DEAN WEIR MEMORIAL LECTURE
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WINDS OF CHANGE IN THE SENTENCING PROCESS*

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This article was presented as the 1986 Dean Weir Memorial Lecture at the University of Alberta and briefly discusses some of the philosophies of criminal sentencing including changes in the United States penal philosophy and practice. The application and effect of these new systems of sentencing in Canada is also considered.

It is a great honour to be asked to speak to the Friends of the University of Alberta and, further, to have this paper designated as the 1986 "Dean Weir Memorial Lecture". I arrived at the University of Alberta too late to have known Dean Weir. But, his reputation for sagacity, as a gifted lawyer and as a skilful teacher lived on into my era. We came to associate his name with every quality that a teacher or a lawyer may possess. Whether his fame made him bigger than life, I cannot know but I am humble to be associated with him, even briefly and at this distance.

The playbill for this evening's performance has promised you a review of the philosophy of criminal sentencing. But in truth the paper is much less ambitious. Rather, I propose to pass on to you some reflections on this perplexing topic prompted by the appointment in Canada of the Canadian Sentencing Commission by federal Order-in-Council.[1] As I review the very detailed mandate of the Commission set forth in that document, I conclude that the Commission's enquiries are directed to nothing more nor less than the establishment in Canada of systems of "determinate sentencing" taken from experiments in that line in the United States. There are, indeed, winds of change in United States penal philosophy sweeping northward with inevitable effects on Canadian theories and practice. What are these philosophies? What changes have they produced in the United States? How will these new practices fare if they are transplanted into the Canadian scene?

I.

First I offer a brief history of United States penal philosophy as a basis for understanding the new trends to be seen there. We must remember that, unlike much in the substantive law, the American penal system has evolved independently of the English system. The American revolution isolated penal philosophy there from England, before changes had been made to the huge list of capital offences in that country. Professor Thomas noted recently[2] that the historical section of any American textbook on penology leaves the impression that England still has a system of "haphazard savagery" with 200 or more capital offences.

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1. P.C. 1984-1985.
2. Thomas, "Have the Courts Failed? The Problem of Sentencing in the 1980's". A paper prepared for the National Seminar on Sentencing of the Canadian Institute for the Administration of Justice, (Toronto, October 1985).

The American contribution to penology was the immediate mitigation of harsh English practices in force at the time of the revolution. This was accomplished in the 18th and 19th centuries by the institutionalization of prisons in America. Whatever we think of prisons today, groups such as the Pennsylvania Quakers established them as a humane alternative to the hangman's noose and the sentences of transportation. But in keeping with the philosophy of the age, retributive justice was the dominant ideal of the new system. The American penologists of the new republic in the 19th century decided that imprisonment must fit the new idealism by fixing a penalty proportionate to the severity of the criminal act.[3] We shall see remarkable echoes of that language, and indeed of that philosophical concept, when we examine the language establishing the Canadian Sentencing Commission.

Through the 19th century the concept of retribution was the paramount concern of American penologists; the concern for rehabilitation was almost non-existent. The basis for release was not the conduct of the inmate, nor that he had been rehabilitated, but that he had served the sentence determined by the severity of his crime. A phrase derived from that age and still heard today is that an offender "has paid his debt to society". The basis for release was that the retributive sentence required by the crime had been completed.

The positivist philosophies of the late 19th century and the first six decades of the 20th century, extending across most disciplines, also influenced penology. Positivists said: "We can do what we will. We can improve our world by our efforts. Any problems can be solved by study, by treatment, by the investment of resources." Suddenly, the emphasis shifted from retribution for the crime to rehabilitation of the offender. An American criminologist, Malmquist, describes the change in these terms:[4]

> Whereas rehabilitation had formerly been a peripheral goal of criminal justice, it was suddenly thrust forward to be the 'uncompromised goal' of criminal sentencing. The Prison congress associated retributivism with an 'infliction of vindictive suffering' and vowed that punishment was thereafter to be directed 'not to the crime but the criminal.... Hence the supreme aim of prison discipline is the reformation of criminals.' It is important to note that in this same declaration, crime is labelled as a 'disease' which warrants a cure.[5]

The Positivist ideal of rehabilitation of the offender ushered in the era of indeterminate sentences. When retribution was the ideal, sentences were fixed and not subject to reductions or increases. Rehabilitation of the offender, if it occurred, was welcome but really irrelevant to the basic purpose of the sentence. With the shift toward rehabilitation, however, fixed penal sentences were both unnecessary and counter-productive. It was believed that the sentence should be directed to rehabilitation and should end when that goal was accomplished. Since the sentencing judge could not foresee when rehabilitation of the offender would occur, he fixed a minimum and a maximum term in each sentence with a wide range

3. See Malmquist, *The Theory and Practice of Determinate Sentencing: The Minnesota Sentencing Guidelines* (Cambridge: M. Phil. Thesis, Institute of Criminology, 1984); Rothman, "Sentencing Reforms in Historical Perspective" (1983) 29:4 *Crime and Delinquency* 631.

4. Malmquist, *supra* n. 3 at 5.

5. See also: D. Fogel, *We are the Living Proof: The Justice Model for Corrections* (1975).

between. Indeed, the ideal indeterminate sentence was thought to be a sentence of one day to life — one day for those judged to be rehabilitated immediately and life for the hopeless recidivist.

The severity of the crime played no part in the theory of this sentence. The time of release of the offender was dependent upon his reformation. Parole officers had the responsibility and the discretion to release him when he was cured. Sentences of definite length, it was thought, obstructed the rehabilitation process. They meant either that the offender was returned to society before he had been rehabilitated or, counter-productively, that he remained in prison after that had been accomplished.

In practice, of course, past influences and the effects of public perceptions of crime affected the actual sentences imposed during the regime of indeterminate sentences. Retribution, sometimes called repudiation or denunciation, still was mentioned in sentencing judgments; in the popular press it was and is the dominant factor. In Canada, deterrence has been a factor frequently mentioned by sentencing judges. For the violent offender and for the recidivist, incapacitation or segregation can be seen in some sentences.

II.

The indeterminate sentence is basic to Canadian penal theory though it is not now expressly mentioned in Canadian penal statutes. For a time the Prisons and Reformatories Act, R.S.C. 1970, c. P-21, authorized the imposition of indeterminate sentences where the sentence did not exceed two years. Curiously, it was allowed only in Ontario by Part II and in British Columbia by Part VIII.[6] One sees in the criminal records of offenders who have moved from those provinces sentences such as "nine months determinate and nine months indeterminate". But in a back handed way, we have established the indeterminate sentence here by means of the parole system and mandatory supervision. In the federal corrections system and in the provincial gaols of Alberta, parole, or the provincial equivalent, is granted at the discretion of parole authorities at some point when more than one-third, but less than two-thirds, of the sentence has been served. At the two-thirds point, the offender must be released on mandatory supervision.

One effect of the Canadian system of indeterminate sentences, the actual length of which is fixed by parole authorities, is that neither the maximum sentence specified by the Criminal Code nor the sentence imposed by the judge bears much resemblance to that which the offender actually serves. Indeed, the whole process has been called an ". . . elaborate charade designed to conceal from the public the real punishment being inflicted on the offender".[7] Maximum sentences specified in the Criminal Code are draconian — life imprisonment for breaking and entering a dwelling house, for example — yet they are never imposed. The

6. These provisions were repealed by S.C. 1976-77, c. 53, s. 46. The provision for indeterminate sentences in Ontario first appeared in 1913, S.C. 3-4 Geo. V, c. 39, and in British Columbia in 1948, S.C. 11-12 Geo. VI, c. 26. See *R.* v. *Huston* (1959) 125 C.C.C. 110 (Ont. C.A.) and *R.* v. *Smith* (1972) 7 C.C.C. (2d) 174 (Ont. C.A.).

7. Thomas, "Have the Courts Failed?", *supra* n. 2 at 7.

sentences announced in a given case may sound severe — yet little more than one-third of it will have passed in most cases before an offender is released.

A further criticism of indeterminate sentences is the disparity seen as between different offenders with similar offences. Since rehabilitation is the goal, the time served will depend upon the personal attributes of the offender and to a much lesser degree on his offence. Thus members of the public are shocked to see different sentences for similar offences or even for co-accused in the same crime. Moreover, parole depends upon human discretion. Any system so dependent and looking only for evidence of rehabilitation will produce widely different results between individuals. On occasion the parole system may be used to produce the opposite result; early parole is sometimes used to ameliorate a sentence thought to be overly severe.

III.

The Canadian system of indeterminate sentence by way of parole had barely been transplanted from the United States when suddenly the whole process came under virulent attack in that country. American penologists looking back on twenty years of sentences designed for rehabilitation were unable to prove statistically that the whole elaborate process had ever achieved any rehabilitation of offenders. Reviewing studies of recidivism made in United States prisons, Professor Von Hirsch (now of Rutgers University) concluded:[8]

> There have been two main interpretations of these studies. The pessimistic view . . . has been that virtually no rehabilitative program has been shown to succeed. The "optimistic" view . . . has been that *few* programs have worked, not none: a select minority of treatment programs indeed have succeeded, when they were limited to certain offender subpopulations whose characteristics had been carefully matched to the program type.
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> In an effort to reconcile these different views, the National Academy of Sciences established a panel of experts to review the literature. The panel's conclusions, published in 1979, tended to side with the pessimists. Since then, there have been occasional claims of success for particular intervention techniques for dealing with particular offender types, but no serious researcher has been able to claim that rehabilitation *routinely* could be made to work for the bulk of offenders coming before the courts. The positivists' hope of building a sentencing system on a rehabilitative base thus has proven illusory. Similar Scandinavian studies have shown equally negative results.

Suddenly in state after state, American sentencing policy turned away from the indeterminate sentence. As rehabilitative efforts were ineffective the alternative adopted was a return to retribution. Criminals should be punished because they deserve to be punished. Professor Von Hirsch had a strong influence on this desertion of the rehabilitative concept by his book *Doing Justice: The Choice of Punishments*,[9] and by later writings.[10] He termed his concept "just deserts" and referred to a doctrine of "proportionality" in punishment — that is the sentence should always, as a matter

8. Andrew Von Hirsch, "Recent Trends in American Criminal Sentencing Theory" (1983) 42 *Maryland L. Rev.* 6 at 10-11.

9. (1976).

10. "Desert and Previous Convictions in Sentencing" (1981) 65 *Minnesota L. Rev.* 591; "Constructing Guidelines for Sentencing: The Choices for the Minnesota Sentencing Guidelines Commission" (1982) 5 *Hamline L. Rev.* 164; With Kathleen Hanrahan "Determinate Penalty Systems in America: An Overview" (1981) 27 *Crime & Delinquency* 289.

of justice, be proportionate to the crime rather than to the rehabilitative prospects of the offender. This requires a determinate sentence, the length of which is fixed by the gravity of the crime. The offender, and the victim of his crime, says Von Hirsch, should know from the time sentence is imposed what its length will be.

The advocates of "proportionality" or "just deserts" in sentencing profess to see a philosophical difference between their concept and 18th century doctrines of retribution.[11] I confess to being unable to see much difference and I am comforted to find that others have the same difficulty.[12] In my view United States penology is returning rapidly to a system of sentences based on retribution. Determinate sentences within a narrow fixed range with little discretion left to judges or parole officials are increasingly common. A number of states, including California, Pennsylvania, Indiana, Minnesota, Washington, Illinois, Maryland, New York, Florida, Maine and South Carolina have adopted the determinate sentence to a greater or lesser degree. I shall refer here to only two of these new systems, that adopted in Minnesota in 1981 and that adopted in Pennsylvania in 1982.

The Minnesota system is based on its "Sentencing Guidelines Grid" a copy of which is attached as Appendix A. Its subtitle is: "Presumptive Sentence Lengths in Months". Two factors affect the length of sentence. The horizontal scale running from "0-" to "6 or more" denotes the "Criminal History Score" derived in an elaborate scoring process from previous criminal convictions in the offender's past. The vertical axis denotes the severity level of the offence for which sentence is to be imposed. These have been graded and evaluated by the Minnesota Guidelines Commission. Sentences above the heavy line will not involve the state prison system. That is not to say that the sentences above the heavy line are free of some incarceration. Sentences of less than 12 months in Minnesota are served in county jails while those of one year or more are served in the state prison system. A typical sentence above the line may be probation but it may also involve a combination of time in the county jail, probation and community service. Thus a thief whose booty was in the range of $150 — $2500 and who had a criminal history score of "1" might receive the 13 months indicated as four months in county jail followed by nine months probation.

Below the heavy line in each box appear three numbers. If we take a simple robbery by an offender with a criminal history score of "3", we see that the presumptive sentence is 30 months in state prison. The permissible deviation by the sentencing judge, without giving written reasons, is 29 months to 31 months. Aggravated robbery, by the same offender has a presumptive sentence of 49 months in state prison with a permitted deviation within the range of 45 months to 53 months.

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11. Singer, *Just Deserts: Sentencing Based on Equity and Desert* (1979); Gray Cavender, "The Philosophical Justifications of Determinate Sentencing" (1981) 26 *Am. J. of Jurisprudence* 159.

12. John Braithwaite, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 *Journal of Criminal Law & Criminology* 723.

Grading the offences and fixing the scale of sentences was the result of many months of work resulting in an "Offense Severity Reference Table" (Appendix B). Undoubtedly there were a multitude of pressures on the Guidelines Commission. But the Minnesota Legislature, itself, imposed one restriction. That was done by specifying that no new prisons were to be built. There was then a given prison capacity in the state and that was to be retained. Thus with crime statistics present and estimated, the Commissioners fixed total sentence lengths which would occupy but not exceed the prison capacity. Presumably the whole grid can be raised or lowered as circumstances require. If that seems remarkable, I can only say that in Canada parole authorities fill the same role. In general, an offender entering the prison system meets an earlier offender being released to make room for him. That is true in Minnesota; it is also true in Canada.

Minnesota Trial Judges are permitted to go outside these guideline figures provided they file written reasons specifying either the aggravating or mitigating factors which induced the variation. The variation is subject to appellate review. The Minnesota Guidelines Commission furnished what it termed "a non-exhaustive list" of aggravating and mitigating factors which could be used for departure from the presumptive grid of sentences. The list is short.

The aggravating factors are:

1. Victim vulnerability where that was known or should have been known to the offender.
2. Victim treated with particular cruelty.
3. Victim injured, and a prior conviction also involved injury.
4. Offence was a "major economic offence" (These involve multiple victims, or very high losses by the victim, or a high degree of sophistication in planning, or breach of fiduciary relationship).

The mitigating factors are:

1. Victim the aggressor in the incident.
2. Offender played a minor or passive role.
3. Offender became involved under circumstances of coercion or duress.
4. Offender lacked substantial capacity for judgment because of physical or mental impairment.
5. Other substantial grounds tending to excuse or mitigate culpability.

The Minnesota Guidelines Commission also produced a list of factors which must *not* be used as reasons for departure from the presumptive sentence. They are:

(a) Race
(b) Sex
(c) employment factors including:
    (1) occupation or impact of sentence on profession or occupation.
    (2) employment history
    (3) employment at the time of offence or of sentencing.
(d) social factors including:
    (1) educational attainment
    (2) living arrangements

(3) length of residence
(4) marital status

(e) The exercise of constitutional rights by the defendant during the adjudication process.

What seems remarkable to the outsider, with admittedly no expert knowledge of Minnesota law, are the factors not on the list. Of prime concern to an Alberta judge would be the age of the offender, for example. Some aspects of the offender's personal attributes do come into play, however, in computing the "Criminal History Score". That process is too elaborate for review in the time allotted for this paper. I have included the rules for computation as Appendix C. The severity of past sentences and the time elapsed since a past conviction do have a bearing on the score.

Two criticisms I would make of the rules for computing the "Criminal History Score" are the complexity of the system and the advantage which seems to accrue from delay in bringing a case to conclusion. The complexity makes a "Criminal History Score" difficult to compute particularly where past convictions arise in other jurisdictions. The score itself may be reduced by judicious delay which lengthens the time since the last conviction. For the most part, however, the grid system is aimed at the offender's culpability for the offence in question and not at his personal qualities or his prospects of rehabilitation. The philosophy exemplified is "just deserts".

Appellate Review of departures from the grid sentences has just begun in Minnesota. The State Supreme Court has specified rules to be followed which put a heavy onus on the person who seeks to overturn the trial judge's variation from the grid sentence either up or down.[13] Nevertheless the State Supreme Court says clearly that judges may depart from the presumptive grid sentences only if there are "substantial and compelling" reasons to do so.[14] Ironically, despite the "just deserts" philosophy inherent in the presumptive grid sentencing, the Court has also upheld decisions by a trial judge to depart from the presumptive sentence where prospective reformation of the accused is a factor.[15] Perhaps the final result of the presumptive grid sentencing model is not yet determined.

The Pennsylvania Sentencing Guidelines (Appendix D) adopt a different approach than do those in Minnesota. Both use a system of minimum sentences, but in Pennsylvania, judicial discretion is limited by a mandatory minimum sentence where sentences are for two years or more. Below two years, sentences are served in county institutions with release on parole discretionary with the sentencing judge. As in Minnesota the sentence is based on an Offence Gravity Score and on a Prior Record Score but the permitted variations above the minimum are much wider than in Minnesota.

The Pennsylvania judge has three different ranges within which to consider sentence. There is a standard range for the typical presumptive sentence but there is also an aggravated range and a mitigated range. In the

13. *Williams* v. *State* 361 N.W. 2d 840 (1985).
14. *State* v. *Garcia* 302 N.W. 2d 643 (1981), *State* v. *Kindem* 313 N.W. 2d 6 (1981), *State* v. *Peake* 366 N.W. 2d 299 (1985).
15. *State* v. *Wright* 310 N.W. 2d 461 (1981), *State* v. *Solomon* 359 N.W. 2d 19 (1984).

result the range of sentence for a given offence is very wide. To consider an example: robbery which inflicts serious injury by an offender with a prior record score of 3, has a permitted range from 40 months at the low end of the mitigated range to 97 months at the upper end of the aggravated range.

As in Minnesota, appellate review of the system's operation has just begun.[16]

IV.

With this review of United States penology, I now turn to consider the mandate of the Canadian Sentencing Commission. In my opinion the Order-in-Council establishing the Commission is nothing more nor less than a direction to the Commissioners to develop in Canada a sentencing grid system based upon the philosophy of "just deserts" that is sweeping United States penology. Almost unnoticed by the Canadian public, a profound change in our sentencing concepts is in the course of being introduced.

The Order-in-Council appoints the named persons "to be Commissioners under Part I of the Inquiries Act:

> (a) to examine the question of maximum penalties in the Criminal Code and related statutes and advise on any changes the Commissioners consider desirable with respect to specific offences in light of the relative seriousness of these offences in relation to other offences carrying the same penalty, and in relation to other criminal offences;
>
> (b) to examine the efficacy of various possible approaches to sentencing guidelines, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context, and for their ongoing review for purposes of updating;
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> (c) to investigate and develop separate sentencing guidelines for:
>
> (i) different categories of offences and offenders; and
>
> (ii) the use of non-carceral sanctions;
>
> (d) to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:
>
> (i) prosecutorial discretion, plea and charge negotiation;
>
> (ii) mandatory minimum sentences provided for in legislation; and
>
> (iii) the parole and remission provisions of the Parole Act and the Penitentiary Act, respectively, or regulations made thereunder, as may be amended from time to time; and
>
> (e) to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of information systems necessary for the most efficacious use and upgrading of the guidelines."

I take Direction (a) to require a review of all maximum sentences in the Criminal Code of Canada and a re-gradation of them. Direction (b) contains a general mandate to consider the philosophical basis of sentencing and to develop "model guidelines for sentencing" founded upon that study. In addition the Commission is to develop a scheme for continuing review of its guidelines.

Directions (c) (d) and (e) drive the Commissioners closer to the sentencing grid systems seen in the United States. Guidelines are to be developed for different categories of offences and offenders and the

16. *Com.* v. *Kane* 461 A. 2d 1246 (1983), *Com.* v. *Royer* 476 A. 2d 453 (1984), *Com.* v. *Tomasso* 457 A. 2d 514 (1983), *Com.* v. *Smith* 489 A. 2d 845 (1985).

Commissioners are to relate those guidelines to other aspects of the criminal law.

The Order-in-Council does not conclude with these five directions as to the subject matter of the Commissioners' inquiries. It proceeds to prescribe "the policy and approach" the Commissioners should follow in developing the model guidelines. Six specific limitations are placed on the powers of the Commissioners. It is directed that the Commissioners be guided, in the development of any model guidelines, by the policy and approach that such guidelines should:

> (f) reflect the fundamental principles and purposes of sentencing as set forth in any legislation that may be adopted by Parliament, and in the Statement of Purpose and Principles set out in The Criminal Law in Canadian Society;
>
> (g) be based on relevant criminal offence and offender characteristics;
>
> (h) indicate the appropriate sentences applicable to cases within each category of offence and each category of offender, including the circumstances under which imprisonment of an offender is proper;
>
> (i) if a sentencing guideline indicates a term of imprisonment, recommend a time, or range in time for such a term; and an appropriate differential between the maximum and the minimum in a range;
>
> (j) include a non-exhaustive list of relevant aggravating and mitigating circumstances and indicate how they will affect the normal range of sentence for given offences; and
>
> (k) take into consideration sentencing and release practices, and existing penal and correctional capacities.

These six guides to the Commissioners appear to prescribe limits on their discretion. Further they direct them to the development of a sentencing grid system similar to that in Minnesota. Direction (h) requires the specification of appropriate sentences applicable for each category of offence. Direction (i) commands that the Commissioners specify a range and "an appropriate differential between the maximum and minimum in a range". Thus we are to have in Canada for the first time a general system of minimum sentences. Directions (j) and (k) echo the language of the Minnesota guidelines with its "non-exhaustive" list of aggravating and mitigating circumstances.

Despite its power to examine various possible approaches to sentencing, it does not appear to me that the philosophical basis of the Commission's work is to be developed by them. Rather, it is mandated in the guidelines which they are directed to follow in their work. It is true that the first two directions enable a general review of the philosophy of sentencing. Nevertheless as the Commissioners settle down to the detail of their task, they are bound to categorize offences, to fix a range of sentences for each category and to specify minimum and maximum sentences. The minimum sentence, now seen in only a few situations in Canadian law, will become a factor in every criminal sentence.

Whether this is a development to be welcomed or to be deplored is very much a matter of individual philosophy on the subject. I offer some observations of a general nature however, for consideration as Canadians decide the course we must follow:

1. Sentencing decisions are spending decisions. Every time judges decide upon a longer sentence rather than a shorter sentence — two years, let us say, rather than one year, they spend a considerable sum of public money. It costs some $40,000 to keep a person in a Canadian prison for a

year. Judges who direct the spending of this money are not elected nor directly answerable to any constituency for that expenditure. I observe, of course, that academics and newspaper editors are in the same position with their recommendations. And, of course the human factors involved so outweigh the monetary factors, that little attention is paid to monetary cost.

2. As we propose changes in sentencing in Canada we must keep in contemplation one major difference between Canadian sentencing practice on the one hand and either English or American practice on the other. That difference is the appellate review of sentences in Canada. Here either the Crown or the Defence may appeal the length of a sentence.

In the United States appellate review of sentence length is virtually unknown unless the sentence involves some constitutional issue. In England the defence may call for appellate review but the Crown may not. Thus we, in Canada, are virtually unique in giving an appellate court full power of review in its attempts to achieve consistency of sentences within its jurisdiction.

In Alberta the Court of Appeal spends a considerable portion of its time reviewing the sentences of 115 provincial judges and some 60 Queen's Bench judges. Of course, as I have said, within a considerable range the ultimate sentence is fixed, in any event, by those who decide the timing of release on parole.

The absence of appellate review of sentences undoubtedly played a part in some of the past changes in sentencing policy in the United States. First parole systems were introduced partly as a means of ameliorating sentences thought to be harsh. Then one may surmise that the inability of prosecutors to appeal sentences perceived to be too lenient played a part in the demand for grid sentencing systems.

3. Changes which are made to sentencing practices are often a response to public clamor. Yet studies show that public perceptions upon which the clamor is based are frequently grossly different from reality. A study of the attitudes to crime of citizens in Calgary done by Wanner and Caputo[17] showed that a large majority lacked knowledge of the basic facts upon which to base opinions. To cite only two conclusions among many made by the study, fully 80 per cent made a "gross overestimation of the amount of crime in Canada which involves violence", and 60 per cent "highly overestimated" the amount of crime attributable to recidivists.[18] In a study by Doob and Roberts in 1983,[19] members of the public were given the "facts" of a criminal case taken from news accounts which had given it prominence. The sentencing Judge had been criticized in an editorial for a too lenient sentence. Sixty-three per cent of those questioned thought the sentence too lenient. When, however, a group evaluated the same sentence, for the same man, for the same offence using information from

17. Wanner & Caputo, "The Attitudes of Calgarians towards Crime and the Criminal Justice System", Department of Sociology, The University of Calgary — A Calgary John Howard Society Report, 1985.

18. *Id.* at 34-35.

19. Doob & Roberts, "An Analysis of the Public's View of Sentencing" Centre of Criminology, The University of Toronto — A Report to the Department of Justice, Canada, November 1983.

the Court transcripts, only 19 per cent thought the sentence too lenient. Indeed, 52 per cent thought the sentence too harsh.[20] Clearly if we react to public demands for change, errors are inevitable unless a massive program of public education is first undertaken.

4. There is one fundamental factor which must be taken into account whenever changes are proposed to a sentencing system. That factor is that variations in sentencing practice often mean that the power to make decisions is simply being switched from one group to another. When indeterminate sentences are the rule, decisions on length of sentence are made, not by judge, but by parole authorities. An armed robber in Canada is sentenced to five years imprisonment by a judge. Three other judges affirm the sentence. But he does not serve 60 months in prison. The decision whether he serves 20 months or 40 months or somewhere between, is made by The National Parole Board. At the 40 month point, Parliament has decided he must be released.

The grid system of sentencing transfers much of the decision making process to prosecutors. In practice that transfer seems to have occurred in the determinate sentence jurisdictions of the United States. The scope of judicial decision is limited by the minimum and maximum sentences prescribed by the guidelines. Prosecutors function at the commencement of the criminal justice process where the decisions are made as to the number and severity of charges to be laid. The place of the offender in the sentencing grid for the present offence and for future offences is thus in their control.

Professor Reiss of Yale University reported to the Canadian Institute for Administration of Justice on a survey he had made of determinate sentencing regimes in the United States.[21] He said:

> With the rise of determinate sentencing and sentencing guidelines to control variability in sentencing among judges, it becomes apparent that sentencing discretion is shifting to prosecutors. Indeed, prosecutors in the U.S.A. increasingly are the primary discretionary agents of the criminal justice system. They are the least subject to review and control by any agents within and without the criminal justice system. The wide-scale use of plea bargaining in the U.S.A. and prosecutorial control of the number and nature of charges, whether or not plea bargained, confers enormous power to constrain the action of others in the system. Prosecutors can, for example, have important effects on sentence length either by manipulation of the *particular offences charged* or by manipulating the *number of charges*. Manipulation of these have both immediate and delayed effects. Delayed effects come primarily through their effect on the prior record of the offender.

The corollary of the power of prosecutors is, of course, that plea bargaining becomes a fine art. Again, whether that is good or bad depends upon personal viewpoint and, I suspect, on personal experience. But one point is certain: where plea bargaining is the rule, much of the criminal sentencing process, perhaps its most important segment, disappears from public view. The sentence length is determined by a private negotiation away from public gaze. Canadian judges will play little part in this process and in any event, with charges pre-determined and sentence fixed by a grid system, will be powerless to do very much about it.

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20. *Id.* at 10-11.

21. Albert J. Reiss, "Sentencing Policies & Practices in the U.S.A." A paper presented for the National Seminar on Sentencing of the Canadian Institute for the Administration of Justice (Toronto, October 1985) at 26-27.

V.

I conclude that it is inevitable that the Canadian Sentencing Commission will report in favour of a grid system of determinate sentences. Indeed, with the mandate it is given, it can do nothing else. That in turn will transfer sentencing discretion from judges and parole officials, where it now resides, to prosecutors. It will introduce Canadian lawyers to plea bargaining as a fine art. It will profoundly change the Canadian criminal justice system. The work of the Commission and its ultimate effect on Canadian law merit the closest scrutiny of all Canadians.

Appendix A

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

SEVERITY LEVELS OF CONVICTION OFFENSE		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Unauthorized Use of Motor Vehicle *Possession of Marijuana*	I	12*	12*	12*	15	18	21	24 *23-25*
Theft Related Crimes ($150-$2500) *Sale of Marijuana*	II	12*	12*	14	17	20	23	27 *25-29*
Theft Crimes ($150-$2500)	III	12*	13	16	19	22 *21-23*	27 *25-29*	32 *30-34*
Burglary - Felony Intent *Receiving Stolen Goods ($150-$2500)*	IV	12*	15	18	21	25 *24-26*	32 *30-34*	41 *37-45*
Simple Robbery	V	18	23	27	30 *29-31*	38 *36-40*	46 *43-49*	54 *50-58*
Assault, 2nd Degree	VI	21	26	30	34 *33-35*	44 *42-46*	54 *50-58*	65 *60-70*
Aggravated Robbery	VII	24 *23-25*	32 *30-34*	41 *38-44*	49 *45-53*	65 *60-70*	81 *75-87*	97 *90-104*
Assault, 1st Degree *Criminal Sexual Conduct, 1st Degree*	VIII	43 *41-45*	54 *50-58*	65 *60-70*	76 *71-81*	95 *89-101*	113 *106-120*	132 *124-140*
Murder, 3rd Degree	IX	97 *94-100*	119 *116-122*	127 *124-130*	149 *143-155*	176 *168-184*	205 *195-215*	230 *218-242*
Murder, 2nd Degree	X	116 *111-121*	140 *133-147*	162 *153-171*	203 *192-214*	243 *231-255*	284 *270-298*	324 *309-339*

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory sentence.

*one year and one day

SOURCE: Minnesota Guidelines Commission.

Appendix B

V. OFFENSE SEVERITY REFERENCE TABLE

First Degree Murder is excluded from the guidelines by law, and continues to have a mandatory life sentence.

X	Murder 2 - 609.19
IX	Murder 3 - 609.195
VIII	Assault 1 - 609.221 Criminal Sexual Conduct 1 - 609.342 Intrafamilial Sexual Abuse 1 - 609.3641 Kidnapping (w/great bodily harm) - 609.25, subd. 2(2) Manslaughter 1 - 609.20(1) & (2)
VII	Aggravated Robbery - 609.245 Arson 1 - 609.561 Burglary - 609.58, subd. 2(1)(b) Criminal Sexual Conduct 2 - 609.343(c), (d), (e), & (f) Criminal Sexual Conduct 3 - 609.344(c) & (d) Fleeing Peace Officer (resulting in death) - 609.487, subd. 4(a) Intrafamilial Sexual Abuse 2 - 609.3642, subd. 1(2) Intrafamilial Sexual Abuse 3 - 609.3643. subd. 1(2) Kidnapping (not in safe place) - 609.25, subd. 2(2) Manslaughter 1 - 609.20(3) Manslaughter 2 - 609.205(1)
VI	Arson 2 - 609.562 Assault 2 - 609.222 Burglary - 609.58, subd. 2(2) Criminal Sexual Conduct 2 - 609.343(a) & (b) Criminal Sexual Conduct 4 - 609.345(c) & (d) Escape from Custody - 609.485, subd. 4(4) Fleeing Peace Officer (great bodily harm) - 609.487, subd. 4(b) Intrafamilial Sexual Abuse 2 - 609.3642, subd. 1(1) Intrafamilial Sexual Abuse 4 - 609.3644, subd. 1(2) Kidnapping - 609.25, subd. 2(1) Precious Metal Dealers, Receiving Stolen Goods (over $2,500) - 609.53, subd. 1(a) Precious Metal Dealers, Receiving Stolen Goods (all values) - 609.53, subd. 3(a) Receiving Stolen Goods (over $2,500) - 609.525; 609.53 Sale of Hallucinogens or PCP - 152.15, subd. 1(2) Sale of Heroin - 152.15, subd. 1(1) Sale of Remaining Schedule I & II Narcotics - 152.15, subd. 1(1)

Criminal Negligence Resulting in Death - 609.21
Criminal Sexual Conduct 3 - 609.344(b)
Intrafamilial Sexual Abuse 3 - 609.3643, subd. 1(1)
Manslaughter 2 - 609.205(2), (3), & (4)

V

Perjury - 609.48, subd. 4(1)
Possession of Incendiary Device - 299F.80; 299F.815; 299F.811
Receiving Profit Derived from Prostitution - 609.323, subd. 1
Simple Robbery - 609.24
Solicitation of Prostitution - 609.322, subd. 1
Tampering w/Witness - 609.498, subd. 1

Assault 3 - 609.223
Bribery - 609.42; 90.41
Bring Contraband into State Prison - 243.55
Bring Dangerous Weapon into County Jail - 641.165, subd. 2(b)
Burglary - 609.58, subd. 2(1)(a) & (c), & (3)
Criminal Sexual Conduct 4 - 609.345(b)
Fleeing Peace Officer (substantial bodily harm) - 609.487, subd. 4(c)
Intrafamilial Sexual Abuse 4 - 609.3644, subd. 1(1)
Negligent Fires - 609.576(a)

IV

Perjury - 290.53, subd. 4; 300.61; & 609.48, subd. 4(2)
Precious Metal Dealers, Receiving Stolen Goods ($150-$2,500) - 609.53, subd. 1(a)
Precious Metal Dealers, Receiving Stolen Goods (over $2,500) - 609.53, subd. 2(a)
Receiving Stolen Goods ($150-$2500) - 609.525; 609.53
Security Violations (over $2500) - 80A.22, subd. 1; 80B.10, subd. 1; 80C.16, subd. 3(a) & (b)
Terroristic Threats - 609.713, subd. 1
Theft Crimes - Over $2,500 *(See Theft Offense List)*
Theft from Person - 609.52
Use of Drugs to Injure or Facilitate Crime - 609.235

Aggravated Forgery (over $2,500) - 609.625
Arson 3 - 609.563
Coercion - 609.27, subd. 1(1)
Coercion (over $2,500) - 609.27, subd. 1(2), (3), (4), & (5)
Damage to Property - 609.595, subd. 1(1)
Dangerous Trespass - 609.60; 609.85(1)
Dangerous Weapons - 609.67, subd. 2; 624.713, subd. 1(b)
Escape from Custody - 609.485, subd. 4(1)
False Imprisonment - 609.255
Negligent Discharge of Explosive - 299F.83
Possession of Burglary Tools - 609.59
Possession of Hallucinogens or PCP - 152.15, subd. 2(2)
Possession of Heroin - 152.15, subd. 2(1)

III

Possession of Remaining Schedule I & II Narcotics - 152.15, subd. 2(1)
Possession of Shoplifting Gear - 609.521
Precious Metal Dealers, Receiving Stolen Goods (less than $150) - 609.53, subd. 1(a)

Precious Metal Dealers, Receiving Stolen Goods ($150-$2,500) - 609.53 subd. 2(a)
Prostitution (Patron) - 609.324, subd. 1
Received Profit Derived from Prostitution - 609.323, subd. 2
Sale of Cocaine - 152.15, subd. 1(1)
Sale of Remaining Schedule I, II, & III Non-narcotics - 152.15, subd. 1(2)
Security Violations (under $2500) - 80A.22, subd. 1; 80B.10, subd. 1; 80C.16, subd. 3(a) & (b)
Solicitation of Prostitution - 609.322, subd. 2
Theft Crimes - $150-$2,500 *(See Theft Offense List)*
Theft of Public Records - 609.52
Theft Related Crimes - Over $2,500 *(See Theft Related Offense List)*

Aggravated Forgery ($150-$2,500) - 609.625
Aggravated Forgery (misc) (non-check) - 609.625; 609.635; 609.64
Coercion ($300-$2,500) - 609.27, subd. 1(2), (3), (4), & (5)
Damage to Property - 609.595, subd. 1(2) & (3)
Negligent Fires (damage greater than $10,000) - 609.576(b)(4)
Precious Metal Dealers, Receiving Stolen Goods (less than $150) - 609.53, subd. 2(a)

II

Precious Metal Dealers, Regulatory Provisions - 325F.5213
Riot - 609.71
Sale of Marijuana/Hashish/Tetrahydrocannabinols - 152.15, subd. 1(2)
Sale of a Schedule IV Substance - 152.15, subd. 1(3)
Terroristic Threats - 609.713, subd. 2
Theft-Looting - 609.52
Theft Related Crimes - $150-$2,500 *(See Theft Related Offense List)*

Aggravated Forgery (Less than $150) - 609.625
Aiding Offender to Avoid Arrest - 609.495
Forgery - 609.63; and Forgery Related Crimes *(See Forgery Related Offense List)*
Fraudulent Procurement of a Controlled Substance - 152.15, subd. 3
Leaving State to Evade Establishment of Paternity - 609.31
Nonsupport of Wife or Child - 609.375, subds. 2, 3, & 4

I

Possession of Cocaine - 152.15, subd. 2(1)
Possession of Marijuana/Hashish/Tetrahydrocannabinols - 152.15, subd. 2(2)
Possession of Remaining Schedule I, II & III Non-narcotics - 152.15, subd. 2(2)
Possession of a Schedule IV Substance - 152.15, subd. 2(3)
Selling Liquor that Causes Injury - 340.70
Solicitation of Prostitution - 609.322, subd. 3
Unauthorized Use of Motor Vehicle - 609.55

Appendix C

CALCULATING THE CRIMINAL HISTORY SCORE

Criminal History: A criminal history index constitutes the horizontal axis of the Sentencing Guidelines Grid. The criminal history index is comprised of the following items: (1) prior felony record; (2) custody status at the time of the offense; (3) prior misdemeanor and gross misdemeanor record; and (4) prior juvenile record for young adult felons.

The offender's criminal history index score is computed in the following manner:

1. Subject to the conditions listed below, the offender is assigned one point for every felony conviction for which a sentence was stayed or imposed, and that occurred before the current sentencing.
   a. When multiple sentences for a single course of conduct were imposed pursuant to Minn. Stat. 609.585, the offender is assigned one point;
   b. An offender shall not be assigned more than two points for prior multiple sentences arising out of a single course of conduct in which there were multiple victims;
   c. When a prior felony conviction resulted in a misdemeanor or gross misdemeanor sentence, that conviction shall be counted as a misdemeanor or gross misdemeanor conviction for purposes of computing the criminal history score, and shall be governed by item 3 below;
   d. When a prior felony conviction results in a stay of imposition, and when that stay of imposition was successfully served, it shall be counted as a felony conviction for purposes of computing the criminal history score for five years from the date of discharge, and thereafter shall be counted as a misdemeanor under the provisions of item 3 below;
   e. Prior felony sentences will not be used in computing the criminal history score after a period of ten years has elapsed since the date of discharge from or expiration of the sentence, provided that during the period the individual had not received a felony, gross misdemeanor, or misdemeanor sentence.
2. The offender is assigned one point if he or she was on probation or parole or confined in a jail, workhouse, or prison following conviction of a felony or gross misdemeanor, or released pending sentencing at the time the felony was committed for which he or she is being sentenced.

   The offender will not be assigned a point under this item when:
   a. the person was committed for treatment or examination pursuant to Minn. R. Crim. P. 20; or
   b. the person was on juvenile probation or parole status at the time the felony was committed for which he or she is being sentenced.

3. Subject to the conditions listed below, the offender is assigned one *unit* for each misdemeanor conviction and two *units* for each gross misdemeanor conviction (excluding traffic offenses) for which a sentence was stayed or imposed before the current sentencing. Four such units shall equal one point on the criminal history score, and no offender shall receive more than one point for prior misdemeanor or gross misdemeanor convictions.
   a. Only convictions of statutory misdemeanors or ordinance misdemeanors that conform substantially to a statutory misdemeanor shall be used to compute units.
   b. When multiple sentences for a single course of conduct are given pursuant to Minn. Stat. 609.585, and the most serious conviction is for a gross misdemeanor, no offender shall be assigned more than two units.
   c. Prior misdemeanor and gross misdemeanor sentences will not be used in computing the criminal history score after a period of five years has elapsed since the date of discharge from or expiration of the sentence, provided that during the period the individual had not received a felony, gross misdemeanor, or misdemeanor sentence.
4. The offender is assigned one point for every two juvenile adjudications for offenses that would have been felonies if committed by an adult, provided that:
   a. The juvenile adjudications were pursuant to offenses occurring after the offender's sixteenth birthday;
   b. The offender had not attained the age of twenty-one at the time the felony was committed for which he or she is being currently sentenced; and
   c. No offender may receive more than one point for prior juvenile adjudications.

The designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law.

The criminal history score is the sum of points accrued under items one through four above.

Appendix D

Table 1: GUIDELINE SENTENCE CHART

Offense Gravity Score	Prior Record Score	Standard Range*	Aggravated Range*	Mitigated Range*
5 For example: Criminal Mischief (Felony III); Theft by Unlawful Taking (Felony III); Theft by Receiving Stolen Property (Felony III); Bribery**	0	0-12	12-18	non-confinement
	1	3-12	12-18	1½-3
	2	5-12	12-18	2½-5
	3	8-12	12-18	4-8
	4	18-27	27-34	14-18
	5	21-30	30-38	16-21
	6	24-36	36-45	18-24
4 For example: Theft by receiving stolen property, less than $2000, by force or threat of force, or in breach of fiduciary obligation**	0	0-12	12-18	non-confinement
	1	0-12	12-18	non-confinement
	2	0-12	12-18	non-confinement
	3	5-12	12-18	2½-5
	4	8-12	12-18	4-8
	5	18-27	27-34	14-18
	6	21-30	30-38	16-21
3 Most Misdemeanor I's**	0	0-12	12-18	non-confinement
	1	0-12	12-18	non-confinement
	2	0-12	12-18	non-confinement
	3	0-12	12-18	non-confinement
	4	3-12	12-18	1½-3
	5	5-12	12-18	2½-5
	6	8-12	12-18	4-8
2 Most Misdemeanor II's**	0	0-12	Statutory Limit ***	non-confinement
	1	0-12	Statutory Limit ***	non-confinement
	2	0-12	Statutory Limit ***	non-confinement
	3	0-12	Statutory Limit ***	non-confinement
	4	0-12	Statutory Limit ***	non-confinement
	5	2-12	Statutory Limit ***	1-2
	6	5-12	Statutory Limit ***	2½-5
1 Most Misdemeanor III's**	0	0-6	Statutory Limit ***	non-confinement
	1	0-6	Statutory Limit ***	non-confinement
	2	0-6	Statutory Limit ***	non-confinement
	3	0-6	Statutory Limit ***	non-confinement
	4	0-6	Statutory Limit ***	non-confinement
	5	0-6	Statutory Limit ***	non-confinement
	6	0-6	Statutory Limit ***	non-confinement

*WEAPON ENHANCEMENT: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime

**These offenses are listed here for illustrative purposes only. Offense scores are given in §303.7.

***Statutory limit is defined as the longest minimum sentence permitted by law.

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Table 1 (cont'd.): GUIDELINE SENTENCE CHART

Offense Gravity Score	Prior Record Score	Standard Range*	Aggravated Range*	Mitigated Range*
10 Third Degree Murder**	0	48-120	Statutory Limit ***	36-48
	1	54-120	Statutory Limit ***	40-54
	2	60-120	Statutory Limit ***	45-60
	3	72-120	Statutory Limit ***	54-72
	4	84-120	Statutory Limit ***	63-84
	5	96-120	Statutory Limit ***	72-96
	6	102-120	Statutory Limit ***	76-120
9 For example: Rape; Robbery inflicting serious bodily injury**	0	36-60	60-75	27-36
	1	42-66	66-82	31-42
	2	48-72	72-90	36-48
	3	54-78	78-97	40-54
	4	66-84	84-105	49-66
	5	72-90	90-112	54-72
	6	78-102	102-120	58-78
8 For example: Kidnapping; Arson (Felony I); Voluntary Manslaughter**	0	24-48	48-60	18-24
	1	30-54	54-68	22-30
	2	36-60	60-75	27-36
	3	42-66	66-82	32-42
	4	54-72	72-90	40-54
	5	60-78	78-98	45-60
	6	66-90	90-112	50-66
7 For example: Aggravated Assault causing serious bodily injury; robbery threatening serious bodily injury**	0	8-12	12-18	4-8
	1	12-29	29-36	9-12
	2	17-34	34-42	12-17
	3	22-39	39-49	16-22
	4	33-49	49-61	25-33
	5	38-54	54-68	28-38
	6	43-64	64-80	32-43
6 For example: Robbery inflicting bodily injury; Theft by extortion (Felony III)**	0	4-12	12-18	2-4
	1	6-12	12-18	3-6
	2	8-12	12-18	4-8
	3	12-29	29-36	9-12
	4	23-34	34-42	17-23
	5	28-44	44-55	21-28
	6	33-49	49-61	25-33

*WEAPON ENHANCEMENT: At least 12 months and up to 24 months confinement must be added to the above lengths when a deadly weapon was used in the crime

**These offenses are listed here for illustrative purposes only. Offense scores are given in §303.7.

***Statutory limit is defined as the longest minimum sentence permitted by law.

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