STARTING-POINT SENTENCING FOR DOMESTIC ASSAULT:[1] A CRITICAL REVIEW OF THE *BROWN* GUIDELINES

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I. INTRODUCTION

The history of the law's treatment of violent offenders, particularly in respect of domestic assaults, is less than enviable. "The structure of the household and the legal relationships of its members in the early-modern period" made it not only the right but the duty of the husband to use beatings if necessary to control and discipline his spouse.[2] That the courts undoubtedly sanctioned wife-beating is illustrated by the expression of one 18th century British court that "a man could beat his wife provided the stick used be no thicker than his thumb," and by another 19th century judge that "so long as there was no personal injury, it was best to ignore the matter and leave the parties to forgive and forget."[3]

Today spousal assault is not only *considered* a crime, it is *treated* as one. This is reflected in Alberta's leading case on sentencing for domestic assault, *R.* v. *Brown*; *R.* v. *Umpherville*; *R.* v. *Highway*.[4] There the appeals from sentence of three men convicted of spousal abuse were heard together by the Alberta Court of Appeal. In stark contrast to the historical view of wife abuse as a private matter not to be interfered with by the courts, the Court imposed sentences which ranged from eighteen months to three years incarceration. Thus the question is no longer *whether* the courts will respond to such behaviour, but rather *how* it has responded in terms of sentencing policy and practice.

In setting out the principles which should govern sentencing, the Court in *Brown* revealed its commitment to combat the problems of spousal abuse in our society through the sentencing process. The significance of the decision, however, lies in its establishment as a guideline judgment: a precedential ruling which provides a starting-point approach to sentencing as a means of guiding lower courts in the determination of a fit sentence. The underlying objective of a starting-point sentence is to provide a rational structure to the exercise of a sentencing court's discretion and to ensure

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1 This case note was previously published in excerpted form in: (April 1996) 9:2 *The Criminal Trial Lawyers Association Newsletter* 1.

2 J.M. Beattie, "Violence and Society in Early-Modern England" in A.N. Doob & E.L. Greenspan, eds., *Perspectives in Criminal Law* (Ontario: Canada Law Book Inc., 1985) 36 at 42-43.

3 John Howard Society of Alberta, *Understanding Domestic Violence: Criminal Justice Response to Wife Abuse* (Edmonton: John Howard Society of Alberta, 1991) at 2.

4 (1992), 73 C.C.C. (3d) 242 (Alta. C.A.) [hereinafter *Brown*].

uniformity of approach in terms of the length of sentence and the governing principles. The question to be addressed is whether the guideline judgment, as applied to cases of domestic assault, actually achieves in practice what it endeavours to do in theory. A critical analysis of the *Brown* decision and a review of subsequent case law clearly suggests that it has not achieved much success. This result, it will be argued, is due to the Court of Appeal's failure to comply with its own prior directives on starting-point methodology, as well as a lack of consensus among the judiciary in terms of its stated policy objectives.

II. SENTENCING PRINCIPLES AND STARTING-POINT PHILOSOPHY

The Alberta Court of Appeal has had a tradition of expressing its condemnation of violent criminal behaviour through stated policy directives. The principles of general deterrence and denunciation have been consistently pronounced as the primary objectives in sentencing for offences involving violence.[5] The general theory underlying the principle of deterrence is that, through our system of punishment "the emotion of fear should be brought into play so that the offender may be afraid to offend again and also so that others who may have contemplated offending will be restrained by the same controlling emotion."[6] Corresponding with this goal, however, is the court's concern with disparity in sentencing. The general view is that parity in the sentencing of offenders within specific categories of offences is necessary to maintain predictability, a vital element to ensure effective deterrence.

The potential for disparity is reflected in the *Criminal Code of Canada*[7] provisions relating to assault which envisage a broad range of possible punishments. In arriving at the fit sentence in each case a sentencing judge's discretionary power is statutorily limited only by the maximum penalty provisions.[8] With the majority of cases coming before the courts involving abusive conduct falling short of that deserving of the maximum punishment "the maximum penalty structure provides little guidance to judges..."[9] and may well result in unjustified disparity of sentences.

In order to give effect to the primary objectives of deterrence, denunciation and sentencing parity, the Alberta Court of Appeal has established a number of starting-point sentencing regimes. The philosophy and methodology to be used in developing

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5 See *R.* v. *Johnas*; *R.* v. *Cardinal* (1982), [1983] 2 C.C.C. (3d) 490 (Alta. C.A.) (robbery); *R.* v. *Sandercock* (1985), 62 A.R. 382 (C.A.) (sexual assaults) [hereinafter *Sandercock*]; and *R.* v. *R.P.T.*; *R.* v. *T.S.* (1983), 7 C.C.C. (3d) 109 (Alta. C.A.) [hereinafter *R.P.T.*; *T.S.*] (child sexual abuse by persons in *loco parentis*).

6 *R.* v. *Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.) at 175.

7 R.S.C. 1985, c. C-46.

8 The statutory maximum terms of imprisonment, where cases of assault proceed by indictment, range from five years for assault (s. 266), to ten years for assault with a weapon or causing bodily harm (s. 267), to fourteen years for aggravated assault (s. 268).

9 J.V. Roberts, "New Data on Sentencing Trends in Provincial Courts" (1995) 34 C.R. (4th) 181 at 189.

a structured regime was most clearly delineated by the Court in the 1985 case of *R.* v. *Sandercock*.[10] The process to be followed was stated to be:

> first, a categorization of a crime into "typical cases", [stated with precision]; second, a [precise] starting sentence for each typical case, third the refinement of the sentence to the very specific circumstances of the actual case.[11]

This methodology is intended to offer a rational structure to the sentencing court's exercise of discretion, "a structure which is just because it guards against both disparity and inflexibility."[12] It is important, however, to note the qualifications made by the Appellate Court on the starting-point approach. A rational sentencing structure requires that the "typical cases" be segregated into meaningful categories. The categories of robbery or sexual assault, for example, are said to be "simply too broad for any meaningful sentence regime."[13] The Court further acknowledged that a lack of precision in defining "typical cases" may result in confusion. It is these qualifying statements that underscore the failure of *Brown* to provide a rational sentencing structure for domestic assault.

III. THE STARTING-POINT APPROACH TO SENTENCING FOR DOMESTIC ASSAULT

In stating its recognition of the apparent seriousness and prevalence of domestic violence in our society, the Court in *Brown* determined that it was its responsibility through sentencing policy "to denounce wife beating in clear terms and to attempt to deter its recurrence on the part of the accused man and its occurrence on the part of other men."[14] In determining the fit sentence for spousal assaults "two of the applicable principles are that the sentence should be shaped in the hope of furthering the rehabilitation of that man and in the hope of deterring him from repeating his conduct in the future."[15] However, the more important principles to be given effect in imposing punishment are general deterrence and denunciation: principles which generally envisage a term of imprisonment.

The Court then went on to set out the structure to be followed in determining the fit sentence:

> In cases of assault by a man against his wife, or by a man against a woman which [*sic*] whom he lives even if not married, the starting-point in sentencing should be what sentence would be fit if the same assault were against a woman who is not in such a relationship.[16]

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10 *Supra* note 5.
11 *Ibid.* at 385 (para. 6).
12 *Ibid.* at 384 (para. 2).
13 *Ibid.* at 385 (para. 4).
14 *Brown, supra* note 4 at 249.
15 *Ibid.* at 250.
16 *Ibid.* at 249.

The existence of any aggravating factors (such as the severity of violence or a history of convictions for similar offences) or mitigating factors (such as a guilty plea or signs of remorse) are to be considered at this stage. Once the starting-point sentence is determined the next step is to consider the relationship between accused and victim. Violence against a spouse is characterized as a breach of trust and therefore an aggravating circumstance which should increase the sentence from the starting-point.

IV. A CRITICAL REVIEW OF THE *BROWN* GUIDELINES

The *Brown* guidelines have been met with a great deal of lower court resistance. Its credibility as a rational sentencing structure is undermined by two critical problems: the first relating to the stated "typical category" of offences, the second relating to the actual starting-point sentence. Each shall be dealt with in turn.

The *Brown* guidelines are clearly restricted to assaults involving violence against a spouse or common-law spouse. The Court made no attempt, however, to segregate out of that offence the category of "typical cases" to which it was to apply. Indeed, some may argue that to do so would be a virtually impossible task. Assaults may range from minimal isolated incidents to violent repetitive abuse. However, in *Sandercock* the Court of Appeal stated that in order to have a rational sentencing guideline there must first be a meaningful category of cases defined. Furthermore, domestic assault, like the general category of robbery or sexual assault, "is simply too broad for any meaningful sentence regime."[17]

The approach taken in *Brown* with respect to its stated category of cases is also inconsistent with that which has been followed by the Court of Appeal in other guideline judgments. Numerous starting-point sentencing schemes have been developed with a fair degree of precision for offences which are otherwise considered to be extremely broad in scope. For example, the offence of sexual assault was segregated into typical categories in two separate guideline judgments, *R.P.T.*; *T.S.*[18] and *Sandercock*. In *R.P.T.*; *T.S.*, the stated category of cases to which the guideline applied was defined as including sexual abuse of children by a person in *loco parentis*. At the outset it would appear to be no more meaningful a category than that proposed in *Brown* for domestic abuse. The defining factor emphasized in both cases is the breach of trust aspect. In *R.P.T.*; *T.S.*, however, the Court did go on to further streamline the categories by distinguishing between three "typical cases" and providing a starting-point sentence for each: 1) the most severe cases of child sexual abuse where a penitentiary sentence may be required to adequately reflect the severity of the crime; 2) those cases where substantial aggravating factors exist but the family is to be restored, requiring a stern jail sentence and probationary order (indicating a term not exceeding two years); and 3) where the circumstances are less serious, an intermittent jail term may be available (suggesting a term not exceeding ninety days).

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17 *Sandercock*, *supra* note 5 at 385 (para. 4).

18 *Supra* note 5.

The guidelines established in *Sandercock* refined the "typical cases" as contemplating a major sexual assault between strangers, and "assum[ing] a mature accused with previous good character and no criminal record."[19] The starting-point sentence was stated to be three years incarceration. Planning and deliberation was held to be a major aggravating factor which would place the offence into a secondary category justifying a starting-point ranging somewhere beyond the three year term.

In both cases the Court's ability to set starting-point regimes with a fair degree of categorical and numerical certainty did not yield to the difficulties inherent in the broad nature of the offences dealt with. Achieving the same level of precision in cases of domestic assault then would not appear to be an insurmountable task. One approach that could reasonably be taken to the *Brown* judgment is to interpret the "typical case" more narrowly by drawing from the facts involved in each assault committed in the three cases. There the spousal assaults involved repeated and grave violent conduct, each resulting in physical damage to the victim. *R.* v. *Umpherville* was the most violent case of the *Brown* trilogy. In this case the assailant used a knife to stab his common-law wife in the hand causing permanent damage. In each of the three cases, the accuseds also had a history of violent assaults on a domestic partner.

In summary it may be inferred that the "typical cases" to which the *Brown* guidelines are to apply are those cases of spousal abuse which involve both a serious degree of violence causing grave physical harm to the victim, and an accused with a history of related offences. Whether or not this is what the Court actually intended to classify as the stated category is unclear. That the uncertainty has resulted in confusion is illustrated in the 1994 case of *R.* v. *Bonneteau*,[20] wherein the Court of Appeal found it necessary to re-affirm its sentencing guidelines for spousal abuse.

Bonneteau was convicted of three counts of assault upon his common-law wife. In each incident the accused had kicked and punched the victim, resulting in black eyes and bruises. In concluding that he was not obliged to apply the *Brown* guidelines, the sentencing judge imposed a global sentence of ninety days, to be served intermittently, and a twelve month probationary order. One of the problems lay in the sentencing Court's interpretation of the *Brown* judgment as being applicable only in cases of serious domestic violence where the accused has a history of convictions for the same offence; factors which he concluded did not exist in this case. On appeal, the Court held that this was clearly an error. The *Brown* judgment, it was said, "did not limit its comments to serious spousal assaults involving violence. Nor did it speak only of repeated assaults."[21] Sentencing courts are bound by the guideline judgment even if the assaults are neither serious nor repeated.

The sentencing judge's interpretation of the *Brown* guidelines was not unreasonable if the Court of Appeal's traditional approach of limiting typical categories with precision in starting-point judgments is acknowledged. In commenting on the

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19 *Supra* note 5 at 386-87 (para. 17).

20 (1995), 93 C.C.C. (3d) 385 (Alta. C.A.) [hereinafter *Bonneteau*].

21 *Ibid.* at 392.

precedential value of the *Brown* judgment, the sentencing judge attempted to signal the need for consistency in approach, stating his opinion that "it would be useful for the Alberta Court of Appeal to categorize spousal assaults in the same manner the appeal court has categorized sexual assaults within the family."[22] This was clearly an invitation to the Court to reconsider its sentencing structure. It was, however, passed by without comment.

The manner in which the Court of Appeal itself has applied the *Brown* guidelines further raises concerns about what limitations exist in the scope of its application. An example can be found in the 1993 case of *R.* v. *Harris*.[23] There the accused was convicted of sexual assault against a woman who was his former common-law wife. The relationship had ended approximately two months before the incident, and the woman was in fact involved with another man. In concluding that the *Brown* guidelines did apply Picard J. stated:

> The important thing to analyse in these cases is the control dynamic. It is clear in this case that the appellant was in control. He took control at the door. He pushed his way in. He then proceeded to attack the victim.... These facts put this case within the principles of *Brown*.[24]

It is important to note that in *Brown* it was the breach of the position of trust which makes the domestic nature of such assaults a serious aggravating factor. The circumstances surrounding the breach of trust were said to be that the men are abusing the power and control which they have over a woman with whom they live; a power which often exists because of the financial and emotional vulnerability of the woman making it more difficult for her to leave the situation.[25] Clearly it is not the physical control which places an assault within the realm of the *Brown* judgment, for this would encompass any assault by a man against a woman. Moreover, once the parties are no longer in a domestic relationship, does not the breach of trust factor diminish as well? In the facts of this case Picard J.'s reasoning can be seen to be misleading. Would the *Brown* guidelines apply to any case of assault wherein the parties were previously involved in a domestic relationship no matter how much time has elapsed since its termination? Would it apply to cases where the parties were intimately involved but not living together? This judgment tends to blur the types of cases to which *Brown* is to apply and raises concerns about the limits of its application.

The second critical problem that undermines the credibility of the *Brown* guidelines as a rational sentencing structure relates to the actual starting-point methodology. Rather than taking a direct sentencing approach to spousal assaults, the starting-point is the sentence which would be appropriate if the same assault occurred by a man against a female stranger. An assault upon a stranger, however, will never be the same as an assault against a spouse. Not only do stranger assaults exclude any notion of breach of trust, but also factors such as the violation of the sanctity of the home through the

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22 Quoted *ibid.*

23 (1993), [1994] 14 Alta. L.R. (3d) 155 (C.A.).

24 *Ibid.* at 156 (paras. 2-3).

25 *Supra* note 4 at 249.

constant fear of future abuse and the long-term effects on children who witness the violence. The moral culpability in each case cannot be paralleled, even at the first stage of the sentencing process.

Moreover, this approach would seem to contradict the very purpose in establishing a starting-point regime — to differentiate between general assaults and domestic violence in imposing punishment, the latter being of greater prevalence in our society. This structure further contradicts what the Court previously said was the purpose of defining "typical cases"; it "affords a starting-point for sentencing because one can state a precise sentence *for that precise category*."[26] It is by this method that uniformity of approach is said to be heightened and confusion avoided.

The rationality of its structure is not improved by stating that the breach of trust element is an aggravating factor which should increase the sentence from the starting-point. This approach fails the three step test which the Court of Appeal earlier set out as the methodology to be used in developing a starting-point regime. The result is that "the distinction between the first step of defining the typical offence and the third step of applying aggravating and mitigating factors is blurred."[27] The second step of defining a precise starting-point has been missed altogether.

Disparity in approach by the Court in developing this sentencing structure is also revealed by starting-point guidelines on sexual assault. In *R.* v. *W.B.S.*; *R.* v. *M.P.*,[28] the Court of Appeal established a sentencing regime for the separate category of major sexual assaults upon a child by a person who stands in *loco parentis*; setting a starting-point of four years for the "typical case." The Court expressly rejected an approach based on the starting-point sentence for major sexual assaults aggravated by the fact that the accused was breaching a position of trust. What is most remarkable is that this judgment was handed down only two months after *Brown*, with two of the same justices sitting on both sentencing panels. The parallels between these cases are apparent, yet the inconsistencies remain unexplained.

The Court's failure to comply with its own policy directives undermines its commitment to the goal of uniformity of approach and in turn has created a guideline judgment that fails in practice to offer lower courts a consistent approach to sentencing. Directing the judiciary to begin the process by determining the fit sentence for stranger assaults offers little guidance when no starting-points have been established for general assaults. Case law on sentencing is often unreported, and if reported, often involves global sentences rendering it difficult to ascertain the appropriate punishment for a single offence of assault. In addition, it can be fairly assumed that cases involving an assault by a man against a female stranger are rare in comparison to assaults between men, the latter not being an appropriate precedent to follow.

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[26] *Sandercock*, *supra* note 5 at 385 (para. 6) [emphasis added].

[27] C. Kennedy, "Annotation to *R.* v. *Ollenberger*" (1994) 29 C.R. (4th) 167 at 169.

[28] (1992), 73 C.C.C. (3d) 530 (Alta. C.A.).

Thus a practical application of the *Brown* judgment means the sentencing court will usually be left to the exercise of its individual discretion in deciding the appropriate sentence from which to start. While in theory each court will uniformly increase the sentence giving consideration to the breach of trust factor, the impact which this aggravating circumstance will have on the length of the sentence will vary. It is important to remember that the philosophy underlying the development of a rational sentencing structure is to guard against disparity. The potential for disparate sentencing that existed prior to the *Brown* guidelines would not appear to be minimized by following its approach. The advice given in *Sandercock* that "appellate guidance offered cannot be so vague as to permit unjustified disparity of sentence"[29] appears to have been overlooked in constructing the sentencing guide for domestic assault.

V. GENERAL DETERRENCE AND DENUNCIATION AS PRIMARY GOALS IN SENTENCING

Aside from the problems arising from the imprecise starting-point methodology used, the *Brown* guidelines have not had much success as a binding precedent in other aspects of the judgment as well. In pronouncing that the principles of general deterrence and denunciation are to be given primary consideration in sentencing offenders convicted of domestic assault, the Court clearly took an active role with respect to a social policy issue. While acknowledging that rehabilitation of the offender and preservation of the family unit may be applicable considerations, they were said to be factors which

> should not readily be permitted to prevail over the general sentencing policy that envisages imprisonment of the man as not only an instrument of the deterrence of other men, but also as an instrument of breaking the cycle of violence in that man's family even at the risk of the relationship coming to an end during the enforced separation.[30]

Although the thrust of the judgment is undoubtedly in favour of a substantial term of incarceration in all cases, except perhaps the most minor, the Court's directive in terms of stated policy objectives has not been met with a great deal of success. Much of the lower court resistance appears to arise from a refusal to simply accept that harsher punishment actually has a positive deterrent effect or that it is the most appropriate measure to be used in ending the cycle of violence.

Despite the Court of Appeal's willingness to adopt sentencing policies on the basis of taking judicial notice of the effectiveness of deterrent sentencing, it is in fact an issue which is the subject of much dispute. The literature surrounding the criminal justice penal system reveals a wide divergence of opinion on whether the broader objective of protecting the public from harm is best achieved by substantial incarceration or a sentence which focuses on attempts to influence an offender's future

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[29] *Supra* note 5 at 384 (para. 3).

[30] *Supra* note 4 at 251.

behaviour through rehabilitative measures.[31] A court that structures a sentence towards rehabilitation of the offender tends to appreciate the need for judicial sensitivity to the realities that surround family violence in our society. The fact that incidents of domestic violence often correspond with the abuser's personal problems cannot be ignored. Substance abuse, inadequate coping strategies to deal with stress, and subjection to violence in the abuser's childhood are factors which often contribute to the violence and aggression levelled against a spouse.[32] Sentencing objectives which fail to address these factors may result in a criminal justice system which is seen to be making futile attempts at protecting the public from the risk of future violence.

One illustration of this is found in the case of *R.* v. *Crazybull*.[33] Clifford Crazybull was convicted of assault causing bodily harm to his common-law wife. The facts revealed that the accused had an extensive record involving similar crimes of violence. Previous terms of incarceration had clearly not had any deterrent effect. The facts also indicated that the accused was a chronic alcohol abuser and was only violent when he had been drinking. Based on this the provincial court judge concluded that rehabilitation of the accused should prevail over punishment directed towards deterrence and denunciation and imposed a suspended sentence plus three years probation with strict terms as to treatment. The judge expressly adhered to the view that only treatment of the offender's personal problems would protect society in the long run.

The response by the Court of Appeal, however, was to chastise the judge for depreciating the primacy of deterrent sentencing in accordance with the *Brown* guidelines. An appropriate sentence, it was suggested, would have been twelve months imprisonment. What is most interesting, and confusing, is that the Court went on to state that it would be correct to minimize the "deterrent aspect in [sentencing] in a special case, as when a treatment program as a highly desirable rehabilitative program would be in irreconcilable conflict with the right deterrent sentence."[34] The problem, however, is that more often than not the right deterrent sentence will be counter-productive to the effective rehabilitation of an offender. Porter J. suggests that one of the reasons for this is that the principles of deterrence and denunciation and the principle of rehabilitation reflect penal objectives which cannot effectively be pursued simultaneously in the same sentence.[35] He summarizes the dilemma as follows:

> Achievement of the broader objectives of a punitive sentence may require the sentencer to adopt an approach which is not likely to assist the offender towards conformity with the law in the future, and may positively damage such prospects of future conformity as exist already, while a measure designed

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31 M. Porter, "Alternatives in the Sentencing Process: Sentencing of Natives" (Address to the Canadian Bar Association, Alta. Branch, Midwinter Meeting, January 1994) [unpublished]. See also *R.* v. *Sweeney* (1992), 7 B.C.A.C. 1 (C.A.), and *R.* v. *Preston* (1990), 47 B.C.L.R. (2nd) 273 (C.A.).

32 M. Hoffard, "Family Violence: Challenging Cases for Probation Officers" (1991) 55 *Federal Probation* 12.

33 (1993), [1994] 141 A.R. 69 (C.A.).

34 *Ibid.* at 72 (para. 19).

35 *Supra* note 31.

> to assist the offender to regulate his behaviour in the future may appear to diminish the gravity of the offence and weaken the deterrent effect of the law on potential offenders.[36]

Faced with this apparent conflict, the traditional approach would have been to allow a judge to decide which objective is to prevail considering the needs of the individual offender. The *Brown* guidelines, however, were clearly intended to decide that issue once and for all; punishment is to be the governing policy consideration.

That the primacy of deterrent sentencing continues to be a matter of some dispute is further reflected in the fact that this view has not achieved consensus even among some members of the Court of Appeal itself. This can be seen in the case of *R.* v. *Piche*[37] where two appellate justices upheld a lower court's sentence which de-emphasized deterrence. McClung J. expressly acknowledged that in cases of spousal abuse "experience shows that little deterrent heed is paid to intensified gaol terms imposed on other offenders."[38] Although this judgment does not set out the law in Alberta, it does send out conflicting messages on how the criminal justice system ought to deal with domestic violence. It also illustrates that so long as there exists a disagreement among the judiciary on what principles are to be stressed in sentencing, the *Brown* guidelines will continue to be an illusory attempt at providing appellate guidance on sentencing for domestic assault.

VI. CONCLUSION

While maintaining confidence in the value and logic of the starting-point philosophy in general, the above commentary was intended to explore the cause of resistance among the judiciary to the guidelines imposed on sentencing for domestic assault. By adopting an approach which is in discordance with the established methodology of starting-point regimes, the result is that the *Brown* guidelines are both vague and difficult to apply. The imprecision of the typical category of cases and the ill-defined starting-point sentence reflect the failure of the *Brown* judgment to provide a rational sentencing structure. Until the Court is willing to reconsider the approach taken toward sentencing for domestic assault the *Brown* guidelines will continue to stand as an obstacle to achieving the goals which underlie a starting-point regime: sentencing parity and uniformity of approach.

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36 *Ibid.*

37 (1993), [1994] 145 A.R. 233 (C.A.).

38 *Ibid.* at 234 (para. 5).