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Distributive and Retributive Justice in Canada

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I. *Introduction*

The publications of the Law Reform Commission raise many ethical issues. One question — how distributive justice affects the working of retributive justice — is raised in several of their studies but not yet explicitly faced. This paper¹ approaches the question by way of a reflection on Paul Weiler's lucid and balanced argument, presented in "The Reform of Punishment".² I fully agree with the polemic thrust of Weiler's essay, namely, that the rehabilitative model of corrections, which views crime as a disease, is inadequate and leads to injustice. What I aim to do here is to analyse and subject to some empirical scrutiny Weiler's argument to re-establish a philosophical basis for a retributive understanding of criminal justice.

II. *The Need for Punishment*

There can be no doubt there are deeply imbedded historical and psychological sources of the impulse to punish criminals. What is at stake, in sociological terms, are the benefits of social order and the need that the values of these benefits be internalized by all. As we have developed rational means to grasp the interdependence of society, we have been able to render it at once more complex and more efficiently provident of benefits. But while there have been enormous benefits derived, the intricacy of men's interdependence in modern society has demanded of us a stern discipline.

Why do people accept the discipline? Freud spoke of repression; sociologists speak of internalization. It seems to be a matter of people accepting certain core values and along with them the price they exact. There are artists at the edge of our culture who scoff at our inhibitions. Most of us, however, when we read or see

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1. This paper is part of a contribution to a series of studies on the work of the Law Reform Commission, instigated by the Church Council on Justice and Corrections. The series investigates some connections between ethics and the criminal law.

2. Paul Weiler, "The Reform of Punishment" in *Studies on Sentencing* (Ottawa: Information Canada, 1974) at 91-105

something like “Zorba the Greek”, though we might perhaps feel a twinge of envy, see him to be a creature of another world. In our world there are paramount values: high health standards, high nutritional standards, good schools, opportunity for travel, comfortable homes, opportunities for sports, for reading, for music. We have schooled ourselves sufficiently to think of human fulfilment and human happiness as comprising these benefits, that we have difficulty noticing the cost, in terms of work, discipline, foregone leisure and pleasure.

Indeed, we develop not just a tolerance for the discipline, but we erect it into a positive virtue — maturity, responsibility. Most of us most of the time doubtless think of criminal behaviour as not simply unfair to others, but as a free ride, something we were given as children, but now unworthy of us. Our self-respect as adults is framed largely in terms of steadiness, of self-reliance, of work habits, of responsibility.

Yet what are we to make of the interesting statistic, that when asked anonymously, ninety-one per cent of a large random sample of American males admitted to criminal behaviour at some time in their lives?³

It would seem that internalization works for the most part, but that each of us, when confronted with the opportunity to cut a small corner, to take a short free ride, find the temptation almost impossible to resist. As Weiler puts it,

[i]t is in nearly everyone’s interest that nearly everyone comply with some such set of standards but in concrete situations, this may require a substantial sacrifice to one’s private interests. There is always a temptation to be a free rider on the sacrifices that others make, especially if one can keep his own default secret.⁴

Surrounding most people — at least the “good” people — are a series of networks (kin, neighbours, friends, work mates) which fulfil a double role. These networks help individuals solve problems, deal with crises. They hold out, in other words, the promise of societal benefits, but only on condition that the rules upheld by the networks are complied with. Thus there is an extremely effective shoring up of internalized values by the informal networks which surround most of us.

3. C. B. Becker, “Discretionary Clearances and Observations on Police Screening Practices” in *Studies in Diversion* (Ottawa: Information Canada, 1975) at 166

4. *Supra*, note 2 at 126

But, shored up as they are by their informal networks, and reinforced as they are by the effective promise of societal benefits, the majority of Canadians still express fear. If the statistic cited means anything at all, then almost everyone has engaged in criminal behaviour. Perhaps many are able to rationalize their occasional lapse; many fear their own potential for further criminality. If one dwells on the negative connotations of the Freudian term, repression, then it is understandable that people would have unnamable fears about the behaviour and perspective which has been rejected.

Reinforcing these fears about the repressed tendencies in themselves are the fears aroused by that segment of the population branded criminal. It is difficult to say what is the basis of these fears. Are they grounded in the television stereotype of the criminal? Do they stem from the strangeness of the poor, from the intuition that the poor are not constrained so effectively from crime by the promise of societal benefits? Are they largely projections of inadequately dealt with (*i.e.*, repressed) libidinous impulses? Whatever the source, these fears are real and they are prevalent. Without quite knowing why, people insist that if the state as the "perfect community" should give them any absolute guarantees, it should be the suppression of these chaotic forces which (from without and within) threaten to engulf peaceful order and the worked-for benefits.

The scope of possible human behaviour is too wide; it becomes frightening. People insist that some possibilities be absolutely excluded.

It misses the point to brand this insistence on punishment as vengeance and to connote that it is somehow reprehensible.⁵ The more accurate characterization of this motive for punishment is denunciation. Through the drama of declaring certain actions criminal and of singling out individuals who have committed those actions, the community engages in a very serious morality play through which it reminds each member of the dire consequences of chaotic behaviour and assures each that protection will continue to be afforded against those consequences.

5. See D. B. Chandler, *Capital Punishment in Canada: A Sociological Study of Repressive Law* (Toronto: MacLelland and Stewart, 1976). He argues there that, as societies progress, they move from "expressive" reactions of moral outrage over wrongdoing to "instrumental" reactions to control deviance. I am arguing that this is not necessarily progress.

Morality and immorality meet at the public scaffold, and it is during this meeting that community declares where the line between them should be drawn.⁶

The LRC has repeatedly affirmed this notion: “. . . one of the purposes of the criminal law is the protection of certain core values in society . . . ”.⁷ Recently, the Appellate Division of the Supreme Court of Alberta cited this passage approvingly in affirming, at least in principle, the fittingness of a prison sentence for a “flagitious offence”, even when rehabilitation of the offender was out of the question.⁸

In summary, human beings, faced with the awful responsibility of managing the human project of history, find it necessary to exclude some possibilities lest the lurking forces of chaos become unmanageable. We need the loose edges of our symbolic universe nailed down.

III. *The Just Distribution of Punishment*

But even if there is a human need to punish someone in order that community life be kept stable, who is to be punished? How can the punishment be morally justified? There is a utilitarian answer which says that the good of the greatest number is paramount and that the good of an individual can be sacrificed to it. There is evidence to suggest that this approach is counterproductive with respect to the utilitarian goal of crime reduction. Further, there is the classical notion of inextinguishable individual rights.

The retributionist thus raises the question of punishment from a technical, strategic problem concerned with crime reduction to an ethical dilemma.⁹ The question, whom are we to punish, can be put rigorously. If the one singled out for punishment is punished justly, then not to punish him would be unjust. The canon of justice as established by Aristotle is such that laxity is as much an offence against it as severity.¹⁰

6. K. T. Erikson, “Notes on the Sociology of Deviance” in H. Becker, ed., *The Other Side: Perspectives on Deviance* (New York: Free Press of Glencoe, 1964) at 14

7. *The Principles of Sentencing (Working Paper #3)* (Ottawa: Information Canada, 1974) at 3. See also *Imprisonment and Release (Working Paper #11)* (Ottawa: Information Canada, 1974) at 33

8. *R. v. Wood*, [1976] 2 W.W.R. 135 at 143; 26 C.C.C. (2d) 100 at 107 (Alta. S.C., A.D.)

9. *Supra*, note 2 at 138

10. Aristotle, *The Nichomachean Ethics* (London: J. M. Dent and Sons, 1947) at 109

What are the conditions necessary for punishment to be just? In communities where the notion of "natural law" has obtained, there was little difficulty answering this question. Natural law rests on two basic assertions. The first is that human law, if just, is a reflection and derivation of cosmic order; and that this cosmic order is open to discovery by "right reason". The second assertion is that man is by nature "sociable"; that is, he is dependent upon right relations within his community in order to develop his human potential, this development being his fundamental obligation to his "nature".

Each person is thereby obliged to obey just laws in order to fulfil his natural obligation to develop humanly. The state is likewise obliged to compel compliance not simply out of deference to the individual's sociality, but because the state's laws are the mirror of the cosmic order. Not to remedy a breach of the cosmic order is a further breach of that order, a continuing breach.

The doctrine of *mens rea* is firmly rooted in the natural law tradition. A person's obligation to the cosmic order and indeed to one's own entelechy is not magical. It is mediated by the exercise of "right reason". Breaches of the cosmic order which provoke state sanction can only be those which are knowing and free. It becomes therefore necessary, in order that punishment be just, that the offence be proved to have been culpable.

What is crucial for our purposes, however, is that the natural law approach implies a notion of freedom which is individualistic, and which prescind entirely from social and historical context. Moral responsibility depends upon the exercise of "right reason". Right reason, in turn, discovers a universal cosmic order. This order is open to anyone of good will, no matter what his social or historical circumstances. With respect to their ability to perceive what is right, the judge, the rich man and the poor man are all equal. Herein lies the basis of the image of justice blindfolded, with neither respect nor mercy for individuals or special circumstances.

The consensus concerning natural law has long been abandoned. The intuitionism — indeed the arrogance — of those natural law theorists who claimed to have a corner of "right reason" led people to seek more empirical bases for their political theory than the metaphysics of natural law. And so there were developed various "social contract" theories which sought to enlist the everyday experience of ordinary people and to build on that a case for the reasonableness of social order.

But legal philosophers, even with the shift from natural law to social contract, hardly break stride in their insistence upon the equal responsibility of all to comply. The social contract, being an abstraction, is imagined to have been entered into by all men. Cesare Beccaria, writing in the eighteenth century, is cited to say “Laws are the conditions, under which men, naturally independent, united themselves in society”.

Commenting on this doctrine, Taylor, Walton and Young remark that

. . . the individual is responsible for his actions and is equal, no matter what his rank, in the eyes of the law. Mitigating circumstances or excuses are therefore inadmissible.¹¹

They note this view is above all a theory of social control; it is a philosophical argument to back up political authority.

Paul Weiler, arguing within the parsimonious framework of social contract, has constructed a fair and honest argument to demonstrate the possibility of just retribution. Before I recount his argument, I should like to note that, as cited above, he does not assume that all men have entered the social contract; he says that “nearly everyone” benefits when nearly everyone contributes to social order by complying with law. But, he adds that, since there are times when one is tempted to be a “free rider” and take windfall gains based on others’ continued compliance, it becomes necessary for the community to insist, through coercion (*i.e.* punishment), upon compliance. It would be unjust to allow a person to keep those gains unjustly made. A rightful balance must be restored if compliance is to remain a reasonable course for most.

The question then becomes, who shall be a proper candidate for this coercion, so salutary for “nearly everybody”? Surely “he who has deliberately sought to advance his own interests, but only by using another as a means to his end”.¹² All members of the community start out equally immune from the exemplary coercion essential to criminal justice.

But the offender was given the opportunity to avoid that harm, and yet he took the risk in order to obtain an extra advantage at the expense of someone else. Can he complain of an arbitrary denial of his rights when society now decides to use him as the means to the protection of the ends of others? Surely not! By his

11. I. Taylor, P. Walton, and J. Young, *The New Criminology: For a Social Theory of Deviance* (London: Routledge and Kegan Paul, 1973) at 2

12. *Supra*, note 2 at 142

own choice he has singled himself out as the proper candidate for the distribution of punishment.¹³

While the metaphysical superstructure of the natural law has been abandoned, the logical structure of the argument is the same. Instead of a cosmic order to be protected, the state now is obliged to protect the interests of “nearly everybody”. Similarly, the argument hinges upon *mens rea*. The punishment is just only if inflicted upon him who “by his own choice” has sought to have unfair advantage of others’ compliance.

Weiler distinguishes carefully between various institutional forms of sanction. Truly corrective sanctions, *i.e.* where pathology is the cause of the disorderly behaviour, cannot depend upon *mens rea* since by definition it is precluded. “Penalties” threatened in order to regulate behaviour and thus deal with modern complexities (*e.g.* parking fines to help deal with city traffic problems) are quite properly deterrent devices and since they carry no stigmatizing effect, deal with behaviour (*i.e.* strict liability) and not with culpability. It is punishment, properly speaking, that Weiler concentrates on: adjudication as guilty in a criminal court, denunciation, fine or imprisonment, even physical or capital punishment.

The essence of the criminal sanction is the infliction of a serious and enduring inequality on an offender which serves, to some extent, the interests of the majority.¹⁴

Having so defined punishment — as indeed he must, given his political theory — Weiler again must ask how it can be justified. He says clearly that the choice of the criminal to take advantage of the law-abiding forbearance of others is the only basis for punishing him justly.¹⁵ Consistently, Weiler argues that criminals are predominantly “normal” individuals who, “as other citizens, are responsible for their actions”.¹⁶ But his notion of freedom and responsibility is individualistic, with an inadequate sense of community as the context within which freedom emerges and responsibility is exercised.

I have suggested that, while Weiler has abandoned the metaphysical superstructure of the natural law argument, the logical

13. *Id.* at 142

14. *Id.* at 169

15. *Id.* at 169

16. *Id.* at 163-64

structure of his argument is the same. If I am right, then he must argue for absolutely equal responsibility before the law. But will this hold? On the natural law view, equality depended upon the openness of everyone's right reason to a universal cosmic order. Within the parameters of a social contract model, to which Weiler has turned, equality will depend upon the openness of everyone to perceiving the benefits which accrue to "very nearly everybody" when "very nearly everybody" complies with the law. If it could be established empirically that those who are punished (*i.e.*, by and large, those who are imprisoned) are the very ones in our society who are the "very few" not included among the "very nearly everybody" who will benefit from compliance, then there would be no reason to conclude that they are culpable. When they read their social situation accurately, they can only conclude that the societal benefits which come with compliance will be withheld from them. Their criminal behaviour might well be free; but not necessarily culpable.

Let me put this another way. In order to legitimate punishment, the judge, the law and the majority assume that the accused is "like me", that is, his use of intelligence and freedom have given rise to the same moral demands in a given situation that would bind me in a like situation. In reaction, those who developed the rehabilitative "disease" model of crime and corrections questioned the assumption that the criminal is "like me". They were able to fasten on certain aspects of criminal behaviour in order scientifically to demonstrate that the criminal is "unlike me", that he is pathological, unfree. Latterly, as the notion of social causation has been invoked, the criminal is again seen as "unlike me" because deprived, lacking life skills essential to the exercise of responsible freedom.

IV. *The Social Reality of Punishment*

It seems to me theoretically possible that, within a view of crime as free human action, there is room for a notion of mediated social causation, or a contextualism. Edwin Schur, for instance, has spoken of the "enormity" of social conditions, such that for some the criminal choice is "almost rational".¹⁷ In Weiler's terms, I propose to ask who are the "very nearly everybody" who benefit

17. E. M. Schur, *Our Criminal Society: The Social and Legal Sources of Crime in America* (Englewood Cliffs, N.J.: Prentice Hall, 1969) at 64

from compliance with the law, and who it is who make the qualifier “very nearly” necessary. If there is in Canada an identifiable group who make decisions, not on the basis of their hope to reap normal societal benefits for compliance with law, but rather on the basis of their despair of ever enjoying their normal share, then their exercise of rational freedom will be on different terms than that of normal people. If that same group can be identified as largely those who are punished through the criminal justice system, then it might be said that, while Weiler has built a sound theoretical case for the possibility of just retribution, the conditions set forth in his argument are not met in Canada.

One way to try to discover if such a group exists would be to undertake a structural analysis of the Canadian economy and society. This is far beyond the scope of this paper. Here I will briefly examine the formulation and application of the *Criminal Code* itself to see if there are any indications of an identifiable group who are not part of Weiler’s “very nearly everybody”.

A close examination of the criminal law itself will not be too helpful. Most of us agree that the laws protecting person and property should be in the *Code*.

It might perhaps be more helpful to notice what is not against the *Code*. True, the LRC keeps saying that there are too many criminal offences; and I would agree. But there are some actions not against the *Code* which fit very snugly the LRC’s definition of a “real” crime.

Intentional conduct that injures people, deprives them of their property, restricts their freedom or subjects them to offensive interferences are examples of conduct that violates values regarded as so important to our society as to warrant the designation ‘criminal’.¹⁸

Shady business practices such as price fixing and misleading advertising fall under this definition and are in the *Code*; but there are also some very normal business practices which fit. Branch plants, for instance, which have, by the parent’s own admission, been making a profit have been closed, throwing hundreds of people out of work and injuring gravely whole communities. Why is this not a crime? Paul Weiler remarks that criminal conduct “evokes the

18. *Criminal Responsibility for Group Action (Working Paper #16)* (Ottawa: Information Canada, 1976) at 11-12

immediate reactions of resentment from the victim and indignation from the onlooker". Resentment is quite evident among the victims in my example. Is there much public indignation? The larger community has been assured that there are higher laws (the free flow of capital to assure maximum returns) which affect the good of all. Perhaps there is a better explanation for the general public's apathy in the face of such events: even if they did feel indignant, they do not have the power to make public policy which would protect the innocent. "Criminal laws", says Richard Quinney, "are formulated [and applied] by those segments of society which have the power to shape public policy".¹⁹

One could push this sort of example a bit further. Industrial pollution has become a fashionable worry; but one could generalize that to rendering the environment unsafe both for workers and people downstream. Granted that corporate responsibility is a complex issue, it is significant that despite bitter strikes over safety conditions in mines and mills, industrial medicine has been remarkably slow to make connections, and the law has not developed the capacity to deal with these issues. This might lead one to suspect that the *Criminal Code* in some aspects is geared more to the protection of the interests of certain segments of society than it is to the protection of those values proclaimed by the community as crucial.

Various forms of sexual behaviour and abortion are lately examples of conduct which evoke indignation on the part of one segment of the community and indifference or approbation in others. The formulation of the *Criminal Code* in these matters is a clear example of a political decision brought about by those who can muster the power to determine public policy. In many other matters, the consensus is so overwhelming that most of us cannot imagine that the actions prohibited could ever be permitted. But, as I have tried to show with my first example, many hurtful actions are condoned; some, especially during times of crisis, have been praised. The formulation of the *Criminal Code*, even in the most obvious cases, is a political decision reinforced by each of us, a decision which powerfully shapes the community in which we live.

If it is plausible to maintain that the *Criminal Code* reflects the interests of those segments of society best able to influence public

19. Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown and Co., 1970) at 43

policy, then it becomes an interesting question to ask why would those who recognize that their interests are not always served by the *Criminal Code* find it their interest to comply with it. Thus the shape of that group who are not part of Weiler's "very nearly everybody" begins to emerge.

When we turn to the application of the criminal law, it becomes apparent quickly that it is even more important than the law itself. As John Hogarth has said:

Since we are all '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

. . . .

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.²⁰

An American criminologist has said much the same thing even more starkly:

The morality which is enforced against the poorer people to preserve a system which benefits the wealthy is never equally applied against the wealthy to protect the interests of the poor.²¹

The research papers published by the LRC and carried out within a framework conceived by Hogarth have studied the screening activities of the police. While they have noted the important influence of various institutional concerns of the police, they also note that screening reflects rather accurately the prevailing norms of the community.²² No policeman wants to "stick his neck out". So there is a funnelling of crime. Not all the times a policeman is called in will be officially reported; not all the reported occurrences will result in a formal charge; not all charges will come to court; not all court cases lead to conviction; not all convicted are punished; not all those punished are imprisoned. In their study of the Toronto Police

20. John Hogarth, "Alternatives to the Adversary System" in *Studies on Sentencing* (Ottawa: Information Canada, 1974) at 50-1

21. Joseph P. Fitzpatrick, "The Role of Religion in Programs for Prevention and Correction of Crime and Delinquency", cited in Schur, *supra*, note 17 at 85

22. Anne Stace, "Criminal Justice and Social Justice: Management of Conflict and Social Disorder by the Metropolitan Police Force" in *Studies in Diversion*, *supra*, note 3 at 107

Force, the research team of the LRC concluded that “of the total number of occurrences reported to the police as criminal events . . . a mere 2.4% were appropriated by the cogrection systems”.²³

Given this kind of filtering, it becomes important to ask if those who have been singled out for the worst punishment have any identifiable traits which might lead us to suspect that their experience of freedom has not been shaped by a reasonable expectation of normal societal benefits from compliance with the law. Certainly, on the face of it, those of us who are middle-aged, middle of the road, fairly well established are, to put it mildly, underrepresented, particularly if ninety-one per cent of us have engaged in criminal behaviour.

Those going to prison are young. Of those entering prison from 1971 through 1973, only ten per cent were entering for the first time when over 25 years old. (See Table #1.)

Furthermore, they are significantly less well-educated than the general population. Table #2 compares the educational levels of the males entering Canadian prisons in 1971 with the educational levels of the Canadian male population not full time in school in 1971. Those entering prison had an average (mean) of 7.75 years in school (not including kindergarten). The Canadian average for males was almost exactly Grade 9 (8.99 years not counting kindergarten). Chances are less than one in a thousand that this difference of one and a quarter years is random. That is, prisons draw from a special population which is less well-educated.

Chart #1 brings out the differences perhaps more starkly. There we find that fully one-half of the men entering prison have had no high school, while only 41.8% of all Canadian men have had no high school. This means that there are proportionately one quarter more men entering prison without any high school than there are in the general population.

It might be noted that those with less than Grade 5, by contrast, are underrepresented in prison. While it is difficult to estimate exactly, there is no doubt that a sizeable proportion of those in the general population with so little schooling fall under the general rubric of retardation. Our society tends to institutionalize such people elsewhere than in prison. These considerations point to the fact that our figures probably underestimate how seriously those without any high school are overrepresented in prison.

23. Becker, *supra*, note 3 at 165. Cf. also *supra*, note 3 at 25

Chart #2 is meant to show how bunched the prison population is with respect to schooling. Fully forty per cent of the men entering prison had between Grade 6 and Grade 8; seventy-five per cent had between Grade 6 and Grade 10.

On the other hand, those entering prison with more than high school — some university — were less than two per cent while over eleven per cent of all Canadian males have had some university.

Lack of education, it is generally assumed, leads to lack of job opportunities. Of the males entering prison from 1971 through 1973, 69.3% had been unemployed (*cf.* Table #3). Not even Newfoundland can match those figures.

The Law Reform Commission summarizes that

. . . 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.²⁴

It might be that some will wish to conclude that the drifters end up in jail where they belong. But this conclusion can only be drawn from the data if one's basic image of human freedom is individualistic; if one's basic image of our society is that each member receives basically the same opportunities for development and for responsible choice, then those conclusions will follow naturally. But another reading is possible: that our society affords some people much more scope for development than others; that those who are punished economically for having (typically) been born into poverty are more likely to be punished judicially as well. On this view, criminality is simply the formal, culminating label branding a person already labeled from childhood. It is a label which a normal middle-of-the-road Canadian almost certainly will escape.

The National Council of Welfare published a study in 1975 entitled *Poor Kids*. One of the questions they raise is whether the social forces experienced by a child raised in poverty will lead to criminality. I would define poverty as being a situation where the only options open are destructive. The Welfare Council seems to agree. "Being a poor kid is either being helpless or being tough."²⁵ To be helpless is to be personally debilitated; to be tough, as they mean it here, is to come into conflict with the law.

24. *The Principles of Sentencing (Working Paper #3)*, *supra*, note 7 at 7-8

25. National Welfare Council, *Poor Kids* (Ottawa: mimeo, 1975) at 29

Table 1
Males Entering Canadian Prisons

	Total Entering	First time over 25 yrs.	
1971	4312	357	
1972	4162	454	
1973	4230	508	
Totals	12704	1319	10.38%

Source: *Correctional Institution Statistics #85-207* (1971, 1972, 1973)
Statistics Canada. Table 11.

Table 2

Number of males attaining level of schooling as % of total population: Canadian males not attending school full time and males entering Canadian prisons*

1971

	<i>Prison</i>	<i>cumulative</i>	<i>Canada</i>	<i>cumulative</i>
Illiterate	0.8	0.8	3.4	3.4
Kindergarten	—	0.8	0.7	4.1
Grade 1	0.3	1.1	0.7	4.8
2	0.6	1.7	1.0	5.8
3	1.1	2.8	2.0	7.8
4	2.9	5.7	3.2	11.0
5	4.4	10.1	4.0	15.0
6	7.7	17.8	5.3	20.3
7	11.6	29.4	7.2	27.5
8	20.6	50.0	14.3	41.8
9	16.7	66.7	9.9	51.7
10	17.7	84.4	11.5	63.2
11	7.2	91.6	9.2	72.4
12	5.7	97.3	12.4	84.8
13	0.6	97.9	3.8	88.6
University				
1 year			2.0	90.6
2 years			1.6	92.2
3 years	1.9		1.5	93.7
4 years			2.5	96.2
5 years			1.5	97.7
6+ years			2.3	

Source: *Correctional Institution Statistics #85-207*, 1971, Table 12
Advance Bulletin 1971 Census #92-764, Table 1.

*not counting 289 who did not declare educational attainment.

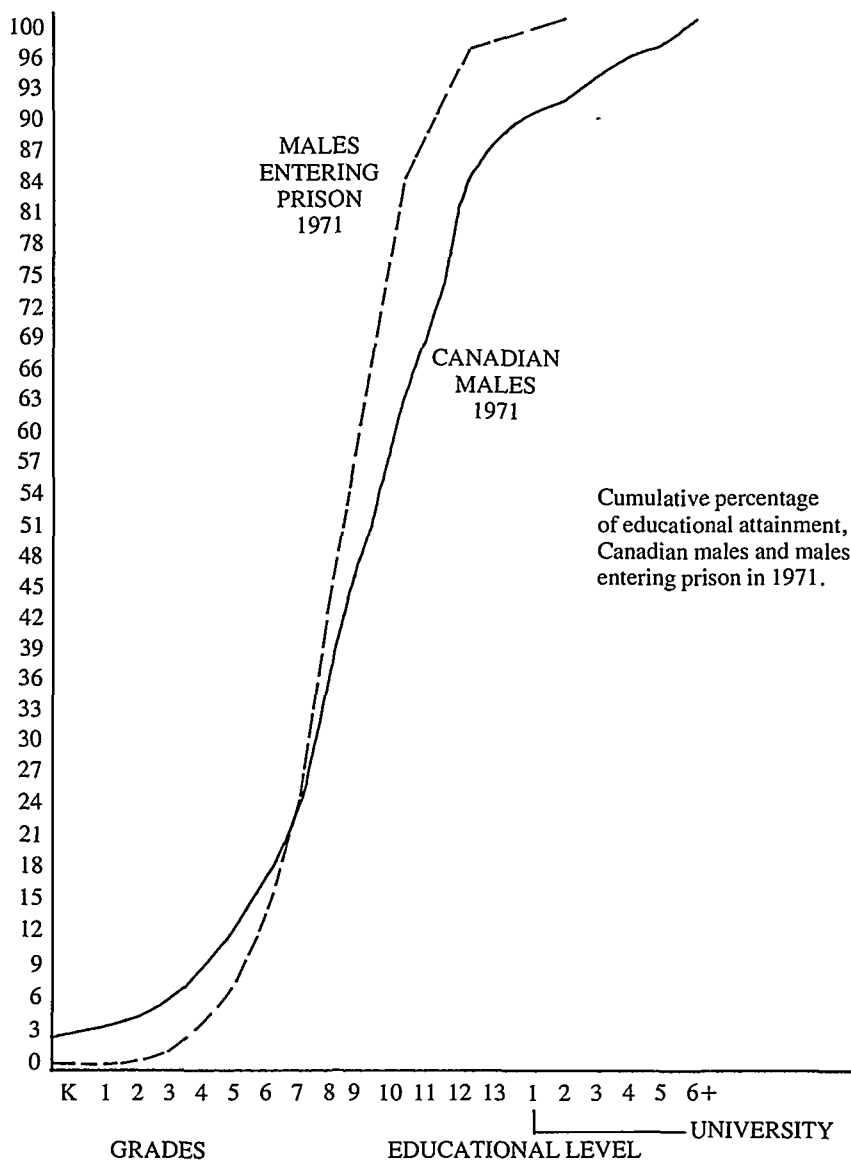
Table 3
Males Entering Canadian Prisons

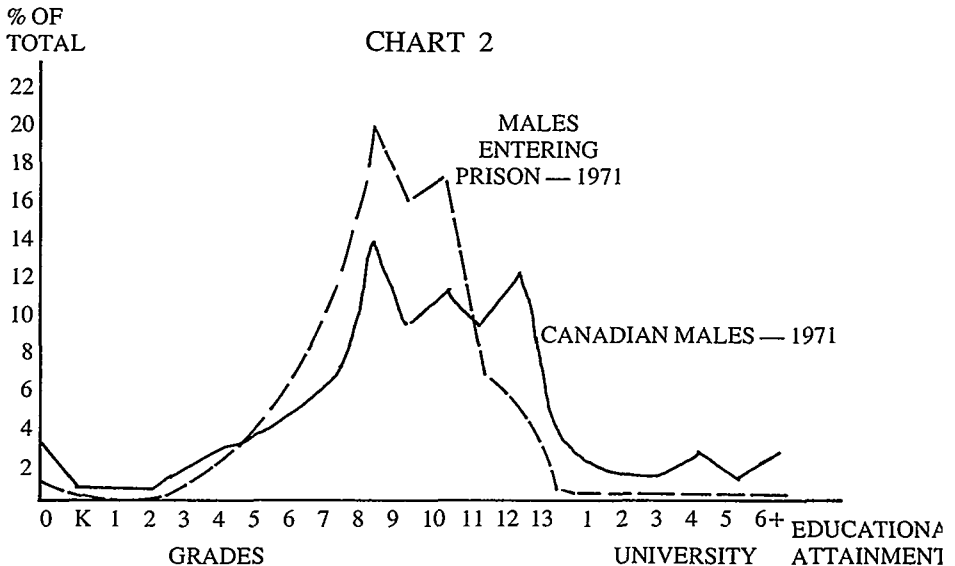
	Total Entering	Unemployed	
1971	4312	2826	
1972	4162	2979	
1973	4230	2999	
Totals	12704	8804	69.3%

Source: *Correctional Institution Statistics #85-207* Statistics Canada (1971, 1972, 1973). Table 31.

% OF TOTAL

CHART 1





They also discuss discretionary screening, noting that courts prefer to place juveniles on probation than to institutionalize them. They cite Ontario as an example where in 1973 only twenty-five per cent of juveniles were institutionalized. But which twenty-five per cent?

Almost half . . . were placed under Section 8 . . . which authorizes such placements where no statutory offence has been committed. What then was the basis on which the courts exercised this discretion? If it wasn't what they had done, was it who they were? This appalling possibility may very well have been the case, because a study of training schools in Ontario has found an incredible 92% of those committed . . . were from low-income or working-class families.²⁶

These statistics are understandable. The obvious place to spend a probationary period is in a family which is relatively stable and coping. If that is lacking — as it so often is among the poor — what other choice does the court have? But it is, then, little wonder that so few of the prison population arrive there for the first time after the age of twenty-five.

Perhaps one of the most startling statistics about our prison population is its racial composition. Race is, as viewed here, among

26. *Id.* at 32. See also D.G.G. Reynolds, "The Use of Diversionary Dispositions for Juvenile Offenders" in *Studies in Diversion*, *supra*, note 3 at 127-45

the handiest ways of labelling people deviant everyday. The racial groups singled out for special treatment in Canada are the native Indians and Metis.

A disproportionate number of Native persons in Canada are being convicted of offences and sent to jail. In British Columbia the proportion of admissions of Native offenders to provincial institutions in recent years has ranged from 14% to 21%; in Alberta, from 23% to 34%; in Saskatchewan from 50% to 60%; and in Manitoba, from 40% to 50%; even though the Native population is approximately 5% in British Columbia and Alberta, and 12½% in Saskatchewan and Manitoba. The proportion of Native offenders in the Saskatchewan Penitentiary is approximately 30%.²⁷

This study goes on to say that natives are jailed for less serious offences than whites; the offences are usually related to alcohol.

V. Conclusion

The figures I have adduced are fairly commonplace and hardly surprising to anyone who knows anything about the criminal justice system in Canada. What I have tried to do is place them within the context of Weiler's argument for a retributive understanding of the criminal justice process. Weiler himself alludes to this real difficulty to his theoretical argument:

In the real world, the enforcement of certain laws against certain people serve only to aggravate an existing injustice and inequality in society. What then should be the conclusion? When the question is put thus squarely, I think the retributionist must answer that punishment which for that reason is unjust is thereby also unjustified.²⁸

He qualifies this position by remarking that crime is almost never a redistributive device working towards equality; and that a few unjust examples would not render the criminal justice system unjust.

I would agree that there is little justification for viewing crime as political, revolutionary or even redistributive. It is a primitive, unreflective, inadequate response to inequitable circumstances even when it is in any sense a response to such circumstances. On the other hand, it might be pointed out that it is ineffective as a

27. Douglas Schmeiser, *The Native Offender and the Law* (Ottawa: Information Canada, 1974) at 81

28. *Supra*, note 2 at 153

redistributive device because that is exactly the purpose of law enforcement.

With respect to Weiler's second qualification, my reaction is to be less sympathetic. Weiler remarks that a retributive theory at least brings out the question of distributive justice while a rehabilitative theory buries it. But after that he and I part company. He seems to have painted himself into a corner by assuming that there are two disjunctive perspectives, the rehabilitative and the retributive.

I would suggest that there is a third perspective, based on what I might call a communitarian notion of freedom. The classical doctrine of retributive justice — coupled, it would seem, with the practical constraints of administering justice — demanded an individualistic notion of criminal responsibility. In moving away from that notion, the rehabilitative perspective fell back on a scientific understanding of correlation or cause. It is, however, possible to understand criminal behaviour as human, as free; but with a more concrete and contextual understanding of freedom.

First of all, social forces structure the situation which the individual confronts and in terms of which he makes decisions. Put baldly, some of us find ourselves in situations where the positive constructive, pleasant alternatives are more frequent and easier of access than for others. Indeed, in this perspective, the definition of poverty would be that situation in which a person faces no constructive, humanizing alternatives.

Secondly, and more importantly, social forces have already (in any given situation) moulded the imagination of the person such that he is capable of reading the situation in certain ways. Thus, even if "objectively" there might be fruitful alternatives open to him, he might not be able to grasp the situation in so constructive a fashion. The labelling processes detected by sociologists are crucial here. If a person has been receiving the label "loser", "inadequate", "untrustworthy" through much of his life, he will see himself relating to every situation in the light of those internalized labels. This process does not, I would insist, obliterate that person's free responsibility, but it will affect his experience of freedom. If this is so, then the sense of self-worth upon which an individual's social responsibility is based, is itself a gift of the community.

The communitarian image of responsibility led me to ask, in Weiler's terms, who it is who are punished in order that "very nearly everybody" might continue to regard compliance with the law as a reasonable alternative, with adequate and proportionate

societal rewards. For if the responsible exercise of freedom is to be equated legitimately with compliance to law, the community ought to have proffered the individual at least that affirmation of his worth which comes with the perceptible promise of societal rewards for compliance. An examination of the prison population leads to the probable conclusion that it is largely drawn from the young, shabby, ill-educated, often alcoholic, unemployed or unemployable, already stigmatized poor. Criminality can be viewed as a culminating stigma almost always labelling those already stigmatized as deviant. Criminality, on this view, only serves to reinforce the rather generally held opinion that the other labels were also “their fault”.

The freedom implied in *mens rea* assumes the basic image of a recipient of societal benefits such as education, life and social skills, physical and social mobility, familial stability, who when given the chance wants even more at the unknowing expense of the rest of us who (at least on this occasion) are law-abiding. Perhaps the picture painted above so sketchily will begin to undercut this doctrine of *mens rea* of the individual who, quite independent of his past, makes clear, rational choices in each situation whether he will play according to the rules.

To many, the rules are not clear. And if they are clear, they hold no promise of societal benefit. There is a strong likelihood that those presently in our jails were never among the “nearly everybody” who benefit when nearly everybody complies with the rules.²⁹

If they acted freely and rationally, then it was probably not with a freedom we have experienced, nor according to the rules of our rationality.

The quest to distribute punishment justly is laudable; but it would be my contention that it is a never-ending quest. Retributive justice cannot be satisfied fully unless we work towards meeting the demands of distributive justice. The classical legal model, with its canon of justice, cannot by itself justify punishment. A new model is needed, based on a notion of freedom which involves a dialectic between individual and community.

29. See C. B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962). There he develops the thesis that Hobbes and Locke masked the emerging inequalities of their contemporary socio-economic order by building their political theory on a principle of equality. At 247, he says of Locke that he “. . . reflected enough of the ambivalence of an emerging bourgeois society which demanded formal equality but required substantive inequality of rights [emphasis added]”.