individuals and organizations to provide an array of visiting services, counselling, therapy, work, recreational or other services.

Indeed, at the sentencing stage itself, one way of maintaining contact with the community and its sense of values is to have individual citizens from the community sit with the judge to assist in the disposition and sentence. Countries such as Denmark have used this device for years and while judges may not be enthusiastic about such a procedure, the community, at least, seems to welcome the opportunity to participate.

Whether it is feasible in Canada to have community input at the sentencing stage, as in Denmark and other countries, is difficult to say without further investigation. If there were to be such a contribution, persons should probably be selected from the voters' lists and asked to sit one day a week for four months. Assuming a modest fee were payable for this service, the cost should not be prohibitive.

Citizen participation in sentencing, particularly where citizens have the power to out vote the judge may raise a problem of increasing disparities in sentences, or bias, or even prejudice in sentencing unpopular offenders. If there are two citizens to assist each judge they may out vote him but it is more likely that lay persons would seek an

accommodation of views with the judge. If the judge is out voted, as long as the sentence is in accordance with the principles and standards set forth in a Sentencing Guide, there can be no real objection. Sentences would, as now, be subject to appeal, so that if a sentence were out of line with other sentences in similar cases it could always be corrected. The risk of prejudice, irascibility or unreasonable disparities is probably not greater with individual citizens than with judges. Studies of sentencing by juries as compared with judges do not support fears of undue bias or prejudice among lay members. Moreover, abuses in discretion can be guarded against, as suggested, by a statement of purposes, criteria and standards in a Sentencing Guide and through provision for review of sentences on appeal.

The benefits to be gained from citizen participation in sentencing and dispositions would reinforce the socializing effect of the criminal law upon many persons in the community. It should strengthen the forces tending to reduce crime and enhance community interest and participation in the administration of justice. At the same time, the primary values and interests that the community wants to see protected can be made clear in a variety of differing circumstances. Participation of citizens should thus foster the main purposes of sentencing and dispositions: the protection of the community by reinforcing fundamental values relating, for example, to privacy, property or inviolability of the person.

## **Compensation**

Finally, if sentencing and dispositions is to give satisfactory recognition to the role of the victim and the need for restitution, it will be necessary to make renewed efforts to provide offenders with employment and to pay them wages that do not fall below minimum standards. Even so, there may be cases where the offender is not able to make adequate restitution. In such cases and in cases where the offender has not been apprehended or convicted, the state should supplement the payments of the offender or, on its own initiative, provide compensation so that the victim is fairly compensated for his loss. Various types of compensation schemes may be found in different countries but relatively few are soundly tied to a theory of sentencing or corrections.

The justification for a compensation scheme may be said to arise from the social reciprocity which H. L. A. Hart suggests is the basis of society. As Workmen's Compensation is a recognition of the social obligation to make good individual losses arising out of exposure to risk in performing highly useful industrial work, so, too, in a society that places a premium on openness and freedom from pervading police control, the citizen who falls victim to a crime should be compensated as a matter of social reciprocity. Thus, compensation to victims of crime is not purely a matter of private civil law, for a public interest is at stake; it is not only a matter of humanitarian concern and welfare law but a matter of fairness and justice. Indeed, on a practical level, a comprehensive compensation scheme serves to promote over-all security. The victim's as well as the public's apprehension, resulting from a crime, may be allayed in part by prompt compensation. To the victim, particularly, such support is likely to be as great a psychological support as it is financial. Forthcoming papers will examine this aspect of sentencing policy in greater detail.

## **Summary**

Assuming that one of the purposes of the criminal law is the protection of certain core values in society, is it not an important function of sentencing and dispositions to assist in making clear what those values are? The educative effect of the sentencing process cannot be lost sight of. Through the sentence the court may influence the behaviour of others by confirming for them that their law abiding conduct is approved and that it is still worthwhile to resist temptation. In other cases, the sentence of the court may make clear that certain conduct is more blameworthy or less blameworthy than was the case in former days. This may be particularly true in a transitional society where values are undergoing constant reconsideration.

History and the social sciences indicate that almost all human societies, regardless of their political structure, must be prepared to accept the reality of criminal activity. At the same time, an accumulating body of research and writing throws growing doubts upon the deterrent effects of sentencing itself as opposed to the total deterrent effect of apprehension, arrest, trial and public conviction. Moreover, penological studies indicate that the rehabilitative ideal is not the heralded remedy it was once thought to be. Both rehabilitation and deterrence, moreover, raise ethical questions concerning the moral right of society to use one man solely as an example to others or to give treatment to prisoners without their consent, especially where such treatment may be "experimental" or result in lasting bodily or personality changes.

Despite doubts about the rehabilitative or deterrent effects of sentencing, however, common sense demands that the criminal law continue to impose sanctions in order to discourage criminal conduct. On the positive side, sentencing and dispositions can be used to take note of the wrong done to protected values, can re-affirm the values that are at stake in the particular criminal offence and can assist in restoring the social balance after the crime has been investigated.

If emphasis is to be placed on sentencing and dispositions as a learning process, in classifying and re-affirming values, alternative procedures may need to be developed. In many crimes, the offence is not one between two strangers but arises out of family or neighbourhood disputes. Need such criminal offences be dealt with in the adversary context of a criminal court? Is there not room for developing settlement and arbitration procedures for this type of offence?

To recognize crime as a form of conflict has implications not only for the procedure to be used in resolving the conflict, but also for the role of the state and the victim in such procedures. It is suggested that in many crimes the state can afford to forego its paramount role and permit the victim to take an active part in settlement and mediation. Even in cases proceeding to trial, the victim's role and interests should be given greater priority than they are in the usual criminal trial.

Recognition of crime as conflict and the importance of criminal law in clarifying the values at stake in the conflict, places importance on providing for dispositions of cases without conviction or, in some cases, disposing of a case, even on conviction, without imposing the usual sanction. It would be a matter of judgment, exercised according to specified criteria, whether the wrong done in each case deserved the elaborate ritual of a trial and sentence or whether settlement, mediation or a simple conviction would be sufficient. The arrest and trial and the settlement and mediation procedures in themselves are seen to carry an educative and sanctioning effect. In this way, sanctions may be seen to be operating at three levels: (1) pre-trial diversion by settlement or mediation, (2) the trial itself, and (3) the sentence of the court.

To fulfill the educative function of sentencing and dispositions, and to recognize the wrong done to the victim, emphasis may well be placed on restitution supplemented by a comprehensive compensation scheme to take care of criminal injuries. Through restitution, the reconciliation of the offender, victim and society is encouraged. Even in more serious cases that go to trial, restitution and community oriented sanctions should not be lost sight of. Imprisonment, because of its costs and doubtful efficacy, should be used with great restraint while various forms of limited deprivation of liberty, coupled with probation, may be seen as an alternative to traditional imprisonment for some offenders. Indeed, restitution, imprisonment and probation will be the subject of forthcoming papers.

The above view of the nature of crime and the function of the sentencing process means that dispositions and sentences should be governed by what is fair and just. It has already been suggested that the justification for the state's intervention through sentencing and dispositions is that it serves to protect core values. The extent and degree of intervention, however, ought not to be measured solely on the basis of the common good but ought to be limited by common notions of fairness and justice. Thus, the innocent ought not to be subjected to the sentencing and dispositions process; dispositions and sentences ought not to be inhumane or cruel; dispositions and sentences ought to be proportional to the offence; and similar types of situations ought to be dealt with more or less equally.



At some future day, more may be known about treatment, rehabilitation or deterrence and dictate a sentencing policy framed in those terms. At present, rehabilitation should not be ruled out entirely but given scope within the confines of a sentence or disposition determined on the grounds of fairness and justice. Similarly, deterrence, to the extent it is operative, and incapacitation may give expression to the need to serve the common good.

In application of the above principles, it is expected that many offences can be dealt with fairly and with justice on the basis of restitution. Undoubtedly, deprivation of liberty will be necessary in some cases, particularly where the offence has been extremely grave, or where the offender has had repeated convictions, or where there is evidence to suggest the likelihood that the offender, if released, would soon commit another crime of violence.

An important aspect of sentencing philosophy as suggested here is the claim the victim has upon society for compensation for criminal injuries. While compensation could be based on charity, or on a notion that society is in breach of its promise of protection to the individual, it may be preferable to see compensation as a claim arising from the reciprocity of social living. In the interests of a free and open society, some minimal level of crime must be tolerated; the alternative is a closed society, heavily fortified and severely repressive. In the interests of pursuing a relatively open society, however, recognition should be given to those who are victims of crimes and whose injuries cannot be totally compensated through restitution.

Another issue in sentencing and dispositions relates to disparity, particularly among prison terms. This is of concern to the extent that the disparity arises out of a failure to follow common principles. The solution does not lie in taking all discretion away from prosecutors, judges or parole personnel but rather in channelling and structuring discretion through a statutory statement of principles, purposes, standards and criteria. Other aids to the uniform exercise of discretion include written reasons for decisions, sentencing councils and decisions openly arrived at with provisions for review and appeal.

Finally, a primary concern for justice in sentencing and dispositions requires that further attention be paid to the whole question of fairness in decision making in matters affecting prisoners' interests. This will be the subject of a separate paper, as will compensation for victims of crime.

This paper has attempted to lay out the basic principles which will guide our approach to specific issues and concrete recommendations. Responses to this working paper, at this time, are important for our further work.

# **alternatives to the adversary system**

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### **Introduction**

In western society, particularly in North America, the criminal justice system has come under increasing attack. Critics of the system fall into four main categories.

The first category consists of social scientists who have tried to show that the system does not achieve its objectives through the classical mechanisms of rehabilitation, deterrence and so on. They call for more research into the technology of corrections and the better application of existing knowledge concerning behaviour modification, thereby enhancing their role in the process. The second group consists of lawyers who demand that “due process” be guaranteed to persons caught up in the legal system at all stages regardless of the economic or social position of the individual. The assumption made by this group is that if everyone had access to a lawyer from the time of arrest to release on parole the basic problems in the administration of justice would be greatly reduced. All correctional decisions would be open to adversarial scrutiny in which the lawyer would play a dominant role. Arguments coming from lawyers appear to be self-serving as well. The third group consists of political radicals who view the criminal process as serving illegitimate socio-economic interests. They do not object to the process as such, but merely the way in which it selects its targets. Indeed, most individuals in this category would extend the power of the state in an effort to achieve its goals. The final group consists of average citizens who have become concerned about the capacity of the state to protect them. They call for greater police protection, longer sentences and tougher correctional measures in the belief that present policies pursued more vigorously will lead to better control.

While each of these groups can make valid criticisms of our existing system and together have created a major crisis of confidence it is my belief that none of the points made are fundamental. None of them examine the mechanism itself. My thesis is that the present criminal process as a technique for problem-solving is inherently unsuited to deal with many of the issues to which it presently addresses itself. Adversarial proceedings, with their concentration on due process, all or nothing outcomes, and formally defined rights and wrongs, lack the capacity to reconcile differences that exist between individuals or between individuals and the group. Improvement in correctional techniques will not achieve more than new rationalizations for essentially punitive behaviour, because corrections is based on the mistaken notion that the majority of offenders are "sick" and in need of involuntary "treatment". The selection of a different group of people to be processed by the criminal justice system in the interest of a new political order will do nothing but change the intake. Stepping up the war against crime will provide employment in the anti-crime industry, but will do little to solve the underlying problems that exist in society.

We must now recognize that there are serious limits to what the state itself can achieve through the formal agencies of social control. Such an examination will hopefully lead us to criteria for determining the kinds of human conflict that can properly be a subject to legal control and alternative intervention strategies that are more likely to be appropriate to the resolution of others, leaving a broad area of human interaction untouched by both law and bureaucracy.

### **Basic Assumptions**

1. In a period of rapid social change a healthy society is one in which there is much expressed conflict over values, goals and competing interests. Conflict is one of the ways in which individuals and groups define themselves in relationship to their community. The expression of such conflict is an important means by which a society learns about itself, sets priorities among competing interests and adapts to change. It is therefore important that the state does not attempt to eradicate conflict but rather provide appropriate means through legal and other institutions for their expression. This does not mean that all conflict should be institutionalized but rather that institutional forms of expression be made available.

2. The criminal law is one and not necessarily the more important of the ways in which individuals learn to determine their relationship to each other and to the group. Standards learned in the home, the

school and the community are equally if not more important. We should not allow legal institutions to become the sole arbiters of values in society.

3. The sanctions available to the law are only effective to the extent that they operate within a set of shared definitions of appropriate and inappropriate behaviour in the specific community within which it operates. The law should not be merely a reflection of public opinion in a particular community for it then would fail to fulfill its essential conservative function of linking past values to present concerns. On the other hand, if the values imbedded in law are antithetical to present needs, the law loses its moral force. While one cannot expect the law to be identical to social mores at a given time, one can demand that it be able to coexist with them.

4. Most people wish to obey the law provided they know its demands and believe it comes from legitimate authority. For most individuals the costs of obedience to law are outweighed by the gains derived from knowledge that other individuals are similarly constrained. Therefore, law and freedom are prerequisites for each other in a stable social order. This breaks down, of course, for individuals who question not only specific laws but the legal order itself. It is also inapplicable to those individuals who are unaware of their legal responsibilities or whose circumstances make it impossible for them to obey particular laws.

5. The criminal law can be no more than a framework of *reasonable* expectations within which individuals may act. Our criminal law for the most part is written, interpreted and enforced by individuals who enjoy a relatively successful position in society. They usually experience very little difficulty in conforming to law. The targets of the criminal process, on the other hand, are less favourably situated. Due to personal, economic and social circumstances, many of them experience great difficulty in conforming to standards established for them. It is important, therefore, that the standards of conduct imbedded in our law be those that are within the reach of a majority of the individuals to whom they are addressed.

6. The criminal law as a body of rules has little meaning to the average citizen. Those rules are demonstrated and made real by the *criminal process* which can be defined as the activities of the police, of the courts and of the correctional agencies. People come into contact with individuals representing the law and it is from interaction with these people that most people learn about law.

"Law in action" as opposed to "law on the books" consists of *rules* (the Criminal Code), *formal structures* (the police, the courts

and the correctional agencies) and *individuals* interacting with one another in both authorized and unauthorized ways. Law reform traditionally concentrates on formal rules with little attention being paid to how those rules will be administered by agencies and individuals. If legislative enactment is to have impact on society it is therefore important that the drafters of those rules be sensitive to the ways in which institutional structures and individual dynamics can modify, extend or abort the purposes of legislation.

### **Criteria for a Criminal Justice System**

Within the framework of the assumptions outlined above, we can now establish a number of minimum requirements of the criminal process if it is to be seen to be legitimate by ordinary members of the public. We can then go on to examine our present system in the light of these criteria. Finally, it will be possible, at least theoretically, to explore some of the alternatives that might be available to deal with the problems identified.

#### *Visibility*

The criminal process should be visible so that it can be subject to effective public scrutiny. Low-visibility decisions should be brought into the open so that they can be evaluated not only by specialists but by ordinary members of the public.

#### *Accessibility*

The agents of social control including the police, court officials and correctional workers, should come into direct face-to-face contact with the public. This is necessary not only to ensure that these officials are aware of public opinion but also to ensure that citizens do not abandon their responsibility for guiding the processes of decision-making as it may affect their interests. Whenever possible, the ordinary person should have direct access to state officials without having to rely upon intermediaries such as lawyers, politicians, or community "spokesmen". In order to make this criterion effective it is necessary to guard against over-centralization of government services in the criminal justice field. Courts should be localized and police officers should be required to become involved in their community. To the extent possible, volunteers should take over tasks presently exclusively reserved for professional and semi-professional persons.

### *Simplicity*

The rules of law and the values underlying them should be expressed in simple language so that ordinary citizens can understand them, criticize them and participate in the process of changing them. Law reform becomes the exclusive jurisdiction of experts once the language of the law becomes specialized. It is also important to ensure that ordinary citizens are capable of understanding the law as it affects their rights and responsibilities. The present rules are unnecessarily complex. While most of them are based on common sense and experience, they are expressed in language that makes it difficult for the public to comply with their demands.

### *Concordance*

There should be a degree of concordance between values imbedded in the law and those operative in a specific community. While the two sets of values need not be identical, effectiveness of law depends upon public support. In a rapidly changing society it becomes increasingly difficult to keep the law up to date. It becomes even more difficult when social mores vary so widely from one community to another. Even the word "community" needs a new definition in the post-industrial era as geography no longer defines community in social terms. It may be necessary to define community in terms of a "community of interest" or, a "shared activity". This means that an individual may function in several communities at the same time with a number of different sets of norms governing his behaviour in his work space, his family space, his recreational space and so on.

To the extent that law should attempt to govern his behaviour in any of these areas it becomes necessary to think of a number of different sub-systems of law. A national criminal law system would concern itself solely with serious crime of national significance and those offences the facts of which are likely to be interpreted fairly similarly in different communities. These two categories would include organized crime, treason, large scale commercial crime, murder and so on.

The bulk of crime is of an essentially local and private character. The meaning and social significance attached to these offences would also vary depending upon the type of community within which they took place. Moreover, what might be considered necessary by way of punishment or control would also vary depending upon the mores and folkways of the community within which they took place.

The crime of assault is a good example. The very definition of what constitutes an "assault" should vary depending upon whether it

occurred within a family, in an urban or rural setting, at a dance, on a dock, or between friends, enemies or lovers. The law's present definitions of justifications or excuses around the notions of self-defence, provocation, and duress seem strangely out of place in some contexts. Nonetheless, the definitions of the ingredients of this offence tend to be "objective" and fairly rigid.

The doctrine of uniformity of sentence requires the court to operate within a relatively narrow range of sentence in "apparently" similar circumstances. But even here the courts, in determining what will be relevant as to sentence, typify crime in terms of criteria that may or may not be considered important by individuals in specific communities.

Throughout the criminal process we see the construction of legally relevant categories of meaning in the typification of crime which serves the function of reconstructing the facts in ways which may be relevant to the law but not necessarily to the community. By limiting the range of possible interpretations of the behaviour in question a legal process also limits its capacity to deal with every day, common-sense interpretations of that behaviour. To the extent that legal typifications and every day meanings diverge the law loses its social impact and moral force. In order to make the law concordant with community values it therefore becomes necessary to decentralize the criminal process not only in its administration but in its law-making and law-interpreting functions.

#### *Accountability*

At the present time, legal actors such as police officers, lawyers, judges and correctional workers are accountable for their behaviour to members of their own professional hierarchy. Thus, a police officer's behaviour is subject to supervision and review by senior officers, judges' decisions are appealable to higher courts consisting of other judges, lawyers are subject to discipline by their professional bodies and the work of correctional people is subject to evaluation and review by superiors within their agencies. At no stage in the process does the public have an effective opportunity to influence decisions ostensibly made on its behalf.

Formal accountability is no guarantee of effective influence. The establishment of citizen review boards or the appointment of one or two professional "laymen" to governing bodies does not appear to be a satisfactory answer. Attention should be directed towards creating structures which promote officials to *feel* accountable towards the public. Formal bureaucratic structures tend to restrict the type of face-



to-face contact between officials and the public that would be necessary to promote such accountability. If citizens are to be treated as people and not as "cases" it becomes necessary to reduce the social distance existing between officials in the administration of justice and the public. The required destructuring of bureaucracy entails a commitment to decentralization which may be resisted by certain officials currently wielding power.

### *Effectiveness*

In order for the criminal justice system to be seen as legitimate it must also be shown to be effective in delivering on its promises. Effectiveness should be seen in terms of the economic and social costs borne by both society and the offender as the result of existing practices. The unfulfilled promise of rehabilitation as an achievable goal within the existing correctional system has led to widespread disillusionment among the public and cynicism among offenders. The gap between aspiration and fulfillment in corrections must be narrowed. There are two ways of doing this. First, we should reduce the level of public expectation about corrections as an effective method of crime control. Certainly the most favourable interpretation that can be placed on recent research evaluating the efficacy of corrections leads to very modest conclusions. Secondly, some improvement in correctional methods may not be beyond our grasp even within the state of present knowledge and facilities. What is needed is a commitment to implement those measures believed to be effective across the board so that they become more than merely token efforts for the purpose of public relations. Thus, it becomes important to ensure that everyone interested knows the extent to which specialized treatment services are made available to those offenders requesting or requiring them. Only in this way is it possible to generate a favourable climate of public interest and support for the translation of goals into broadly based correctional programmes.

Many apparently useful programmes tend to be symbolic gestures only. Born out of a sense of crisis and the need to demonstrate to the public that "something" is being done, a new programme is launched. It tends to be a token effort only, its impact minimized by subsequent administrative inertia, budgetary starvation and other little publicized means. Harold Lasswell put it as follows:

It should not be hastily assumed that because a particular set of controversies passes out of the public mind that the implied problems were resolved in any fundamental sense. Quite often a solution is a magical solution which changes nothing in the conditions affecting the tension level of the community, and which merely permits the

community to distract its attention to another set of equally irrelevant symbols. The number of statutes which pass the legislature, or the number of decrees which are handed down by the executive, but which change nothing in the permanent practices of society is a rough index of the role of magic in politics. (Harold Lasswell, *Psychopathology in Politics*, New York, 1930, page 195).

Little wonder there is so little money spent in evaluating the results of changes in law enforcement and correctional policies. Neither the public nor the agencies concerned really want to know. But the long term interests of both require adequate evaluation and re-evaluation of existing programmes. Some profound and terrible truths may emerge from such evaluation but it is the measure of the maturity of a society in the degree to which it is prepared to acknowledge its own impotence in dealing with social problems such as crime.

This acknowledgement would force us to recognize the enormous social costs of proceeding on the basis of conventional wisdom. If particular correctional programmes are proven to be ineffective or at least no more effective than any other programme then we would be able to choose the least expensive one. If two or more programmes can be shown to be manageable within acceptable economic costs then we might be tempted to choose the one that involves the least interference in the life and liberty of the individual. Cost-benefit analysis is no longer a luxury but a compelling need.

### *Catharsis*

The legal process is one of the ways in which the values in a community may be expressed. A good legal system allows both for the expression of dominant values and challenges to them. Courts are a forum in which symbolic struggles take place in a highly ritualized and dramatic form. Such rituals may have little concrete value in terms of actually bringing the problem concerned under control but they have high symbolic value which cannot be ignored. The public wish to participate in the dialectic between good and evil, challenge and response, fear and reassurance and to feel a catharsis at the end of such struggles. The public need to feel reassured that "justice" triumphs.

Legal symbolism brings out in concentrated form those particular meanings and emotions which members of a community create and reinforce in each other. The drama of the courtroom has great appeal because it calls to public attention those felt needs and concerns which are shared in a society. The more ambiguous and confusing life becomes, the greater becomes the need to find meaning and order in social life. A good legal process maximizes public participation in

a common symbolic enterprise calling attention to joint interests in a compelling way.

The quantum of punishment demanded by the public does not simply depend upon the degree to which misdeeds depart from acceptable norms. The dramatic display of collective will through the legal process can of itself have a cathartic and tension-reducing effect. Whether this occurs depends on at least two factors. First, the need to impose savage punishment upon offenders at least in part on the degree of generalized and non-specific anxiety existing in the community. If offenders are merely scapegoats for other concerns, their punishment merely serves to divert attention from underlying problems. The answer to this does not lie within the courts alone but in a broadly based programme. Second, catharsis cannot take place if the moral issues involved become obscured. Paradoxically, the attempt to eliminate retribution as a legitimate purpose of sentencing leads to rather more severe sentencing practice. The rehabilitative ideal, in particular, leads to massive inconsistency in the name of individualization and rather more severe sentencing practice in the name of treatment. Since research evidence seems to suggest that within the framework of existing knowledge and resources rehabilitation is a myth and deterrence depends more on the certainty of punishment rather than its severity, it would appear that retribution should be given a more prominent place. It also seems likely that if such were done the tension level in the community would be reduced, allowing the courts to moderate existing sentencing practice.

## Part 2

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Having specified the criteria that will be used for evaluating the criminal justice system we can now trace its development, setting the stage for an examination of alternatives.

### **The Diminishing Role of the Victim in the Criminal Process**

Our criminal law originated from a variety of customs employed to settle disputes between individuals and groups. Primitive customary law was directed towards laying down a body of rules that would permit rights to be determined and disputes to be settled in a uniform if not predictable way. Elaborate schemes of compensation developed with a relatively fixed scale of penalties for specified "crimes". The process was victim-initiated and the offending party or his group "repaired" the loss or injury according to a prescribed schedule. The role of third parties was minimal, essentially restricted to ensuring that the rules of the game were observed.

The social need for a jurisprudence governing disputes existed then, as now. Individuals gained from being able to predict with reasonable certainty, the likely social response to their conduct. Groups gained, as social ordering within an organized group would have been impossible if individuals did not submit themselves to rules.

Institutions developed governing aspects of human interaction and conflict in terms of a specialized jurisdiction and language. Law is, as Fuller points out, a special language of human interaction and the grammar of much contemporary criminal law can be traced to early

attempts to control conflict by subjecting it to rules. Early law had no higher objective than to ensure that aggrieved parties were compensated by the aggrievor in the exact amount due, no more and no less. Thus, early criminal law can be categorized as a mechanism of dispute settlement with social order being the possible payoff but not a manifest goal.

With the emergence of the nation state comes the formalization of customary law and gradual shift away from dispute settlement towards social control. The state acquired a monopoly over the legitimate use of force. Victims, their kin and kadis, were denied their previously exercised power to determine, within limits, the penal consequences for crime. They now became mere witnesses to breaches of the King's peace. Offenders paid their debts to "society" and not to the person injured.

In the course of this transition a redefinition of the parties was effected. The state began to assimilate victims' interests, recognizing and supporting only those which were deemed synonymous with its own. Compensation for the harm done became a civil matter and the role of the victim in precipitating if not participating in the crime was largely ignored.

There is little evidence that the King or Parliament really felt threatened by crime when they began to exercise jurisdiction over it. Rather, it appears that the main motives were to wrestle control from the manorial lords and to obtain the revenues derived from courts. The earliest state run criminal courts were used as a direct method of taxation.

With the industrial revolution came the creation of hundreds of new offences, mostly concerned with protecting the use and enjoyment of property. The criminal law became a class weapon protecting the group interests of the "haves" from the aspirations of the "have nots". But even here the individuals actually victimized were not compensated, rather offenders were hung or transported, effectively removing the possibility of accommodation between the parties.

There were a number of consequences flowing from this shift, not the least important being a severe loss in the integrative function of law. The law's capacity to reconcile differences is rooted in age old concerns for natural justice. This concern in turn is based on a notion of returning things to their natural order—a state of equilibrium between the parties that existed prior to the event. While there was no way to undo the harm, it was possible to subject the offender to an equivalent evil and thereby bring things into balance. Crimes were originally understood as the gaining of an advantage by one person over another. Once gained, this advantage cannot be lost unless

and until the criminal undergoes a disadvantage in a precisely relevant aspect, namely, his subjugation to the victim whose rights he freely flouted in the criminal act. Thus, the balance of advantages and disadvantages as between citizens could be restored. The victim would feel that justice had been done and the offender, treated always as a responsible moral agent, could expiate his guilt and thereby retain all the advantages and obligations of community membership.

The modern criminal process, with its concentration of social defence, rehabilitation, deterrence and incapacitation, denies the victim remedy. Many victims feel doubly victimized: first by the offender and second by the criminal process to which they are subjected with no apparent payoff for them. They are not consulted at any stage of the process nor are its technicalities usually explained. They may suffer further financial loss due to attendance at trial, and the possible conviction and sentence to imprisonment of the offender virtually guarantees that compensation will not be made. Due to cost, embarrassment and the uncertainty of outcome, many victims choose not to initiate the criminal process by informing the police about the commission of an offence. The result is a growing mistrust in the capacity of the state to adequately protect citizens and a feeling that appropriate "justice" is not being meted out in the courts.

### **The Growth and Mystification of Law**

During the past one hundred years criminal law expanded exponentially. Penal sanctions are being attached to all kinds of behaviour as the state attempts to exercise control over social life in a manner that has no precedent. The decriminalization of certain types of conduct (private homosexuality between consenting adults, for example) has attracted much publicity and serves to mask the extension of the criminal sanction to a wide variety of human activity that is not considered either immoral or socially dangerous by the majority of citizens. In Canada, only about 6% of federal offences are now contained within the Criminal Code. Moreover, the largest number of offences with penal consequences are not contained within federal legislation at all, but rather in provincial statutes and municipal by-laws. Many of these new "crimes" are almost impossible to enforce effectively. The result is that the frequent commission of offences of some sort becomes almost inevitable for most people, particularly if they drive a car, are engaged in economic activity or function within any area of social life governed by statute or regulation.

Most of these newly created offences hold the offender strictly liable whether or not he intended to commit the offence and whether or not he was reckless or even negligent in committing it. A man may do his best and still be held criminally liable.

These factors combined effectively to neutralize the law as an effective moral force. While some people may be able to draw a distinction between serious common law crimes (*mala in se*) and new regulatory offences (*mala prohibita*), for others the distinction breaks down leading to disrespect for law in general.

It is not suggested that there is no need for legislative activity to deal with new problems in which the public interest is affected. Nor is it suggested that one should not consider using penal sanctions as a method of encouraging compliance to that interest. It is fair, however, to point out that the simple prohibition of conduct by penalizing it frequently does little more than to give assurance to the public that "something is being done". Murray Edelman makes the point that many economic and other regulations are nothing more than exercises in symbolic reassurance. He goes further to suggest that some of these statutes are passed with certain knowledge that they will not be enforced. He comments:

...one of the demonstrable functions of symbolization is that it induces a feeling of well being: the resolution of tension. Not only is this a major function of widely publicized regulatory statutes, but it is also a major function of their administration. Some of the most widely publicized administrative activities can most confidently be expected to convey a sense of well-being to the onlooker because they suggest vigorous activity but in fact signify inactivity or protection of the 'regulated'.

A large proportion of infractions of law do not become detected or penalized. Automobile drivers and policemen are both aware that most speeders will not be caught or fined, and both adapt their behaviour to this assumption. The gain of taking calculated risks in filing income tax returns is so clearly understood and so universally played that it needs only to be mentioned here.

Since we all are "criminals" as far as our habitual and routine activity is concerned, it becomes necessary to create a "second code" which determines how the "game" of law enforcement will be played. This second code consists of all the hidden rules which determine the exercise of discretion in the enforcement of law. Law then becomes, as Edelman points out, not a command but rather a "virtuous generalization around which a game can be played".

Thus, we can seem to eat our cake and have it too. We can on the one hand believe in the power of the state to deal with perceived threats

in our environment through the uniform application of law, and on the other hand see to it in its daily application that it does not interfere with or jeopardize important interests. The hypocrisy in the situation arises precisely because individuals are differently situated with respect to their capacity to make the game of selective enforcement work for them. It is no accident that it is the activities of the politically and economically powerful that are not effectively circumscribed by law despite the existence of a mass of legislation ostensibly dealing with such activity.

Coupled with the growth of law in recent years, has been an increased tendency towards its mystification. Mystification occurs when legal procedures become sufficiently complex that they cannot be understood by ordinary citizens and thus become the property of a select professional group associated with the courts. The elements of ordinary crimes such as theft have become so difficult to understand that it took the English Law Reform Commission a full three years to reformulate the rules on a slightly more rational basis. Even then it is highly unlikely that most lawyers in England will fully understand the new law of theft creating the need for a specialty bar with a select group of experts having a proprietary interest in maintaining mystification. Law thus becomes "privatized".

The history of increasing complexity in criminal procedure is instructive on this point. The earliest King's judges in England had a severely circumscribed jurisdiction over the trial process. They conducted criminal trials at the assizes of those accused persons whom the local Grand Jury presented to them. They were required to accept the "facts" of the cases as found to be true and submitted. Accused persons were not entitled to testify on their own behalf and there was little need for much evidentiary law. The Grand Jury was free to determine the issues and facts unfettered by legal technicalities, assessing in the course of their judgement much information that would now be excluded. Such evidence would include what is now known as hearsay, reputation or character evidence together with testimony which would not be considered relevant, material or trustworthy in a modern criminal trial. In other words, local citizens were able to interpret the meaning and relevance of all the circumstances surrounding an alleged offence as they saw fit. Justice was very much the property of the local community, each community defining it for itself depending upon its needs, interests and concerns.

Undoubtedly the potential for abuse was high in these locally controlled courts. It is clear that not all citizens had equal access to the process and it is likely that there were many instances in which individuals and groups used it as a weapon to "get at" other individuals



and groups. "Outsiders" were particularly vulnerable to abuse by the local citizens. At the same time it seems fair to point out that these courts operated within the fabric of community norms, with checks and balances built in, not in formal rules, but in public knowledge and public participation.

From the fifteenth century on we see the slow and steady erosion of local autonomy, a decline in the role of both the Grand and Petty Juries, the development of a body of technical rules governing both procedure and evidence, the birth of a new profession—that of the lawyer, and generally the pre-emption of the layman from the criminal process. The trend is continuing with the narrowing of the category of offences for which an accused person may opt for trial by judge and jury, a tightening of the rules governing standing for lay advocates, the professionalization of the judiciary at all levels and the growing complexity of the legal rules themselves.

Lawyers secured for themselves a radical monopoly over the criminal process. The courts became private clubs with full membership rights to judges and lawyers and guest privileges to a few psychiatrists and social workers provided they agreed to submit themselves to club rules.

The key to exclusive membership is knowledge of the special language of the law. Those with such knowledge can only maintain their monopoly by refusing to share it. Thus lawyers, like all professional groups, have a vested interest in mystification. Little wonder that impetus for simplification does not come from professionals.

The gains hoped for in the centralization of authority do not appear to have materialized. Bias, prejudice and the protection of the socio-economic interest of the elite did not disappear, as such recent research shows. Rather, these processes became submerged in the rules and procedures themselves and are less vulnerable to challenge because of their apparent complexity. Thus, the power of the law to maintain the *status quo* lies in its magical properties. Mystification therefore is one of the main bulwarks against social change. It follows that simplification of rules is not simply a technical question. It necessarily involves a fundamental shift in power relations and is therefore a political question.

Berger and Luckman describe the techniques employed to maintain the barriers between professional groups and the laity:

... this is done through various techniques of intimidation, rational and irrational propaganda (appealing to outsiders' interests and to their emotions), mystification and, generally, the manipulation of prestige symbols. The insiders, on the other hand, *have to be kept in*. This requires a development of both practical and theoretical procedures by which the temptation to escape from the sub-universe

can be checked... An illustration may serve for the moment. It is not enough to set up an esoteric sub-universe of medicine. The lay public must be convinced that this is right and beneficial, and the medical fraternity must be held to the standards of the sub-universe. Thus the general population is intimidated by images of a physical doom that follows "going against doctor's advice"; it is persuaded *not* to do so by the pragmatic benefits of compliance, and by its own horror of illness and death. To underline its authority the medical profession shrouds itself in the age-old symbols of power and mystery, from outlandish costume to incomprehensible language, all of which, of course, are legitimated to the public and to itself in pragmatic terms. Meanwhile the fully accredited inhabitants of the medical world are kept from 'quackery' (that is, stepping outside the medical sub-universe in thought or action) not only by the powerful external controls available to the profession but by a whole body of professional knowledge that offers them 'scientific proof' of the folly or even wickedness of such deviance. In other words, an entire legitimating machinery is at work so that laymen will *remain* laymen, and doctors doctors, and (if at all possible), that both will do so happily.

What a striking parallel between medicine and law in this regard!

### **Law and the Construction of Reality**

Ever since the work of Schutz, sociologists have employed the term "typification" to describe the ways in which individuals and groups construct realities in specific social contexts. What is "real" about an alleged crime will differ depending upon the context of the discussion. Moreover, the "meaning" of the event would be different for the offender, the victim, or the criminologist. Once the issue is presented to the legal system a process of redefinition takes place for the purpose of identifying the "legally relevant" facts and issues. What is really legally relevant does not arise intrinsically from the subject matter, nor does it depend upon what the witnesses or parties deem important. Rather, the legal process constructs meanings in a highly particular way in order to create a "case" with which it can deal.

In other words, it is necessary for the lawyer and the judge to make cases out of facts, the imposition of a reality which may bear little significance to the subjective experience of the original parties or witnesses. By constructing cases in this way, the legal process legitimizes itself. Since it cannot deal with the problem as understood by the parties it must redefine the problems in terms of "typical" problems capable of solution by "typical" responses available to the court. Because of the power and majesty of the law, offenders and victims can see themselves as the law sees them and begin to respond to one another accordingly.

Typification is essential in the legal process. It enables lawyers and judges to give meaning to the ambiguities of the fact situations with which they deal. It allows for categorization of problems in a manner relevant to the task and the court is thus saved from the time consuming and sometime painful process of working out *de novo* how it should respond to it. Thus, the real question is not whether typification should or should not exist (it is essential to the process) but rather whether the existing constructs or typification utilized by the law in the criminal process are useful means of interpreting crime. How then does the law presently typify crime?

Hans Mohr has provided a useful paradigm for analyzing crime in terms of offender-victim-act relationships. He points out that the bulk of recorded criminality occurs within ongoing relationships—familial, friendship, neighbourhood or commercial. Research shows that 60% of crimes of violence occur within the family and 80% between people who know each other. As far as offences against property are concerned, the bulk of these are thefts which consist, for the most part, of offences committed by employees and regular customers of stores.

Parliament, in an effort to protect victims, creates offences which are almost always defined in terms of the act alone with little consideration given to the relationship between the parties. At trial the court shifts its interests to the relationship between the accused and the alleged act and, apart from narrowly circumscribed justification of self defence or provocation, does not deal with the role of the victim in precipitating or participating in the offence. At the sentencing stage the focus of interest is almost exclusively on the offender and at the post-sentence stages of correction the victim is totally ignored.

The criminal process is designed to deal with crimes committed by strangers on unsuspecting and completely innocent victims. This forces it to typify crime in these terms and serves to protect the community from acknowledging the reality that most crime committed today is a normal and inevitable outcome of group living. This leads to exaggerated concern about the nature and extent of criminality in society and diverts attention away from those strategies most likely to be effective in dealing with them.

Research by McLintock, Chappel, Mohr and others have shown that it is possible to classify crime in ways that are more meaningful for the purpose of intervention at the police, court and correctional stages. The fact that this has not been done to date indicates the degree of resistance from acknowledging the normality of crime.

Legal typification goes further than this. In the routine handling of cases under pressures of high volume and production norms it

becomes necessary for the criminal process to restrict the range of its enquiry to the last link in a chain of events leading to the commission of the offence. A complex problem usually arising out of a long history of conflict and/or alienation becomes translated into a discrete issue severely bounded in time and in space to the precise moment and place at which the final act constituting the crime occurred. Even this act is evaluated in terms of formally defined rights and wrongs. What is now prohibited becomes permissible. What is not provable in court did not happen.

Both the offender and the victim begin to see themselves as the legal process sees them. The victim denies his role in the commission of the offence and the offender limits his responsibility to what the state can prove. Having mischaracterized the problem, neither the offender nor the victim, nor indeed the state itself, can deal effectively with it. Legal typification is designed to spawn the magical problems to which the magical solution available to the court can be applied.

### **The Adversary Process as a Zero-Sum Game**

The criminal trials in common law countries are usually characterized as having three distinguishing elements. First, it is an accusatorial as opposed to an inquisitorial system. It is alleged that in our system the state must prove beyond a reasonable doubt every allegation made against the accused. The presumption of innocence and the privilege against self-incrimination are seen as protections for accused persons against the overwhelming power of the state to investigate crime and prosecute alleged offenders. Second, the trial itself is characterized as an adversary system, founded on a struggle between two contesting parties before an impartial tribunal. Counsel on each side does his best to establish his client's case and destroy his opponents' arguments, and from this conflict truth and justice are expected to emerge. The parties maintain in combative positions with no thought of flexibility or compromise, and from their polar positions a win or lose outcome results. Third, the judge acts as an independent adjudicator with no stake in the outcome except to see that the rules of evidence and procedure are upheld and to ensure relative equality between the parties.

This process seems to have the advantage of presenting to each party the opportunity of presenting evidence and making relevant arguments for a decision in his favour. All evidence is subject to cross examination and arguments on the law are open to attack. In his passive role as adjudicator, the judge decides the case on the evidence,

the arguments put forward by the parties and on his interpretation of the law. No solution other than a guilty outcome is considered.

As may be readily seen, the above description has all the elements of a zero-sum game. At the end of the day there must be an ultimate winner or loser and at each stage of the game, a point won by one party is a point lost by the other.

Two important consequences flow from this. First, the criminal trial guarantees that 50% of the parties go away disappointed with the result. Second, the process leads to further alienation and polarization between the parties. They come to see each other in terms of winners and losers and more importantly, see the world as made up of these two classes of people. Habitual prisoners see themselves as losers, a condition that can only be overcome by becoming a winner. Both the offender and the victim develop attitudes which are antithetical to responsible social living. Social responsibility depends upon the capacity to see an identity of interest with a potential adversary, to know how to compromise, to give a little and to take a little. If parents taught children how to relate to other children in the way in which the criminal process teaches victims and offenders to respond to one another, social life would become impossible.

Lon Fuller, in *Forms and Limits of Adjudication* (1958), laid down a number of criteria that must be met before adjudication becomes an appropriate device for dealing with conflict. He states the essence of adjudication lies in the office of the judge; he must be impartial and must be willing to hear both sides. Further, if the arguments of the parties are to have any meaningful influence on the decision, the process must assume the burden of rationality not borne by any other form of social ordering. A decision which is the product of argument must be prepared to meet itself the test of reason. Second, opinions should accompany the decision; otherwise the parties must take it on faith that their participation in the decision was real and that the adjudicator had in fact understood and taken into account their proofs and arguments. Third, the decision should rest on grounds argued by the parties or the meaning of the parties' participation will be lost. Fourth, the adjudicator must be qualified and impartial. A strong emotional attachment by the adjudicator to one of the interests involved in the dispute is destructive of the participation of the parties. The adjudicator's life experience must not embrace the area of the dispute but he must be able through personal research to understand the social context in which it arose. Fifth, the decision must be retrospective. It is not a function of the courts to create new aims for society or to impose on society new basic directives, although courts should develop case by case what these aims or directives demand for

their realization in particular situations of fact. Finally, Fuller states that a necessary condition for adjudication is that the problem before the court may be isolated as a single issue capable of a zero-sum outcome. He contrasts this with a polycentric problem—one in which there are many interacting centres, so that a change in one will have some effect on each of the others. Such a problem is unsuited to adjudication because the adjudicator must be able to consider the repercussions of his decision, which becomes increasingly complex as the number of interacting centres grows, and because it is difficult to give each effective party meaningful participation through proofs and arguments from which to derive a decision that meets the test of rationality. Fuller states that the ultimate test is whether “the underlying relationship (between the parties) is such that it is best organized by impersonal act-oriented rules”. If, on the other hand, effectiveness of human association would be destroyed by the imposition of rules, then adjudication is out of place.

Let us briefly examine the temporary criminal process in the light of Fuller's criteria. First, the criminal process is initiated by the police or the Crown Attorney, both agents of the state. The deciding tribunal, the judge, is also an agent of the state, and therefore the state is initiating the process and adjudicating it. In design, the judge maintains that independence from the interest of the state represented by the Crown, but where the line is drawn in fact is not altogether clear especially in the eyes of many accused. Suspicion of partiality grows in those courts where judges and Crown Attorneys have expressed personal rapport from continued association with each other. Opinions rarely accompany decisions, if only because of the backlog of cases that must be processed quickly. In cases where written reasons are given the accused rarely sees them. In any event, in about 90% of cases the accused offers a plea of guilty. Moreover, plea bargaining has replaced the traditional adversary trial process in the majority of cases dealt with by urban courts. It is becoming more common that the judges' participation is simply to give the stamp of approval to a “deal” made between counsel. One of the main problems of plea and sentence negotiation between counsel arises from the fact that the original parties to the dispute do not participate. The inherent problems in this process have been commented upon elsewhere and need no further comment here. The answer to the question as to whether most judges are both qualified and in fact impartial can be found in the fact that all lawyers in criminal matters “shop for judges” in the firm belief that justice is a very personal thing. It is becoming increasingly difficult for judges to have some experience with the social conditions leading to breaches of the Criminal Code and other quasi-criminal

statutes encompassing conduct from the whole range of human experience. This may be an inevitable and unavoidable problem in any form of dispute resolution and indeed it may even contribute to a more impartial decision. But since the office of the judge is so crucial to the integrity of the entire adjudicative process, this factor must be examined. If nothing else, the criminal process seems to satisfy Fuller's fifth characteristic in that its decisions are retrospective based on past authority and with little apparent impact on changing the future course of society.

It's on Fuller's final point that the effectiveness of the adjudicative process in criminal trials seems to fall far short of the mark. Apart from professional crimes and few isolated offenses committed by individuals, most crime occurs within continuing relationships which are exceedingly complex and difficult to unravel. In other words, they are polycentric problems. Willoughby Abner, Director of the National Centre of Dispute Settlement, describes a typical criminal case:

Much like the visible tip of an iceberg, the private criminal complaint... frequently deals with relatively minor charges growing out of deeper human conflict, frustration and alienation. In such cases, more often than not, neither the complainant nor the defendant is entirely blameless, yet... the criminal law with its focus on the defendant alone is ill-equipped to deal with this basic fact. The judge faced with an overcrowded court calendar, "beyond reasonable doubt", criteria for conviction, conflicting stories and minor charges, typically dismisses the case or lectures the defendant, threatening possible punishment for future offences. This is not conflict resolution; it is not problem solving in a community nor is it intended to be. The tip of the iceberg has been viewed but the underlying problem mass remains unseen and potentially as destructive as ever. Neighbourhood tensions have not been reduced. Relationships have been ordered.

As an alternative course of action Abner proposes the submission of the dispute, if agreed by the parties, to voluntary arbitration under the auspices of the National Centre for Dispute Settlement. One may question whether a national centre can bring the proper perspective to what is essentially a local dispute, but the redeeming feature is of course the expertise the arbitrators bring to bear on unpacking the underlying problem. I shall quote one further passage from Abner's address, which neatly sums up the advantages of such a plan:

These procedures provide a greater opportunity to deal meaningfully and sensitively with human beings in conflict, to probe for the underlying causes and to address them. It provides a far greater opportunity for accommodation, meaningful dialogue, and the clearing up of possible misunderstandings. It also provides finality through the arbitrator's award if agreement is not reached. However, the process itself makes far more acceptable the award rendered. The conflict

arises in the community, is settled in the community and under conditions of maximum involvement and participation by the parties to the dispute who reside in the community.

### **The Influence of Urbanization in our Reaction to Crime**

There is considerable evidence to suggest that punitiveness is a function of social distance between the punished and the punisher. That is, the less we know about the offender and the less contact we have with him the more we fear him. "To know is to forgive" is an apt phrase in this connection.

In the growth of cities, which Durkheim called "citadels of loneliness", people are thrown into a larger number of relationships with strangers. Informal social control tends to break down and responsibility for one's safety tends to be given over to bureaucratic agencies which have enormous power, but over which the individual has little control. Moreover, our dependency upon strangers is becoming increasingly important in a modern industrial society as our safety depends more and more on the good conduct of many people we do not know. Take, for example, the havoc that one irresponsible driver can cause on the busy highway or the mass destruction that one saboteur can cause by destroying an aircraft or some other form of mass public transportation. Neighbours are seen as potential threats rather than potential friends. The sense of *anomie* that arises lessens the bond of social interdependence which in turn creates conditions in which crime can flourish. The combination of social distance between people plus dependence upon professionals for safety creates fear and this fear produces further social distance. The mass media feeds it by giving extravagant attention to crime. Crime and crime control has thus become a major political issue in North America. Rather than dramatizing the evil, efforts must be found to normalize it.

### **The Bureaucratization and Centralization of Government Services**

The bureaucratic process replaced the legal process when the primary function of government changed from regulation and resolution of disputes between individuals and the group to direct intervention in and control over social relationships. This is as true for economic and welfare systems as it is for the criminal justice system. In fact, the parallel developments in each of these fields are striking. In a sense, modern law enforcement and correctional practices are based on the



social and political values of the New Deal, which may be summarized as confidence in big government to solve society's ills. Of prime importance in this change is the need to legitimize governmental processes in terms of legal and correctional philosophies. Hence, the change in nomenclature by which crime is seen as a "threat" to society, offenders are seen as "sick" and in need of treatment, "peace" officers are seen as law "enforcement" officers and "social" workers as "correctional" officers.

There were many results flowing from this change, not the least important of which was further isolation of the mechanisms of social control from the fabric of everyday life. Giving of power to the police has as necessary corollary taking away responsibility from ordinary members of the public for their own protection. "Let the police do it", "I do not want to become involved", are examples of public attitudes which developed as a result of this process. It also yields certain changes in attitudes of police officers. It should be of some concern that police are becoming more and more alienated from the main stream of society, despite recent attempts by some police forces to counter the trend. The hypocrisy of our present attitude towards police officers, in which we give them enormous power without guidelines as to how that power is to be exercised, wait for them to make mistakes and then criticize them, is likely to yield a closing of ranks among law enforcement officers, which in turn, blocks meaningful dialogue between police and members of the community at large. Moreover, denying to the police the legitimate peace keeping and dispute resolution role can only lead to further social distance between the police and members of the public.

Whatever gains in efficiency that might have been made by replacing the foot patrolman by officers isolated from the public in patrol vehicles is far outweighed by the cost involved in terms of police-community relationships. The results of all of these factors have been to make the police a minority group in society.

## **The Abuse of Science**

One of the features of the modern industrial state has been growing confidence on the part of most people in the capacity of science to solve problems. Great stress is placed on measuring the efficiency of an operation in terms of concrete properties amenable to be reduced to quantitative terms. Thus correctional programmes are being measured in terms of their success in reducing recidivism and attempts are being made to justify certain kinds of correctional measures on the grounds of their alleged superiority in these terms. In my view, this has

not only doomed the correctional process to be seen as a total failure (when it is not), but it has also stepped up the war against crime. Most importantly, it has a tendency to obscure the human and legal values involved that are not as easily amenable to the same kind of treatment that can be provided within the framework of existing resources. The truth of the matter is that if there is sickness in the crime area, it is more likely to be found in the way in which society responds to crime rather than in the behaviour of most offenders caught up in the criminal justice system. Not only do we lack the technology to diagnose offenders accurately in terms of any known psychiatric or psychological classifications, but it is also clear that we do not have the mechanisms of intervention which are likely to yield better results than can be achieved by not treating offenders at all. Moreover, there is evidence to suggest that efforts to deal with offenders as sick persons is likely to further their criminality rather than to reduce it. The main thrust of sociological writing in recent years has been directed towards the labelling, stigmatization or moralizing functions of the criminal justice system. The impact on an individual being caught up in it is to reinforce his self image as a helpless deviant rather than as a responsible human being. Whether our motives are treatment oriented or punishment oriented, the result is the same, namely, a further degradation of the concept of self as a worthwhile member of the community.

### **The Overselling of Corrections as a Method of Social Control**

Correctional administrators are under increasing pressure to justify the performance of their agencies in terms of crime control. Many administrators seem to have capitulated to this pressure by agreeing to assess the performance of their work in terms of simple recidivism rates. A parallel pressure is placed on police administrators to measure results in terms of "crime known to the police" and "clear-up" rates.

In the beginning, of course, it was possible to convince an unsophisticated audience that measures such as probation are measurably more effective than imprisonment in reducing crime. However, it is widely known that these measures appear more effective solely on the basis of the fact that they deal with much better risks than an offender sentenced to imprisonment. In fact, research suggests that the relative success of probation *versus* imprisonment would be exactly reversed if everyone sentenced to imprisonment was placed on probation and *vice versa*. The public relations job based on the alleged success of treatment is a losing strategy, as it is likely to lead to a cut-back in budgets

for programmes which may be more superior on humanitarian grounds. Moreover, even if all measures are equally effective, then it would appear on economic as well as on humanitarian grounds that suspended sentence, fines and probation should be used whenever the risk allowing the offenders concerned to remain in the community is tolerable.

Measuring police performance in terms of law enforcement, rather than crime prevention criteria, indicates an implicit devaluing of the traditional peace keeping role of the police officer. Measurement criteria are good indices of the ordering of priorities in the criminal justice system. If we are truly committed to closing the gap between the public and the police there is bound to be a rise in "crimes known to the police" and a lowering of the proportion of crimes "solved" by charge. Without alternative ways to measure police effectiveness we will contribute to the public perception of the criminal justice system as a failed method of social control.

To the extent that law enforcement and the treatment of offenders have tended to move away from treating the offender as a human being who is morally responsible for his conduct and towards crime control through rehabilitation and deterrence, the more dehumanizing the criminal justice system has become for everyone caught up in it, including not only the offender, but all those dealing with him. Attempts to achieve social control through arrest, reformation and deterrence have not only failed, but have also lead to penal practices which, if stripped of their euphemistic labels, are nothing more than abuses of fundamental freedoms in the name of enlightenment. The historical transformation from punishment to treatment, as Matza points out, has been the opposite of enlightenment. It has, at best, been mystification and, at worst, a cruel hypocrisy. What is needed is a return to much more modest goals in the crime control area. If effectiveness cannot be demonstrated, then at least justice and fairness should be our goals. Public participation is needed if for no other reason than to secure public confidence in our system. At the same time, there is an urgent need to find other channels for the handling of conflicts that inevitably arise in society. The criminal process should be seen as only one among many forms of dispute settlement and attention must now be given to finding alternatives.

### **Practical and Ethical Considerations in Criminal Law Reform**

This section addresses itself to an exploration of the issues involved in effecting legal reform in the criminal law area. While the need for substantial change is becoming more obvious to a larger number of people, operating both inside and outside the official legal system, the processes involved in bringing about such change are poorly understood.

Two things are clear. First, remedial moves at the legal-technical level designed to give the appearance of rationality and internal consistency to the formal rules without changing either institutional structures or individual behaviour patterns will not suffice. Second, short of revolution, effective change within the legal system is inevitably incremental as the extent of its impact on society depends upon the beliefs and purposes of individuals within the legal subculture (*i.e.* victims, offenders, police officers, lawyers, judges and correctional workers) and the attitudes and expectations held by persons in the wider culture, *i.e.* society generally. If these cultural patterns are changing relatively slowly (which seems to characterize Canadian society) one should not expect radical transformation of society through law alone. Law is, after all, but a surface manifestation of deeper structures in society—structures which reflect long established differences in power relations. This assertion does not imply that law has no impact on social change, nor does it provide the excuse to refrain from conscious efforts to improve the law. What is claimed is that law reform in a relatively stable society is negotiable within severely bounded structural limits. This means if one is serious about substantial legal change one has to concentrate on opening up structures and on changing the level of social consciousness held by both legal actors and the public generally.

In any event, change is taking place within the legal culture without the guidance of parliament, law reform commissions or the public. Indeed, many of the more important recent changes in the criminal justice system, the evolving role of police officer as social worker and the gradual replacement of the trial process by plea and sentence negotiation, to give but two examples, have been implemented within sub-systems of the legal structure as "in-house" responses to particular needs and interests as defined by the specific legal actors concerned. It becomes obvious that the challenge to law reformers is to become involved in *doing* law reform through innovation, experiment and public education as opposed to merely *recommending* it to parliament. This immediately involves one in the ethical and practical issues in achieving this objective.

#### *The Myth of Objectivity*

It seems curious that at a time of profound examination of all social institutions, from the nuclear family to the nation state, many academics and some legal reformers claim that they can maintain an "objective", "neutral" stance with respect to the issues of the day. This posture is not only illusory, it is dangerous. It is dangerous because the liberal-academic's penchant to obscure value questions by seeing all sides of every issue and weighing all factors equally leads to the emasculation of both thought and action. The myth of "effective neutrality" has lead many people to become immune from their social environments, an environment which they can no longer experience in human terms. This in turn yields widespread disillusionment about the capacity of the individual to control his world, with the resulting retreat into narcissism in which short term self-interest replaces concern for others. The resulting immobilization of spirit destroys purpose and intent and merely serves to support the *status quo*. Whether or not the liberal reformer views the basic hierarchical structure as essentially correct or in need of substantial change the result is the same, the creation of a sense of exceeding complexity to social issues requiring the expertise of a few extra-privileged technocrats. The production of technical reports, social surveys and complex statistics buttresses the impression and serves to enhance the power of the liberal establishment.

This process must be seen as leading to no more than false rationality and pseudo-excellence. Moreover, the so-called "ethical" posture of neutrality must be seen for what it is—the preservation of hierarchically ordered relationships in society.

But the stubborn facts of social life will not go away despite all the statistics and technical reports. More and more people have come to realize that social structures have grown beyond human scale and

dimension. They are looking for a way out and if liberal reformers wish to play a role in the restructuring of society they must be prepared to commit themselves in a directly practical and relevant way. The risks involved are, of course, real. There is no escape from the ethical burden of evaluating the consequences of one's behaviour in terms of its impact on others. There are no guarantees of success and there are personal costs in failure. Most importantly for a well socialized liberal-academic, the personal commitment to analyze one's social behaviour in terms of its political and ethical purpose, its utility and its impact on others, involves him in a painful process of change within himself.

Fortunately, he will not find this a lonely quest as the claim to obedience to liberal authoritarianism is rapidly losing its force and legitimacy. The legal reformer will find help from surprising quarters. Many police officers, judges, correctional workers, lawyers, and laymen share his sense of a dehumanizing criminal justice system even though they may differ as to its original and final solution. What is possible is the collaborative development of strategies of collective action designed to deal with specific issues in a more humane and effective way.

There seems to be no easy way to discharge one's ethical responsibilities for social intervention. Many tempting escapes are provided. One can delegate responsibility to a formal procedure consisting of review committees, statements of principle, codes of ethics and written releases from civil and criminal liability. Experience seems to show that in many instances this process offers the researcher an opportunity to escape real responsibility since once the formal requirements are met he is free to act without further considering the impact of his work. It also seems to be the case that in some instances ethical considerations have been used by university administrators, governments and funding sources to prevent significant social intervention from taking place. Ostensibly acting as the "conscience of the community", these bodies have steered research and action into safe, non-controversial areas which do not challenge the existing social order.

#### *The Escape into Ideology*

Another convenient escape from responsibility is for the researcher himself to espouse a philosophy which is so radical in concept that it clearly will not gain acceptance either from the subjects directly effected or the potential sources of funding. By refusing to deal with practical everyday problems that are recognized as ripe for change the ideologue protects himself from the need to act, guaranteeing that he will have little impact on society. The most genuinely radical movements in today's society appear to be those which eschew a specific ideological

orientation. They are issue-specific and are able to catalyze change in a way that few of the ideologically oriented movements appear to have done. Examples include the ecological movement, the women's movement, ratepayer and neighbourhood groups.

Citizen involvement in the political process is undergoing a remarkable change. Grass roots movements are springing up everywhere. Most of them lack formal structure, membership lists, voting procedures and all other due process games which divert energy from immediate tasks. Daniel Bell in his book *The End of Ideology* might, after all, be shown to be correct, but paradoxically for the very opposite reason he espouses. Ideology is dead (at least for the time being) not because basic goals of society have been settled once and for all but precisely because there appears to be no basis for agreement among people as to those goals. In the meantime, people are putting brackets around their ideological differences and getting on with the task of attempting to deal with specific problems that they share. Interestingly enough this denial of ideology and formal organization has allowed social activism to cut across traditional class and political lines. Whether this is a temporary phenomenon or whether a genuine "new politics" is emerging remains to be seen. For the present it may be stated that new forces are at work in society which are egalitarian in structure, diffuse in membership and narrowly mission-oriented. This provides new opportunities for legal-institutional reform with a high level of public involvement in the process of change.

This new dynamic also provides an ethical framework within which social intervention can take place. The reformer is forced to live with the results of his own work. Political and legal theory, formal statements of ethics and ideological postures find their ultimate test in practical experience. Law reformers are in a stronger position ethically and politically once they can demonstrate the validity of their proposals in terms of a successful experience.

#### *Blocks to Public Participation in Law Reform*

While the position taken here is that law reform works best when it proceeds within the boundaries of the collective consciousness of the people affected, around felt needs and practical problems, it is not argued that an activist approach to law reform is permanently locked in to the current perspective of the majority of people directly concerned. It is argued that it is ethically defensible to attempt to change these attitudes and beliefs if the reformer is convinced that they reflect a false and debilitating consciousness. Justification for such action rests on the conviction that each individual in an open society has the right to express his views as forcefully as possible provided that he is tolerant of

other views and is genuinely interested in others as *people* as opposed to *things*. This means that the strategy of public education must be one in which the individual pressing for reform does not present himself as an expert but rather as a participant in a dialogue with those members of the community who wish to participate in the development of social intervention strategies. Humility cannot be legislated, nor can it be forced upon those whose personality tends towards intellectual and moral imperialism. It occurs naturally in those individuals whose life experience has taught them that creative problem-solving with respect to complex social problems cannot be derived from theory or ideology alone but are usually fashioned out of concrete experience.

Two myths block effective community involvement in criminal law reform. The first is that crime is ever present in community life—that neighbours, strangers and all those with whom we share space are potential criminals. While it can be empirically demonstrated that in Canada the life chances of being a victim of a serious crime is relatively low compared to other risks from illness, accidents, and so on, many people in large cities view their social environment as threatening. The second myth is that while individuals are potential threats to life and liberty, the state itself is benign. These two myths are the main underpinning of liberal authoritarianism. It inhibits involvement of citizens in matters touching directly upon their lives and promotes a retreat to the protection of mother institutions of the state, the church, the school and the professions.

It is interesting to note that the main thrust of North American social policy (perhaps more clearly visible in the United States than in Canada) has been to emphasize both the smallest and the largest units in society, *i.e.* the individual and the mega-institution. Very little attention has been paid to the building blocks of society, the family, the neighbourhood, the borough and the city. This is a prescription for alienation, the consequences of which we can now witness. The anomic existence of the individual in the large city who is a stranger to his neighbours, and is forced to relate to his community through large impersonal organizations which affect his daily life but over which he has little control, is leading to a breakdown in social order as all standard social indicators seem to indicate. Relatively high rates of suicide, divorce, mental illness, crime and juvenile delinquency in large cities as opposed to rural and small town communities reflect the social disorganization which occurs when individuals can no longer relate to one another in human terms. While the return to the village is a hopelessly romantic notion, as many people who have experienced the communal movement have learned through bitter experience, it should not be beyond the wit of urban dwellers to fashion their environment in



ways that enable them to get a sense of well being through sharing in the processes of decision-making as it affects their community. To get involved in this, one must be able to tolerate ambiguities of direction, and the confusion and upset of change. The choice appears to be between striving for a clean, predictable, antiseptic society (the failure of achieving this is visible for all to see) and an open, dynamic yet unpredictable society. Let us now explore some of the elements that will be involved in restructuring the criminal justice system to this latter end.

### *The Natural Development of Criminal Law Reform*

Due to enormous discretionary power not to invoke the criminal process at each stage, from the calling of the police by the victim to the final release of an offender on parole, there is considerable room for manoeuvre on the part of officials to change institutional practice without requiring legislative approval. In Canada, this is particularly pronounced as lower officials in administration of criminal justice have more discretionary power vested in them than ordinarily given in common law jurisdiction. Thus, the Canadian police officer has a far more discretionary power in matters of arrest, search and seizure than that given to his American counterpart. Lower court officials such as Provincial Court judges and Magistrates have a broader jurisdiction and greater sentencing powers than that given to single lower court judges in any commonwealth country, the United States or continental Europe. Parole is strictly a matter of grace in Canada and correctional decisions are relatively free of legal control. It is interesting to note that while the legal room for manoeuvre of these officials in Canada is very wide, the actual behaviour patterns appear to be more circumscribed than in other countries. This is probably due to the fact that the elements of the legal culture within which the officials operate provides standards of conduct that have a real impact on decisions made. In any event, a great deal can be done prior to asking parliament for changes in the written law. Indeed, when one examines criminal legislation during this century one finds that significant changes in "law in action" as opposed to "law on the books" have always emanated from the bottom, parliament merely giving the final stamp of approval to something that has been operative for some time. A lesson to be learned from this is that law reform must begin at the cultural-institutional level.

The following is an outline of the steps to be taken in a natural evolution of criminal justice reform. This evolution is more likely to "take" than forced changes from the top and is one in which the full consequences, practical and ethical, will be revealed in time to change direction if the need should become apparent.

1. At the least consequential level there is change of the most informal and imperceptible kind. This involves redefinition of the nature of the problem as understood by ordinary members of the public. Irrational fears of specific offences tend to diminish once there is a better understanding of the nature of those offences and the individuals committing them. In Toronto, the Clarke Institute of Psychiatry contributed greatly to a lessening of fear about the pedophile through a public education campaign carried by the mass media. This in turn led the public to lower their demands on the criminal justice system which eventually resulted in a less punitive approach towards this category of offender.

2. The second change is in the working languages of the courts, lawyers, policemen, and judges involved in the process of administering the law. Once officials begin to see crime in a different light they tend to respond consistent with their altered perceptions. Many examples abound concerning shifts in perceptions and attitudes of police officers as a result of becoming involved in family crisis intervention, community service work and crime prevention.

3. The third change can be characterized as genuine cultural innovation. It occurs when the working norms of legal control agents are expressed not only in what they *say* but also in what they *do* in exercising their power. The use of discretion not to lay criminal charges when alternative intervention strategies are available to the parties is a good example of this. Another example involves the increased use of suspended sentence, absolute and conditional discharges by courts once they recognize that the criminal event is merely a technical violation or an offence arising out of a larger social problem better dealt with by non-coercive agencies.

4. The fourth step occurs when cultural innovation becomes formalized by the creation of new strategies, units or agencies, or—more likely at this level— by significant reallocation of resources. The creation of specialized youth bureaus, community service programmes are examples.

5. The fifth step indicates a still higher degree of innovation. At this stage there is a formal statement of new policy with respect to specific types of crime—a policy which is no longer experimental and is applied across the board. An example of this would be the decision not to charge certain youthful marijuana offenders with respect to possession of “soft” drugs. Another example, three years prior to the removal of homosexuality between consenting adults from the statute books as a crime, was the decision of the Toronto police that they would no longer arrest a person falling into this category.

6. The final step is the creation of a new law, removal of an old one or a substantial modification in existing law based upon changes that have already taken place at the enforcement level.

There is a final change which is *supra*-legal in its import. It involves fundamental changes in the value premises of the legal culture and in the technological premises at the legal-social structure. Such changes are so emphatic and thorough that it can be said a legal revolution has occurred. The hierarchy of values has been completely upset. In terms of this paper such a change will have taken place when legal organizations are no longer hierarchical in structure, control decisions are disbursed and the criminal process returns to its main task of peacekeeping through dispute settlement. The objective conditions for such a change in the relatively near future do not exist. Canadian society may evolve towards this goal or it may continue towards centralization of authority. The Law Reform Commission of Canada can have an influence on this choice. If it chooses to implement a process of substantial legal reform along the lines outlined it would appear that a useful first step would be a public statement of its own inability to bring about substantial law reform without public involvement in a manner far exceeding the traditional calls for written briefs and opinions. It should seriously consider the establishment of local law reform committees with a mandate to innovate and experiment as local conditions permit. It should offer encouragement, advice and consultation to those committees without controlling the direction of their work. Finally, it should communicate the funded experience of each participating group to all other groups and finally to the Canadian public. In the meanwhile, the Commission can busy itself with essential lawyers' work at the technical level and with those reforms that are so manifestly obvious that further experiment is not required.

## Part 4

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### **Towards a Social-Educative Model of Criminal Justice**

Very few people would argue that the criminal justice system can resist change. Nearly everyone recognizes the urgent need to understand the marked changes that are taking place in patterns of crime and to know how to respond to new demands made on our institutions. It would appear, therefore, that we are beyond debating the inevitability of change. The contemporary debate has swung from change *versus* no-change to the methods that should be employed in controlling and directing the forces of change. The predicament we confront, then, concerns methods; methods that will maximize the freedom of individuals and encourage the potentiality for growth and adaptation; methods that will realize man's dignity as well as bring into fruition desirable social goals. The practical challenge lies in inventing and developing a theory of change, consistent with our best social and behavioural knowledge and adequate to the moral and practical tasks of creating a system of criminal justice that has the capacity to respond and adapt to new pressures and demands made upon it. This section addresses itself to questions of creating a system that not only provides prescriptions for solving today's problems but also the generative capacity to identify needs for change in the light of new conditions and to work out improved knowledge, technologies and patterns of action in meeting those needs. The model presented will be called a *Social Educative Model* and it will be distinguished from a *Rational-Empirical Model* and a *Power-Coercive Model*.

#### *The Rational-Empirical Model*

This is the traditional model arising from the Age of Enlightenment and classical liberalism. The assumptions of this model permeate the

thinking of most planners in the criminal justice field. Norms of expertise, professionalism and formal education are emphasized. The basic assumption underlying the model is that the criminal justice system can be a rational system achieving its stated goals provided that key positions in the system are filled by persons possessing a high degree of professional expertise. Experts play a key role in policy development and occupy nearly all positions of power, from law reform commissioner to agency head. Scientific investigation and research represent the chief ways of extending knowledge and reducing the limits of ignorance. The model is highly elitist in nature; plans emanate from the top and are disseminated down through the ranks by way of regulation or prescription.

The traditional approach is to commission the talents of acknowledged experts to develop a "rational" plan. This may take the form of a Royal Commission, task force or other group of outside professionals or it may be a plan emanating from top civil servants. The responsible government minister may release all, some or none of the resulting report and he may or may not commit the government to implement its recommendations. Public participation is limited to a negative role of reacting to decisions already made. Unless the media takes up the issue it is unlikely that changes will be made. Opinion may be mobilized by a special interest group adversely affected by this proposed change but here again the impact is more likely to be to destroy a proposal rather than to suggest one.

It is for these reasons that rational-empirical approaches are more suited to deal with problems which do not reflect underlying value conflicts in society. Once there is basic consensus as to purpose and direction, intelligent action requires the mobilization of expertise towards those ends. Paradoxically, rational approaches to criminal justice planning often reveal hidden conflicts as research frequently shows the gaps that exist between "what is" and what people believe "ought to be". The simple point is that empirical research in the planning process may reveal or heighten conflicts but cannot resolve them.

At the decision-making phase, rational approaches must deny contradiction. Creative solutions to value conflicts can only be forged within the crucible of those contradictions. The necessary dialectical process can be initiated by rationality but creativity requires another element; a synthesis of conflicting thoughts and actions. Once synthesis is achieved rationality once again assumes an important role. The big issues in our society are not technical ones for which technical experts can produce technical solutions. They represent genuine dilemmas as to how to harmonize competing interests. An open society is one that admits of basic conflicts in both means and goals and provides ongoing

mechanisms for coming to terms with its internal contradictions. Technocrats deny contradiction because their training is irrelevant to deal with it. Technocracy becomes authoritarianism when all issues become technical issues.

Change taking place within the framework of this model is discontinuous. It cannot take place until expertise is mobilized and this does not happen until the experts themselves see the need to act. In Canada, the result is a twenty-year time span between major reviews of the system, the intervening years being filled with minor remedial recommendations to improve the efficiency of the then existing systems.

The rational-empirical approach depends upon knowledge as a major ingredient of power. In this view, men of knowledge are legitimate sources of power and the desirable flow of influence is from men who know to men who don't know through the processes of education, dissemination of valid information and, in some instances, simply by fiat.

Knowledge tends to be equated with formal education. Knowledge based technologies develop which are immune from pressures for change, as the challenges usually come from people who do not have the formal qualifications to question the existing order. Training and vocational upgrading become the key to success, creating a growing demand for vocational upgrading among police officers, correctional workers and others.

There is little evidence that formal training leads to better job performance for line staff at least. Giving degrees for basic level work in corrections and law enforcement tends to disguise the real nature of that work. Indeed, a professional education may be dysfunctional for many occupational roles. Attempts to bureaucratize empathy (which most agree lies at the roots of this work) increase social distance between the worker and the client and sets up communication blocks. Moreover, the felt need among professionally trained people to categorize people and complex social situations in the terms of the theoretical perspective of their discipline frequently makes it more difficult to achieve the practical, *ad hoc* solutions needed in concrete situations. Finally, there are tremendous social costs in pre-empting the amateur from work in this field. At the time when interest in lay involvement in the penal-correctional process is on the rise, one should be cautious about creating new professional groups with pecuniary and status interests in excluding the amateur.

There is also a tendency in the rational-empirical approach to create professional specialties with exclusive jurisdiction over particular components of the criminal justice system and to harden the boundaries between them. The lawyer, the judge, the police officer and the

correctional worker demand exclusive rights to deal with their particular aspects of the problem. Overspecialization not only leads to lack of understanding between professional groups but also contributes to a lack of unity in both purpose and method for the system as a whole. The conversations that do take place between professional groups tend to center around jurisdictional conflicts. Thus debates are dominated by territorial fights between judges and parole authorities, police officers and defence lawyers, provincial and federal governments, public and private agencies, and between prison and after-care workers. The result is a rigid system, paralyzed by internal conflict.

The tendency to specialize knowledge in the criminal justice field also leads to partial views of the problem. Crime is a multi-faceted phenomenon. It does not naturally divide into the imposed categories of each professional group. Each group has a particular method of describing the reality of crime from a specific observational standpoint. Constructed realities emerge within distinct contextual framework of meaning. These realities are described in language systems which are asymmetrical to one another. Professional jargon facilitates communication within professions but not between them. Each professional group within the criminal justice system operates within its own closed system of meaning. The everyday meanings of laypeople are lost in the process.

In any given criminal case there are at least five realities: the "facts" believed by the accused and his lawyer, those put forward by the Crown Attorney, those found to be true by the judge, those of the correctional worker, and those of the public formed for the most part from the media. Our criminal justice system does not provide sufficient opportunity for the sharing of these perspectives and will not be able to do so until the barriers between professional disciplines are removed. This will involve a commitment not only to the sharing of ultimate goals but also of decision-making tasks. The sharing of concrete tasks is essential because it is only around a living problem that diverse perspectives can be integrated. More importantly, the removal of barriers between disciplines and professional groups will inevitably make it easier for the layperson to play a more significant role in the penal correctional process.

In sum, learning in the rational-empirical model tends to be highly specialized, partial and elitist. The professional structures which developed within this framework spend most of their energy preserving and enhancing their own particular professional interests. This, in turn, leads to internal squabbles and paralysis. The public are left out of these debates except to play a minor and negative role. Rational approaches are suited to deal with problems which do not reflect underlying value conflicts in society. They are useful in revealing gaps between aspirations

and fulfillment and sometimes uncover hidden contradictions. But they must be combined with other strategies if such contradictions are to be resolved. A way out of the dilemma is to remove the walls that exist between professional groups which, among other things, will allow for public participation in the shaping and implementation of policies.

#### *The Power-Coercive Model*

Power-coercive strategies characterize much of the new movement for change within the criminal justice system. Thus, lobbying, civil disobedience, prisoners' strikes, staged court room dramas and other methods have been used to demonstrate injustice, unfairness or cruelty in the existing system. Attempts to weaken or divide the opposition through physical or moral coercion combined with methods to provoke officials to overreact to perceived threats, thereby demonstrating injustice, are standard moves within the repertoire of the modern activist. The purpose is to open up conflicts and the result is to polarize ideological positions. These strategies are based on the assumption that the only way to change power relations within the penal system is to bring existing processes to a halt.

Some of the difficulty with this model arises from an over-estimation by change agents of the capacity of symbolic action to effect change in practice. Recent history seems to show that there are more failures than successes with these strategies. More often than not they lead to the mobilization of opposition to real change.

Even when concessions are made they are frequently symbolic. It cannot be assumed that desired change has been made if, as the result of pressure, a new administrative ruling or law has been announced. All that has been done is to bring the force of legitimacy behind some proposed change. The re-education of persons who are to conduct themselves in new ways still has to be carried out. It is necessary that new knowledge, new skills, new attitudes and new values in orientation be adopted.

This is not to discount the importance of formal action symbolizing the desire for change, it is rather to emphasize that normative – re-educative strategies must be combined with symbolic action if acceptable changes in practice are to be achieved. For example, legislation designed to redress the balance of power between racial groups in the United States, arising in part from coercive strategies of individuals in the civil rights movement, appeared to have worked only to the extent that they have allowed for genuine change in the value orientation of the target population, i.e. racists in positions of power and among the public generally. Where, on the other hand, the coercive strategy simply



led to the polarization of opinion, a "backlash" effect was the more likely result.

Another problem with the model is the fact that if threats are to be made they must be carried out, at least occasionally, or the movement loses its credibility. In its pure form, it is an all-or-nothing strategy in which the risks of failure are high. The risks are high because those entrenched in power have at their command not only political legitimacy but an array of political and economic sanctions backed by the legitimate use of force. That is why coercive strategies emphasizing the utilization of moral power, playing upon sentiments of guilt and shame, are more likely to be effective than those that emphasize physical, political or economic power. There is a modest record of success in manipulating power elites either by co-opting them to the cause or at least neutralizing their impact. Power relations within our society are not entirely stable and fixed. This provides opportunities for the radical activist to pressure, cajole and threaten, provided he is constantly aware of the needs of his opponents and provides them with avenues of escape which meet those needs. The alternative is a fight to the finish in which only the most powerful group will survive.

Power-coercive strategies, if successful, are likely to lead to new structures of power which are themselves coercive. What usually happens is that a new elite is created protecting its interests against aspirations of the majority of people for whom it ostensibly acts. Examples of successful populist movements being transformed into new forms of coercive control are too numerous to mention. Finally, as with change agents operating within the Rational-Empirical mode, radical activist strategies tend to confirm the intellectual and ethical assumptions of the agent. But, instead of shrouding issues in social science or legal complexities, the radical overly simplifies issues by producing a simple, brutal response from the establishment. The need for revolution is thus confirmed.

The main difficulty is one of fitting the model to the "data", *i.e.* what we "know" about the operation of the criminal justice system. Our criminal justice system is not monolithic. The further one moves from the formal law as expressed in legislation and reported cases toward a phenomenological examination of what people do, the harder it is to fit the data.

Social ordering does not depend wholly or even largely upon coercion. Such a community would be very unstable. Stable political systems consist of a web of converging and diverging interests. Traditionally, conflict was over means not ends. In our society, there is more consensus than conflict in ultimate goals, although recent developments tend to show a breakdown in both goals and means.

Power is not so neatly and unevenly distributed as the radical position would make us believe. Personal, cultural and organizational dynamics frequently conflict with the manifest aims of a dominant group in a political system. Internal bureaucratic as opposed to external political pressures tend often to dominate. The police, for example, tend to behave in quite different political systems. Conversely, within any given political system, tremendous variation exists in the exercise of discretion among members of law enforcement agencies. The same holds true for prosecutors and courts, *et cetera*. Each individual actor in the criminal justice system responds to a host of personal and social pressures and is not merely an automation serving the interests of superior forces. The threat posed by criminality becomes significant to the police, for example, not in political terms, but more often in personal terms. Their response is, therefore, more likely to be determined by such facts as personal security, job competence, administrative support, *et cetera*.

The determinism inherent in neo-Marxian analysis is subject to all the criticisms of deterministic views of man that one frequently sees in certain writings in sociology, political science, and so on. Even Darwin could not explain why man's brain was five times larger than needed for survival. The relationship between man and society is reflexive; *i.e.* society influences man—man influences society.

Much law and law enforcement is an expression of more general cultural forces in society that cannot be fitted to a model of conflicting economic interests. Tradition, sentiment, *et cetera*, work to ameliorate the impact of power.

The legal system is inherently conservative. The concept of legality is not neutral, but contains within it a bundle of notions, some of which are authoritarian, but many of which are egalitarian. Procedural law does in fact restrict the power of the state. Legal culture, *i.e.* the standards, expectations, and norms of behaviour, tends to socialize the agents of the state into accepting certain restrictions on their behaviour. How then can one explain the fact that in the exercise of discretion most police officers, crown attorneys, judges, do not utilize the full extent of their power? Legal room for manoeuvre, formal power, is much broader than what individuals can justify as socially permissible (*i.e.* effective room for manoeuvre). All is not power.

In sum, power-coercive strategies are sometimes useful to focus attention on particular problems. If power is unevenly balanced in society, these strategies are more likely to work if they operate at the level of moral persuasion or through the manipulation of power elites. There are great risks of simply mobilizing opposition to change or of

transforming genuine populist movements into authoritarian power structures.

#### *The Social-Educative Model*

This model is based on the belief that the challenge of responding appropriately to the need for change can best be met by the widest possible participation in the shaping of alternatives. Change is seen as a continuous process of adaptation to new conditions and it will arise from within the criminal justice system and does not have to be imposed from the outside. People will be the targets of change within such a system rather than rules of law or formal policies. The strategy is designed to release and foster growth within individuals who make up the system. In order to achieve this, the model emphasizes norms of openness of communication, trust between persons, removal of status barriers between parts of the system and a recognition of identities of interest between various parts. The identification and reconstruction of basic values is pivotal to change within this model. The value systems that are particularly important are those associated with informal organizations that grow up within each of the formal sub-systems. According to this model, it is only through the sharing of concrete experience among different legal actors within the system that integrative solutions to complex problems can be worked out. These solutions cannot be worked out in advance but only in the context of real, live problems.

By not emphasizing the formal and highly visible aspects of the criminal justice system it is possible to view the system as part of a larger social defence network. This wider network consists of all the mechanisms that work in society which lead to conformity to the values protected by the criminal law. These mechanisms cover a range of activities from gossip at the soft end to penitentiary sentences at the hard end. Each of the mechanisms contain one common element: a set of interactions between individuals from which the participants learn something about themselves, the other people involved and the society in which they live. Thus, victims and offenders interact and learn from it as do police officers and accused persons, judges and lawyers and so on. For those who have repeat experiences of a similar nature, namely professionals on either side of the law, there is a tendency to be reinforced in a particular view of themselves and of the other individuals involved. Thus, police officers, judges, lawyers and other professional persons within the criminal justice system, as well as habitual offenders, tend to have a set of reinforcing life experiences out of which are fashioned not only their working styles but also their

value systems. These experiences promote fairly rigid conceptual systems that cannot be undermined unless the individuals concerned are required to experience reality in radically different ways. The Social-Educative Model would suggest two strategies to deal with this.

The first strategy would involve training, but not of a narrow vocational kind. The pace of change taking place within society generally and within the crime field in particular makes both professional and non-professional persons open to radical change in their belief systems several times in one career. The challenge to educators is to fashion learning experiences that provide for each individual a primary reality focus appropriate to his immediate occupational choice, with a number of secondary and contrary foci to challenge it and thereby open him to change when the situation requires it. This means that while individuals may end up as lawyers, police officers, correctional officers and so on, their basic training would be generic, giving them a broad perspective on the criminal justice system as a whole. Even during the vocational aspects of their education each student will serve short internships covering a range of roles from community worker to correctional officer.

All officials in the criminal justice system should be trained to know how to mobilize community resources. This will necessarily involve the examination of grass roots political structures and the development of skills in functioning within them.

While recognizing the role for formal education, the Social-Educative Model places more emphasis on experiential learning. Learning is seen as a continuous process and the challenge posed by this model is to create learning structures that teach appropriate things to all the actors involved from the ordinary citizen to the highest official.

The task is, therefore, to let the data of shared experience get into the processes of perceiving crime, criminals, victims and other actors in the system of new ways. Since people are the targets of change and experience, the main vehicle for change, the first goal of change agents must be to open up structures which create lines of communication between people so that sharing of experience becomes possible. This view highlights current problems on the centralization of authority, heavy handed supervision and communication blocks.

It also means that we must create a system that meets the tests set out earlier in this paper: visibility, accessibility, simplicity, concordance, accountability and effectiveness. It must be a system which is *just* both in the sense of protecting basic freedoms and in ensuring that the punishment passed on individuals bears some relationship to the harm experienced by their victims.

The Social-Educative Model would place justice in the context of searching for shared interests between adversaries and would attempt to instill in each a thorough going respect, not only for their legal rights to attack one another in court, but also for their social rights to seek solutions which allow them to maintain relationships with each other.

This model emphasizes learning that takes place at all stages of the criminal process. The unfortunate tendency in present methods to conceive the education, rehabilitation, and training of offenders as starting after sentence fails to take into account that the offenders concerned have probably learned their most enduring lessons through earlier interactions with victims, police officers, lawyers and the judges who conducted their trials. All subsequent learning in the post sentence phase is done against the background of these earlier experiences. If the rules of criminal procedure are seen as setting a framework within which learning takes place, then the artificial splits between procedure, substantive criminal law and sentencing must be removed if we are to avoid the present tendency to teach contradictory lessons at different stages of the process.

This approach does not deny the existence of power imbalances in society supported by groups with vested interests in the *status quo*. Nor does it discount the need for research and rational planning. Where it differs from the models described earlier is in the strategies to be employed in utilizing both power and knowledge in the change process. It views the criminal justice system not only as a system capable of fundamental change but also as a system undergoing continuous change. It suggests that radical transformation of our system cannot be forced upon us by an elite group of technocrats, nor by pressure from outside radical activists, but by liberating individuals who make up the wider system to participate in innovation and experimentation as both a right and as a duty. In the process of such involvement, social consciousness will heighten as to what further changes are deemed necessary, what knowledge is relevant to those changes and where the sources of power are to effect or to block change.

So it can be seen that this approach is both conservative and radical. It is conservative in restricting change agents to operate within the collective consciousness of the people directly affected by change. It is radical in challenging everyone to transform both themselves and the social structures in which they live.

### A Working Model

So far this paper has avoided dealing with the classical aims of the penal system. It has not confronted directly the well known debates about the relative merits of retribution, rehabilitation, deterrence and incapacitation. Whilst these debates can be interesting as exercises in logic and sometimes lead to greater clarity about what *ought to be* the aims of the penal system, it is unfortunate that philosophical discourse does not seem to lead to measurable changes in penal practice.

It is interesting to note that very similar penal practices have been labelled and justified in quite different ways depending upon the mood and temper of the time. Thus, as retribution becomes unacceptable as a justification for imprisonment, deterrence was used and later, when many considered it morally offensive to punish one individual to deter another, prisons were presented as "treatment" centres designed to "reform" the offender. Institutional regimes have not changed as much as the labels used to describe them. So it would seem that statements of philosophical principles have not yielded more than new rationalizations for old conduct.

In any event, it should be recognized that the so-called aims of rehabilitation, deterrence, *et cetera*, are not *ends* in themselves but rather *means* used to protect certain personal and proprietary interests in society and to promote public order and tranquillity. What might be necessary to create a sense of public order and tranquillity and what personal and proprietary interests need protection by the criminal law are not fixed and immutable but change over time and vary from community to community.

For all these reasons it would seem more practical not to deal with philosophical principles as abstract doctrines but rather to describe

what a model system would actually *do*, concentrating on the roles of individuals who would make up that system. What is presented here is not intended to be more than a working model designed to provide a framework for specific discussions about concrete proposals for action. This model cannot be implemented immediately and the forms of implementation that might be employed will depend upon local needs, resources and people.

First, some general observations: emphasis would be placed on providing offenders and victims with opportunities, as a matter of first refusal, to deal with problems that exist between them without intervention on the part of the state. The criminal justice system as we now understand it would be seen as a back-up system to be used when the seriousness of the crime makes it impossible to consider an out of court settlement or where either party to the offence feels that there is a threat to his civil rights in subjecting himself to less formal mechanisms.

The entire system would not be founded on the concept of a battle between the parties based on the notion of irreconcilable interests between them and would instead be directed towards reconciliation. Arguments as to whether we should have a "due process" or "crime control model" would become irrelevant, as both those positions can be seen to be based on a common false assumption, namely, that the criminal process must always be a struggle between two contending forces whose interests are implacably hostile. As John Griffiths points out, the assumptions underlying the battle model of criminal justice based on a "struggle from start to finish" defines out of existence any question of reconciliation. Griffiths also points out that the ideological assumptions underlying the battle model work as self-fulfilling prophecies in as much as they promote hostility, alienation, and polarization between the parties.

The Social-Educative Model would be a multi-tiered one, involving mechanisms of conflict resolution in the community without intervention of any kind, the use of individuals and agencies that might facilitate solutions to conflicts that cannot be settled by the individuals directly concerned, diversion back to the community whenever police officers and court officials can achieve a mediated settlement between the parties, and the formal adjudicative system containing most of the elements of our existing system with a vastly reduced intake.

Finally, a commitment to this model will involve significant changes in the roles that individuals currently play within the court system.

#### *The Role of the Court*

Crown attorneys and defence counsel would be encouraged to replace adversarial posturing *vis-à-vis* one another with roles which are

co-operative, constructive and conciliatory. Together with the judge they would be asked to direct their energies toward assisting the tribunal to come to decisions which best incorporate and reconcile the interests of all concerned. Certain structural changes would be required to make this workable.

An intake policy would have to be established at each court. The elements of the policy would include mediation between offenders and victims, voluntary arbitration, possibly on the Philadelphia model, and diversion to voluntary social services. The difference between mediation and voluntary arbitration lies in the fact that in the former case the settlement is entirely voluntary and cannot be legally enforced, while in the latter only the agreement to submit the case to arbitration is voluntary—the ultimate award being an enforceable order of the court. The two mechanisms are, of course, complementary, as one can easily envision cases suitable for one but not for the other.

Mediation or voluntary arbitration would be explored in all cases of crimes committed within continuing relationships, while diversion would primarily be used in cases of crimes without direct victims, such as drug offences. Selected for formal adjudicative trials would be serious crimes where reconciliation is out of the question, crimes committed by strangers on strangers and cases where there is a dispute as to the truth of the allegations.

Absent would be the notion of absolute irreconcilability of interests between the state and the individual. Underlying this would be the assumption that public officials in the administration of criminal justice, in most instances, can be trusted. It would no longer be a system based on the view that all legal actors are potentially bad men who wittingly or unwittingly misuse their powers. Having abandoned the concept of battle, in all but the most serious of cases, it is possible to see that solutions to most problems will not necessarily be imposed either on behalf of the accused person or on behalf of the state.

Offenders would be seen as responsible persons having both the right and duty to make restitution rather than members of a special category of irresponsible criminals needing help. The victim's role in contributing or participating in the crime would be examined. This means that the information base to decisions would have to be broadened to include not only the elements of the offence but also the history leading up to it and relationship between the parties.

To mediate a long standing dispute between individuals or to find a solution by way of voluntary arbitration requires skills that are not learnt through court experience. To get litigation lawyers to think in terms of "solving problems" instead of "winning cases" will require more than formal education. It will mean setting up an incentive and



reward system in professional practice which accords the same measure of prestige, income and personal satisfaction in settling cases as in winning court battles. Leading members of the bar and bench could do much to symbolize the importance of finding alternatives to the adversarial process by taking an active part in developing these mechanisms. Once established they must be adequately supported by appointing prestigious arbitrators with all necessary ancillary services. The intake programme would therefore likely include: a court administrator, trained mediators, an umpire or arbitrator, social service personnel and an adequate physical plant. While the costs of such a programme would not be minimal, they would be more than offset by diverting cases away from the highly expensive criminal process as it now exists.

This is not to say that abuse of power is not possible in this system. Nor does it exclude the creation of mechanisms to deal with abuse when it arises. Rather, it places both a public trust and a public duty upon state officials to work together positively towards reintegrating the offender with his community and the person he injured. A primary control of abuse of power would lie in creating mutualities of interest among various parts of the system and not solely in negative sanctions. Checks and balances would be also built in through high visibility, public knowledge and public participation at all stages of the process. The public's role would be proactive rather than reactive. This means that the public would participate in concrete tasks presently reserved exclusively for professionals. These tasks would cover the whole field from recommending a law reform to supervising offenders processed through the courts.

#### *The Role of the Public*

Lay persons would be involved in every step of the process. At the formal level there would be involvement in the court itself as lay assessors sitting with professionally trained judges (as in the Scandinavian system). Lay persons could also form part of court committees in both the juvenile and adult field, the function of which would be to advise the court of the needs of the community within which it operates. Interested citizens would have the right to discuss problems of a general nature in the community of which crime is but the tip of the iceberg. Courts would then become true learning mechanisms in which community conflicts would be discussed and within which individual cases would be dispensed, first in terms of the merits of the particular case and secondly in terms of the problem the case represents to the community as a whole. It would allow judges to become "arbi-

trators of community conflicts" and would allow the court to play a major educative role.

Citizens would also have direct access to police officers. The police would be encouraged to become integrated into the community, working on a host of social planning problems in collaboration with others. It would mean a decentralization of police functions, the break-up of para-military structures and a restructuring of police priorities in the direction of crime prevention as opposed to law enforcement.

The public would also have a direct role to play in corrections. Parole decisions would be decentralized, with local parole boards attached to each institution and lay persons sitting on these boards on a rotation basis. Probation and parole services would be conducted for the most part by lay persons on a one to one basis as is done in some jurisdictions. The role of the professional would be to seek, train and give support to lay counsellors.

Large prisons would be dismantled and relocated in small units within easy access of the services available in the community. Instead of "special but equal" treatment of offenders in prisons, the majority of offenders would receive their vocational counselling and training in the community by agencies and individuals that provide these services for the public generally. This would go a long way towards treating the offender as a human being instead of stigmatizing and labelling him as a person different from others.

By far the largest role the public can play is in the informal aspects of the social defence system. Here an array of community based systems can be created that will act as information and referral sources in which neighbours with problems would be put in touch with neighbours with resources to assist in handling problems that arise. The information centres should be staffed by members of the local community and their initial task would be to consult and pass on information with respect to resources, needs and problems. Lay mediators could be used to deal with domestic and neighbourhood disputes which form the original base of so much crime, and an effort would be made to keep problems in the community wherever possible, utilizing formal agencies as last resorts in ordinary cases.

These community based organizations must be grass roots in the true sense. They should not be imposed upon a community by a group of individuals using the device to work out their own problems at the expense of both the taxpayer and the members of the community that probably did not invite them in. The values and attitudes of the people working in these centres must be those of the majority of the people in the areas they serve. They must not be seen as agents of authority or representatives of an outside controlling institution. The main pro-

tection from abuse in the system lies in the fact that true grass roots organizations operate within the framework of the communities value system. However, the decision to use the resources of a community based organization by an individual in difficulty must be a voluntary one and it must be one that does not preclude access to any of the formal systems.

Perhaps the best that could be hoped for from grass roots agencies of this kind is that they will promote community responsibility to deal with its own problems before these become so extreme that authoritative action by some official must be taken. They should be seen as working in partnership with the more formal agencies of the state and not in opposition to them. They are able to play this role to the extent that they are perceived by people in difficulty as a non-authoritarian community resource with a capacity to deal with their problems humanly and effectively.

### *The Role of the Police*

The delicate task here will be to create positive roles for the police in society without breaking their tie with the law. While it is widely recognized that the police are not and should not become social workers, they are the major agency operating twenty-four hours a day and are responding to crisis situations of all kinds. The police must be trained to handle family disputes, neighbourhood quarrels, racial conflicts and a host of other problems for which they are inadequately prepared and insufficiently supported. The response in referral roles of the police need additional attention through training, integration with social services, guidelines for the exercise of discretion, experimentation and innovation.

Being a major intake agency to the entire criminal justice system, the decisions made by police officers with respect to discretion not to invoke the criminal process, levels of enforcement, priorities with respect to certain kinds of offences, diversion of social service networks and informal mediation at the community level have important consequences at each subsequent stage of the process. Being part of a larger system, police policy must be integrated with the criminal justice system as a whole and this will require more effective liaison through the sharing of information and joint planning.

In restructuring law enforcement, it is essential to remember that the police officer is one of the few individuals in society with special powers to use force to prevent breaches of the peace and in arresting and detaining suspects. This necessarily imposes limits to their helping the role. While it is true that up to 80% of calls for police assistance

do not involve a breach of the criminal law, police are the coercive arm of the state. They should not be encouraged to take over voluntary social service functions. It appears from the evidence that the reason for public calls for police assistance in non-criminal matters lies not only in the fact of police readiness to respond quickly, but also because the police are seen as an authoritarian agency with the powers to freeze situations before they get out of hand. It appears, therefore, that short term crisis intervention is a legitimate police function. Where there appears to be some confusion at present lies in differences of opinion among police officers and others as to what a police officer should do once a situation has been brought under control and it is determined that no useful purpose would be served by laying criminal charges. It would appear to be both wrong in principle and unworkable as a matter of practice for the police to undertake responsibility for counselling or long term follow-up in these cases. It also seems questionable for police to hire their own social workers as members of the police force. These measures lead to unnecessary confusion in the minds of the public and police officers themselves. A better solution would appear to be one of considering the police officer's role simply in terms of an intake function to either the criminal justice system or to a voluntary social service network. In order to make this work it would be necessary to ensure that voluntary social services can respond adequately to referrals from police officers. This means that each community will have to examine its resource network and supplement it as necessary. Medical, social and counselling services must be available to the police on a twenty-four hour basis. Police themselves will have to be trained to use this network appropriately and this means that curricula for police officers in training must have components dealing with discretion not to invoke the criminal process, the identification of mental or social problems requiring professional help, short term crisis intervention and police community relations. Many police academies at present do not pay any attention to these matters and the result is that 100% of police training at the recruit level deals with 25% of police activity on the street.

By far the most important change needed is a fundamental structural change in the role of the police in the community. It is important that the police be seen as a social service and be integrated at the planning and organizational level with other social services. This means that in each community officers will be directly involved in general social planning processes in which problems of co-ordination and delivery of services would be discussed with other relevant agencies and individuals concerned. Individual police officers will be encouraged to participate in the life of the community, not only for purposes of

public relations, but more importantly as a technique of crime prevention through interaction between community members and police officers around potential areas of conflict between citizens and the law.

Finally, there is a need to establish a clearing house of information on police innovation. Provincial and federal governments can play important roles in funding experiments, monitoring them and disseminating results. Only in this way will it be possible to take full advantage of novel attempts to find more constructive roles for police officers in a rapidly changing society.

To summarize the tentative working model as discussed in this paper it is schematically presented below.

# SCHEMATIC PRESENTATION OF MODEL

