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"Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System"

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I. Introduction

The Canadian criminal justice system is facing serious criticism for being racist.¹ Certain Canadian laws² and judicial decisions³ in the past have made the legal system an easy target for such charges. Canadian governments have acknowledged the problems of racism in Canadian society⁴, and provincial and federal human rights legislation exemplify efforts to eradicate racial discrimination.⁵ However, racial discrimination persists in Canadian society and the criminal justice system occupies a particularly sensitive place in controversies over the role of the state in these problems.⁶ Moreover, the equality provisions in the Canadian Charter of Rights and Freedoms have quite properly raised expectations that legislatures, courts and policy makers can and must use legal mechanisms to counter racial discrimination wherever it exists, but particularly in the criminal justice system.⁷

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†This paper was prepared for the conference “Sentencing now and in the Future” sponsored by the Attorney General and Solicitor General of the Province of Nova Scotia, held on March 3 and 4, 1989 in Halifax, Canada.

1. For a discussion of what may be meant by a racially defined ethnic group, see E. Kallen, *Ethnicity and Human Rights in Canada* (1982), pp. 62-63.

2. For example, see the British Columbia *Coal Mines Regulation Act*, S.B.C. 1888, c.84, as amended S.B.C. 1890, c.33 prohibiting employment of “Chinamen” which became the subject of dispute in *Union Colliery Co. of British Columbia Ltd. v. Bryden*, [1899] A.C. 589 or the Saskatchewan statute prohibiting the employment of white women by Chinese businessmen which was upheld in *Quong Wing v. The King* (1914), 49 S.C.R. 440.

3. For example see *Christie v. York Corp.*, [1940] S.C.R. 139 which upheld the “right” of a tavern owner in Montreal to exclude black patrons; or *Re Noble v. Wolfe*, [1949] 4 D.L.R. 375 (Ont. C.A.) where the court upheld a trial decision confirming the right of a property owner to place a covenant in a deed prohibiting sale to any person of the “Jewish, Hebrew, Semitic, Negro or coloured race or blood” (overturned [1951] S.C.R. 64 on grounds not related to the discriminatory nature of the covenant).

4. See Minister of State and Multiculturalism, *Race Relations and the Law*, Ministry of Supply and Services, Ottawa, 1983 at pp. 11-20.

5. See the main Canadian text W. Tarnopolsky, *Discrimination and the Law in Canada* (1982), *passim*.

6. Allegations of racism by police have recently emerged in Montreal and Toronto. The Royal Commission on the Prosecution of Donald Marshall, Jr. has commissioned two studies on racial discrimination in the justice system in the Province of Nova Scotia (one devoted to blacks, the other to Micmacs) which will be published shortly.

7. See Raj Anand, “Ethnic Equality”, in A.F. Bayefsky and M. Eberts, *Equality Rights and the*

The purpose of this paper is to explore certain problems and solutions regarding racial discrimination in the processes of sentencing and the administration of criminal sanctions. In adopting this focus one must be ever mindful that sentencing judges have no real choice in determining which cases will come before them.⁸ Judges have virtually no control over patterns of crime causation,⁹ nor are they able to greatly influence the patterns of police behavior which will determine how police resources are used to detect crime or apprehend suspects.¹⁰ Thus, if racism in society at large or in policing practices brings before the court a disproportionate number of visible minority offenders,¹¹ sentencing judges cannot be "blamed." On the other hand, the criminal trial and the process of sentencing in particular are a symbol and an embodiment of the principles of justice (or injustice, as the case may be) in Canadian society. As such, it is essential to ensure at the very least that the methods by which offenders are sentenced and sanctioned do not promote or exhibit characteristics of racial discrimination. Wherever possible in accordance with principles of justice the sentencing and correctional processes must also be actively directed toward the elimination of racial discrimination. This paper is intended to assess how these two objectives — egalitarian sentencing and ameliorative sentencing — can be achieved.

In order to do this, the evidence of racial discrimination in the Canadian criminal justice system and the perceptions of racial bias in sentencing must be examined. Next, it is essential to look at the disparate purposes of the criminal sanction, the principles governing sentencing and the range of sentencing options, to gain a sense of the limitations and the potential of criminal sentencing in reducing racial discrimination. There

Canadian Charter of Rights and Freedoms, Carswell, Toronto, 1985, pp. 81-130. Also: Rainer Knopff, "Prohibiting Systemic Discrimination: Policy Development or Discontinuity?" (1985-86), 50 Sask. L. Rev. 121; and Ian Savage, "Systemic Discrimination and Section 15 of the Charter" (1985-86), 50 Sask. L. Rev. 141.

8. Some control by courts of abuse of their process is recognized. See for example *R v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.). However, these cases will never amount to a wholesale judicial assertion of the right to control the docket. Prosecutorial discretion will no doubt continue to be a primary factor in the administration of criminal justice. See Bruce P. Archibald, *Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia*, Research Study of the Royal Commission on the Prosecution of Donald Marshall Junior, Halifax, forthcoming, *passim*. Also Phillip C. Stenning, *Appearing for the Crown*. (Brown Legal Pub., Cowansville, P.Q., 1986.)

9. The inconclusive nature of the effect of sentencing decisions on general deterrence is discussed in F.D. Cousineau, *Legal Sanctions and Deterrence*, a Research Report of the Canadian Sentencing Commission, Dept. of Justice, Ottawa, 1988.

10. Judicial decisions concerning allegations of police misconduct, whether in the context of civil or criminal proceedings, might arguably have such an effect. However, such proceedings are so rare that their impact is of no general concern here.

11. Evidence for the existence of such phenomena will be discussed below.

subsequently follows an analysis of how choices can be made among sentencing options in the interests of equality and affirmative action to ensure justice for offenders from visible minorities which have historically suffered from racial discrimination. Finally, the paper attempts to identify tasks and allocate responsibilities for various players in the criminal justice system with a view to reducing systemic discrimination via the sentencing process. Given the enormous importance of the endeavour, it is hoped that readers will pardon the presumptuousness of attempting such a difficult undertaking in such brief compass.

II. *Racial Discrimination in the Criminal Justice System*

Disputes over whether racial discrimination exists in the criminal justice system, or the extent to which it exists, are often related to what is meant by the term "discrimination". It is not merely, then, a pedantic exercise to begin this section with a discussion of how discrimination has been defined and how the concept has been applied recently by the Supreme Court of Canada in relation to the equality guarantees of the Charter. This section will then turn to the evidence available which demonstrates systemic discrimination in the criminal justice system as a whole, before considering the problems in any effort to scientifically demonstrate the existence of racial discrimination in the sentencing patterns of the judiciary. Conclusions are then drawn as to the problems which the evidence poses in relation to sentencing policy and visible minorities.

1. *Systemic Discrimination Defined*

It is now widely accepted in Canada that racial discrimination is understood to exist even where individuals involved in the discriminatory behavior do not directly intend that their actions have an adverse effect on the individuals or groups so harmed.¹² This principle is the basis for recognizing remedies against discrimination, in a variety of legal contexts, which have been adopted recently by the Supreme Court of Canada. Dickson, C.J. has stated:

"Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . it is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the by-product of innocently motivated practices or systems.

12. See Kallen, *supra*, footnote 1; *Race Relations and the Law*, *supra*, footnote 4; and Tarnopolsky, *supra*, footnote 5. See also the *Report of the Royal Commission on Equality in Employment*, (The Abella Report), Ministry of Supply and Services, Ottawa, 1984, pp. 7-10.

If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices which led to this adverse impact may be discriminatory.”¹³

This approach means that Canadian courts will increasingly be called upon to determine whether discrimination exists based on evidence of social patterns or legal practices demonstrating disproportionate “adverse impacts” or “systemic discrimination” based on race where proof of intentional bias is impossible.¹⁴

This concept of adverse effects or systemic discrimination has been used by the Supreme Court of Canada for the purpose of defining equality rights in section 15 of the Canadian Charter of Rights and Freedoms.¹⁵ Charter section 15(1) provides, in part: “Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination.”¹⁶ In other words, section 15 of the Charter is designed to prevent and prohibit discriminatory practices which purport to have the force of law.¹⁷ McIntyre, J., in a passage which gained the approval of the whole court, interpreted the meaning of the word discrimination in Charter section 15 in the following manner:

“... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association

13. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (known as the “action travail des femmes case”) at pp. 1138 and 1139. See also: *Re Bhinder and C.N.R. Co.*, [1985] 2 S.C.R. 561; *Re Ontario Human Rights Commission et al. and Simpson Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.); *Robichaud et al. v. The Queen* (1987), 40 D.L.R. (4th) 577 (S.C.C.).

14. For a full discussion see Beatrice Vizkelety, *Proving Discrimination in Canada*, Carswell, Toronto, 1987, *passim*.

15. Being Part I of the Constitution Act, 1982, enacted by the Canada Act 1982 (U.K.) c.11, proclaimed in force April 17, 1982, as amended by the Constitution Amendment Proclamation, 1983, S.I./84-102, effective June 21, 1984; hereinafter cited simply as “the Charter”.

16. For helpful analyses of the meaning of this provision see: Anne F. Bayefsky, “Defining Equality Rights”, in Bayefsky and Eberts, *supra*, footnote 7, at p. 1, and A. Wayne MacKay, “The Equality Provisions of the Charter and Education: A Structural Analysis”, (1986) 11 Can. J. of Education 293. A more broad ranging series of articles on the potential impact of section 15 can be found in Christine L.M. Boyle, A. Wayne MacKay, Edward J. McBride and John A. Yogis, *Charterwatch: Reflections on Equality*, Carswell, Toronto, 1986, *passim*.

17. Section 52(1) of the Constitution Act, 1982, reads: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."¹⁸

The sentencing provisions of the Criminal Code,¹⁹ the common law principles of sentencing,²⁰ and the decisions of sentencing judges²¹ make no overt distinctions based on race or personal characteristics which are explicitly attributed to accused persons on the basis of being a member of a visible minority group. In this regard sentencing law or the sentencing process can be described as "neutral on its face", or premised on notions of "formal legal equality" among accused persons. It is the purpose of this part of the paper to explore the extent to which the sentencing process is, or is perceived to be, discriminatory in the sense of being characterized by "adverse effects discrimination" or "systemic discrimination" in relation to visible minorities.

2. *The Problematic Evidence of Adverse Effects Discrimination in Sentencing*

The charge is often made that "equality before the law is a social fiction."²² Indeed, the facts in Canada present some startling evidence to this effect. It is a well documented fact that visible minorities are over represented in Canadian prisons by comparison to their proportion in the population as a whole.²³ For example, aboriginal peoples form 2% of the Canadian population, but 10% of the offenders in federal prisons.²⁴

18. *Andrews v. The Law Society of British Columbia*, [1989], 1 S.C.R. 143, in which provisions restricting admission to the legal profession in British Columbia to Canadian citizens were struck down as contrary to Charter section 15. McIntyre, J. dissented as to the result, but the other justices adopted his approach to the interpretation and application of Charter section 15.

19. *The Criminal Code*, R.S.C. 1985, c.C-46, ss. 716-761, hereafter cited as "Criminal Code".
 20. The difficulties caused by the absence of statutory principles of sentencing are discussed, *infra*, in text corresponding to footnotes 44 to 50. For standard texts describing the common law principles by which Canadian sentencing judges attempt to rationalize the exercise of their broad sentencing discretion see R.P. Nadin-Davis, *Sentencing in Canada*, Carswell, Toronto, 1982; and Clayton C. Ruby, *Sentencing*, (3rd ed.), Butterworths, Toronto, 1987.

21. Intentional and express discrimination against any person on the basis of prohibited classes of distinction would clearly be grounds for appeal. Moreover, such discrimination would undoubtedly form the basis for complaint against that judge before the appropriate Judicial Council, with the likely recommendation for dismissal. Since such overt discrimination is rare, and carries particular remedies, this paper is primarily concerned with the more difficult problems of unintended or covert systemic discrimination and its relationship to sentencing. For certain rare "affirmative action" considerations by judges, see text and law cited, *infra*, at footnote 161.

22. For example, see Thorsten Sellin, "Race Prejudice in the Administration of Justice" (1935), 41 Am. J. Sociology 212 at p. 217.

23. See Knopff, *supra*, footnote 7; and Savage, *supra*, footnote 7.

24. Ole Instrup, Chairman, National Parole Board, "Chairman's Presentation to the Standing Committee on Justice and the Solicitor-General", Ottawa, December, 1987 at p. 23. Statistics

However, this disproportionate representation of visible minorities in prison populations is not, in and of itself, evidence of racial discrimination in *sentencing*. It is evidence of a pattern which may demonstrate adverse effects discrimination in the criminal justice system as a whole, or in the way in which that system applies to a racist society. However, it is not evidence, per se, of racial bias in judicial decision making.²⁵ Reasons for this disproportionate number of visible minorities in Canadian prisons may lie in differential crime rates across races,²⁶ variations in deployment of police resources in relation to certain types of crimes,²⁷ discrimination in public reporting of crimes,²⁸ discrimination in police arrest practices,²⁹ discrimination in charging practices on the part of Crown prosecutors, differential request rates for parole,³⁰ or discrimination on the part of parole authorities, to name only some of the logical possibilities.

Regardless of the fact that racial imbalances in prison populations may be the result of systemic discrimination from many sources, the view is widely held that there is racial discrimination in sentencing itself. The well known criminologist Richard Quinney asserts:

“Obviously judicial decisions are not made uniformly. Decisions are made according to a host of extra-legal factors, including the age of the offender, his race and social class. Perhaps the most obvious example of judicial discretion [sic] occurs in the handling of persons from minority groups.

provided to the author by the Solicitor-General of Nova Scotia indicate that Black offenders make up approximately 7% of the Nova Scotian adult penal institution admissions, while Aboriginal offenders are between 4 and 5 percent of prison admissions. Estimates place black populations of major metropolitan areas in Nova Scotia at between 3% and 5%, of total population while the aboriginal population (mostly Micmac) is less than 1% of the population of Nova Scotia.

25. For a useful brief discussion of the relationship between possible discrimination in various aspects of the criminal justice process and sentencing see Alfred Blumstein, Jacqueline Cohen, Susan E. Martin and Michael Tonry (eds.), *Research on Sentencing: The Search for Reform* National Academy Press, Washington, 1983, pp. 13-16.

26. There is evidence to suggest that for reasons related to special and economic discrimination in society at large, blacks in the U.S. do commit certain crimes more frequently than whites. See M.J. Hindelang, “Equality Under the Law”, (1969) 60 J. of Crim. L., Criminology and Police Sci 306-313.

27. For the classic Canadian discussions of the way in which deployment of police resources “creates” crime, see Richard V. Ericson, *Making Crime: A Study of Police Detective Work*, Butterworths, Toronto, 1981, *passim*; and R. Ericson, *Reproducing Order: A Study of Police Patrol Work*, U. of T. Press, Toronto, 1982, *passim*.

28. The most recent study on public perception of crime was undertaken by the federal government. See Solicitor General of Canada, *Canadian Urban Victimization Survey*, Bulletins 1-10, Ottawa, 1983-1988.

29. See R.M. Bienvenue and A.H. Latif, “Arrests, Disposition and Recidivism: A Comparison of Indians and Non-Whites” (1974), 16 Can. J. Criminology and Corrections 105.

30. There is some Canadian evidence, for example, that native prisoners are less likely to make application for early parole release than other inmates.

Negroes, in comparison to whites, are convicted with lesser evidence and sentenced to more severe punishments.”³¹

Early social science studies of sentencing conducted in the United States supported this view,³² particularly in relation to the imposition of the death penalty in the southern states.³³ Indeed, recent American data confirms that the renewed use of the death penalty falls with unequal incidence on blacks and whites, especially when the race of the victim is taken into account.³⁴

Despite these widely held impressions, the greater weight of the modern sociological literature indicates that many of the earlier studies were methodologically flawed, sometimes merely correlating race, offence and sentencing outcomes.³⁵ The majority of modern studies which take into account a series of variables, such as seriousness of the offence, number of offences, degree of harm caused to a victim, use or non-use of a weapon, employment status, prior criminal record, dependence on alcohol or drugs, and so on, are finding that there is not a statistically significant relationship between race of the accused per se and sentencing outcome. Most studies state that evidence of racial discrimination in sentencing is at most indirect or that sentencing outcomes are predicted by legally relevant factors.³⁶ The most comprehensive American study concludes:

“The available research suggests that factors other than racial discrimination in sentencing account for most of the disproportionate representation of blacks in U.S. prisons, although racial discrimination may play a more important role in some regions or jurisdictions, for some crime types, or in the decisions of individual participants.”³⁷

31. Richard Quinney, *The Social Reality of Crime*, (1970), pp. 141-142.

32. See for example: Thorsten Sellin, “The Negro Criminal: A Statistical Note” (1928), 140 *Annals Am Academy of Pol. and Soc. Sci.* 52.

33. E.H. Johnson, “Selective Factors in Capital Punishment” (1957), 36 *Social Forces* 165.

34. Samuel Gross and Robert Mauro, “Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization” (1984), 37 *Stan. L. Rev.* 27; and Anthony G. Amsterdam, “Race and The Death Penalty” (1988), 7 *Criminal Justice Ethics* 2.

35. The most complete attempts to survey and assess the literature are: J. Hagen, “Extra-legal Attributes and Criminal Sentencing: An Assessment of the Sociological Point of View” (1974), 8 *Law and Soc. Rev.* 357-383; G. Kleck, “Racial Discrimination in Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty” (1981), 46 *Amer. Soc. Rev.* 783-805; and J. Hagen and K. Bumiller, “Making Sense of Sentencing: A Review and Critique of Sentencing Research,” in Blumstein et al. *Research on Sentencing, supra*, footnote 25, Vol. II, pp. 1-54.

36. For example, see Susan Welch, John Gruhl and Cassia Spohn, “Sentencing The Influence of Alternative Measures of Prior Record” (1984), 22 *Criminology* 215-227.

37. Blumstein, et al. *Research on Sentencing, supra*, footnote 25, Vol. I, at p. 13. In agreement, see Marjorie S. Zatz, “Race, Ethnicity and Determinate Sentencing” (1984), 22 *Criminology* 147-171.

At least one Canadian statistical study supports such a conclusion,³⁸ and it would not be surprising if the research undertaken by the Marshall Inquiry disclosed the same results.

Statistical studies, of course, may mask the appearance of discriminatory actions which have the effect of cancelling one another out in the general results. For example, one U.S. study conducted in Georgia found that “blacks are the victims of discrimination by some judges, but the beneficiaries of discrimination by others.”³⁹ Hence the difficulty of relying on statistical data showing no systematic racial bias in sentencing at the aggregate level. Furthermore, some “legally relevant” factors in sentencing may have obviously discriminatory effects in practice. For example, in considering whether an accused is an appropriate candidate for a rehabilitative programme or a less punitive sanctioning option, reference is often made to the accused’s employment status and employment record.⁴⁰ Higher rates of unemployment among visible minority groups under such circumstances will lead to disparate sentencing results, but an analysis of comparative sentencing data will ascribe the outcome to employment status and not racial discrimination in sentencing.⁴¹ Some American jurisdictions have found the correlation between employment status and race so potentially damaging to visible minority groups that they have prohibited reference to employment record in the sentencing process.⁴² This issue, of course, demonstrates how a sentencing process which may be neutral and impartial on its face can contribute to and perpetuate systemic discrimination which has its roots in the social and economic systems of society at large.

3. *A Sentencing Response to Perceived and Actual Systemic Discrimination*

At least one expert on sentencing research has decried the unwillingness of researchers and the public to admit the fact that there is little evidence

38. Marek Debicki, “Sentencing and Socio-Economic Status,” in Dale Gibson and Janet K. Baldwin, *Law in a Cynical Society? Opinion and Law in the 1980’s*, Carswell, Calgary, 1985, pp. 219-235. For a British study with similar results see Michael McConville and John Baldwin, “The Influence of Race on Sentencing in England”, [1982] *Crim. L. Rev.* 652-658.

39. J.L. Gibson, “Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study” (1978), 12 *Law and Soc. Rev.* 455-478.

40. Standard Canadian sentencing texts assume that reference to employment status and record will be made. See for example, Ruby, *supra*, footnote 20, p. 183.

41. For a recent review of the American literature on the topic see Bradford C. Mank, “The Role of Employment Factors in Sentencing” (1988), *Criminal Law Bulletin* 249-253. Data on Employment rates of visible minorities in Canada is found in The Abella Report, *supra*, footnote 12, at pp. 79-99.

42. Minnesota has done so in its sentencing guidelines: Minn. Stat. Ann. 244.09 Comment II.D.03(1) (West Supp. 1987); as has Congress in relation to the United States Sentencing Commission: U.S.C.A. 994(d) and (e) (West Supp. 1987).

of systematic racial discrimination in sentencing when research controls for legally relevant aggravating and mitigating factors.⁴³ But there is a widespread perception among members of visible minority groups, which is unlikely to disappear, that judges are racially biased in the exercise of their sentencing discretion. These perceptions may be accurate to the extent that they are based on individual instances of racial discrimination which are not caught through statistical studies. At the very least they demonstrate that the sentencing process suffers from a credibility problem — justice is not being seen to be done. More importantly sentencing judges are caught in a legal system reinforcing a social and economic order which draws visible minorities into its clutches in disproportionate numbers. Using currently approved, legally relevant criteria, judges may be forced to sentence disproportionate numbers of visible minority offenders to prison in the name of formal equality.

There are thus two factual conclusions to be drawn which cry out to be addressed in the sentencing process. First, there appears to be systemic discrimination in the justice system as a whole, whether or not related to sentencing, which has the effect of putting larger numbers of visible minority offenders in prisons than their numbers in society at large would warrant. Secondly, there is a widespread perception that there is racial discrimination in sentencing itself, whether or not this is actually the case. Before discussing how the sentencing process might address these problems, it is necessary to assess critically the purposes, principles and options which presently structure sentencing discretion in our criminal justice system.

III. *The Sentencing Process: Purposes, Principles and Options*

Perceptions of racial discrimination in sentencing may in some measure be a reflection of the public's general concern over sentencing disparity in Canada. The Canadian sentencing Commission has collected data which indicates that there is a widespread belief among both Crown and defence counsel across Canada that unwarranted disparity in sentencing exists.⁴⁴ Moreover, research into judicial attitudes⁴⁵ and statistical

43. G. Kleck, "Life Support for Ailing Hypothesis: Modes of Summarizing the Evidence for Racial Discrimination in Sentencing" (1985), 9 *Law and Human Behavior* 271-285. Kleck argues that the class nature of the offender's crime has more to do with racially disproportionate prison populations than race *per se*.

44. The Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Ministry of Supply and Services of Canada, Ottawa, 1987 states at p.74: "... approximately 93% of defence and 92% of Crown counsel were of the opinion that there was at least some unwarranted variation in sentences in their own jurisdiction . . . Forty percent of defence counsel and 41% of Crown counsel thought that there was a "great deal of unwarranted variation" in sentences handed down across Canada.

45. John Hogarth, *Sentencing as a Human Process* U. of Toronto Press, Toronto, 1971,

analyses of sentencing practices in various parts of Canada⁴⁶ support the view that there are wide differences in outcomes in relation to essentially similar cases. As Hogarth has indicated, some sentencing disparity may be related to judicial differences as to the appropriate purposes of principles which ought to govern the sentencing process.⁴⁷ Thus judges who think deterrence is the over-riding consideration in a particular case seem more likely to hand down a harsher sentence than judges who believe the interests of rehabilitating the offender ought to predominate. This uncertainty concerning basic purposes and principles of sentencing, when combined with the broad sentencing discretion given to judges within the maximum allowable penalty for a given offence, has implications for solving actual and perceived problems of racial discrimination in sentencing.

If order is to be brought to the sentencing process, it is useful to distinguish between the *purposes* of the criminal sanction and *principles* of sentencing which govern the imposition of such sanctions. When this distinction is clarified, the basis for choosing particular sentencing options can be related to issues of equality and the particular problems faced by visible minorities.

1. *The Purposes of the Criminal Sanction*

The litany of purposes of the criminal sanction is familiar to anyone seriously involved with the criminal justice system. The over-arching purpose of the criminal sanction is sometimes said to be the "protection of the public".⁴⁸ As has been pointed out by others,⁴⁹ this purpose is one which is shared with other components of the criminal justice system

passim, and T.S. Palys and S. Divorski, "Judicial Decision-Making: An Examination of Sentencing Disparity Among Canadian Provincial Court Judges", in D.C. Muller, P.E. Blackmun, and A.J. Chapman (eds.), *Psychology and the Law* John Wiley and Sons, Toronto, 1984.

46. S.K. Jaffary, *Sentencing of Adults in Canada*, U. of T. Press, Toronto, 1965; K.B. Jobson, "Imprisonment" (1971) 4 Ottawa L. Rev. 421-457; L. MacDonald, "Crime and Punishment in Canada: A Statistical Test of the Conventional Wisdom" (1969), 6 Can. Rev. of Soc. and Anthro 212-236. From government sources, see: Dept. of Justice of Canada, *Sentencing*, Ministry of Supply and Services, Ottawa, 1984; and Solicitor General of Canada, *Long Term Imprisonment in Canada*, Ministry of Supply and Services, Ottawa, 1984 as well as studies cited in the Canadian *Sentencing Commission Report*, *supra*, note 44, at p. 76.

47. Hogarth, *supra*, footnote 45.

48. See *R v. Grady* (1971), 5 N.S.R. (2d) 264 (C.A.).

49. Andrew Ashworth, "Criminal Justice and Deserved Sentences", a paper presented to the Conference of the Society for the Reform of the Criminal Law, "Reform of Sentencing Parole and Early Release", August 1-4, 1988, Ottawa. Some, of course, would argue that the phrase "protection of the public" has become more narrowly associated with the notion of "incapacitation" discussed below. See Sentencing Commission Report, *supra*, footnote 44, at pp. 145-147.

such as police forces or the correctional system. Thus it is not terribly helpful as an analytical tool for the understanding of sentencing, although it does emphasize the primarily public aspect of criminal law as opposed to the predominantly private character of civil law which is directed to compensation of losses suffered by persons (whether natural or juristic).⁵⁰

(i) *Retribution*

The most important *purpose* of the criminal sanction in the eyes of most members of the public and those of many jurists, and certainly a most important *effect* of the criminal sanction from the perspective of most offenders, is punishment or retribution.⁵¹ Retribution is the commonplace notion justifying the imposition of the criminal sanction whereby it is said that the person who chooses to break the law *deserves* to be punished.⁵² The concept underpins the Criminal Records Act⁵³ in so far as it is understood that people who have served their sentence and “paid their debt to society” merit having their record expunged if they have been of good behavior for the requisite statutory period. Retribution, of course, differs from vengeance in that it is a measured social response to the harm done to society by the offender (the “eye for the eye” but no more) and is not the mere infliction of limitless pain on a wrongdoer.⁵⁴ During the period from the early twentieth century until the 1960’s, retribution was down played. Described as backward looking and akin to vengeance, retribution as a purpose of the criminal sanction gave way to the forward looking, utilitarian goals meant to reduce crime, such as deterrence, rehabilitation and incapacitation.⁵⁵ Interestingly enough, the leading

50. This public/private distinction is often resorted to in describing criminal law in introductory texts. See for example, Cross and Jones, *Introduction to Criminal Law*. (London, Butterworths, 1980).

This emphasis on public protection and de-emphasis on compensation has become the focus of criticism of victims rights groups, to be discussed below.

51. For a summary of classical notions of retribution see Nigel D. Walker, *Punishment, Danger and Stigma*, Blackwell, 1980.

52. It is this principle upon which we base our basic notions of fault or mens rea in general criminal law theory. For a discussion of the fault notion and its constitutional importance under the Charter, see Bruce P. Archibald, “The Constitutionalization of the General Part of Criminal Law”, (1988) 67 Can. Bar. Rev. 1.

53. R.S.C. 1985, c. C-47.

54. The consideration of the place of the *lex talionis* in the history of western civilization is beyond the scope of this paper! However, see Walker, *supra*, footnote 51, or Julius Stone, *Human Law and Human Justice*. (Stanford U. Press, Stanford, 1965), at p. 18.

55. The ascendancy of the utilitarian approach can be seen in the *Report of the Royal Commission to Investigate the Penal System of Canada* (Archambault Report), Queen’s Printer, Ottawa, 1938; and the *Report of a Committee Appointed to inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada* (the Fauteux Report), Queen’s Printer, Ottawa, 1956, which led to the establishment of the national Parole Board in 1959. A good brief discussion of this “reductivism” is found in Eric Colvin, *Principles of Criminal Law*, Carswell, Toronto, 1986, pp. 19-24.

Nova Scotian case on sentencing decided at the end of this period makes no reference to retribution as one of the purposes of the criminal sanction.⁵⁶ However, more recent jurists and sentencing reformers have returned to refurbished retributive principles under the label “just deserts” in order to salvage sentencing policy from the excesses of the utilitarian approach.⁵⁷

(ii) *Deterrence*

Having broached the topic of utilitarian purposes for the criminal sanction, a word is in order concerning deterrence. The deterrence rationale for punishment has been prominent in western penological thought since the eighteenth century,⁵⁸ and is now understood to include what are termed “general” and “particular” deterrence.⁵⁹ An effective general deterrent is said to be that degree of punishment which will inhibit members of the general public from committing the offence in question, while particular deterrence is that thought sufficient to prevent the accused in question from re-offending. These amounts, of course, may differ.⁶⁰ Conventional wisdom is that general deterrence has differential thresholds of success in relation to three categories of people: (a) those for whom the mere existence of the law or the threat of a sanction is sufficient to ensure compliance; (b) those determined individuals for whom no level of threatened sanction will curb behaviour; and (c) that group of rational would be criminals who will weigh the degree of severity of the sanction against the benefit to be derived from the commission of the crime.⁶¹ For the first category, general deterrence amounts to social control through a “denunciation” of the conduct

56. *R v. Grady*, *supra*, footnote 48. See, however, the more comprehensive Nova Scotian decision from the same era, *R v. Fairn* (1973), 12 C.C.C. (2d) 423 (N.S. Co. Ct.). The Supreme Court of Canada has had no difficulty in naming punishment as a purpose of the criminal sanction: see *Smith v. The Queen*, [1987] 1 S.C.R. 1045.

57. The primary theorist of the new just deserts model is the American Andrew Von Hirsch. See his influential *Doing Justice: The Choice of Punishments*, Hill and Wang, New York, 1976; and his more recent *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*, Rutgers U. Press, New Brunswick, 1985. As to sentence reform, see Ken Pease and Martin Wasik (eds.), *Sentencing Reform: Guidance or Guidelines?* Manchester U. Press, Manchester, 1987; or the helpful summary of American sentencing reforms in the *Canadian Sentencing Commission Report*, *supra*, footnote 44, at pp. 283-301.

58. The foundations of classical criminology were grounded in deterrent theory in 1764 with Cesare Beccaria's *On Crimes and Punishments*, translated by Henry Paolucci, Bobbs Merrill, Indianapolis, 1963.

59. For a standard treatment see Ruby, *Sentencing*, *supra*, footnote 20, pp. 5-10.

60. For a judicial treatment of this problem see *R v. Fairn*, *supra*, footnote 56.

61. This approach has been attractive to modern economists. See Gary S. Becker, “Crime and Punishment: An Economic Approach” (1968) 76 J. of Pol. Economy 169-217. It is mentioned in *R v. Fairn*, *supra*, footnote 56.

declared by the state to be criminal and seems effective for a large but indeterminate group of people. This purpose has been strongly advocated by the Law Reform Commission of Canada.⁶² For the second category, deterrence is of no value. For the third category, deterrence might work in principle, but the theory of deterrence assumes a uniformity and rationality of crime causation which is not supported by scientific evidence.⁶³ Social science evidence on the effectiveness of deterrence is inconclusive to say the least.⁶⁴ Given the haphazard way in which the news media report criminal sanctions to the general public, there is little reason to think that raising the level of sentence in any particular case will act as an effective general deterrent.⁶⁵

(iii) *Incapacitation*

The second weapon in the utilitarian arsenal in the fight against crime is incapacitation. This strategy relies primarily on the sanction of incarceration, and is premised on the common sense proportion that jailed offenders are by definition not capable of committing crimes affecting society at large (although they may commit crimes in prison). This purpose for the criminal sanction rests on the notion that the offender being sentenced would commit further crimes if given a sanction to be served at large in the community.⁶⁶ The difficulty in its use is that it relies upon the assumption that it is possible to predict dangerousness or the certainty that an individual offender will recidivate. While many are quite sanguine about the system's capacity to do this,⁶⁷ the most prevalent view is that in most cases we simply do not have the capacity to predict the future behavior of individuals and the concomitant need for incapacitation in most situations.⁶⁸

62. Law Reform Commission of Canada, *Our Criminal Law*, Ministry of Supply and Services, Ottawa, 1976.

63. For an excellent review of theories of crime causation see George B. Vold and Thomas J. Bernard, *Theoretical Criminology* (3rd ed), Oxford U. Press, Toronto, 1986.

64. See Cousineau, *Legal Sanctions and Deterrence*, *supra*, footnote 9.

65. This is the conclusion in the *Canadian Sentencing Commission Report*, *supra*, footnote 44 at pp. 135-138.

66. See A. Blumstein, J. Cohen and D. Nagin (eds.) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* National Academy of Sciences, Washington, 1978, p. 9.

67. P. Greenwood, *Selective Incapacitation*, 1982. Also the majority of the Supreme Court of Canada in *Lyons v. The Queen*, [1987] 2 S.C.R. 309.

68. A. Von Hirsch, "Selective Incapacitation Re-examined: The National Academy of Sciences' Report on Criminal Careers and 'Career Criminals'" (1988) 7 *Criminal Justice Ethics* 19; also C. Webster, B. Dickens and S. Addario, *Constructing Dangerousness: Scientific, Legal and Policy Implications*. (Toronto: Center of Criminology, Univ. of Toronto, 1985.)

(iv) *Rehabilitation*

Rehabilitation is a purpose for the criminal sanction which has emerged from a recent, but mercifully brief eclipse. Depending upon one's strategy this purpose is also known as reform or treatment. While the rehabilitative ideal dominated penology in the early part of the twentieth century, there was widespread disillusionment with rehabilitation in the 1960's and 1970's.⁶⁹ Indeterminate sentencing systems in many American states were subjected to the scrutiny of comparative statistical research. It was found that prisoners detained for the supposedly humane purpose of rehabilitation or treatment were spending more time behind bars on average than in states where the avowed purpose was punishment for a relatively fixed period.⁷⁰ Prisons were revealed not to improve prisoners, but to be schools for crime.⁷¹ Moreover, the title to a famous publication became twisted into slogan by which to bludgeon the rehabilitative ideal: "Nothing works", it was said.⁷² Correctional officials excised the language of "rehabilitation" and "treatment" from their vocabularies, and strove instead to achieve the more limited goal of "re-integration" of offenders at the end of periods of incarceration through providing "opportunities for self-improvement" to willing offenders.⁷³ However, persistent research and action by those committed to the goal of rehabilitation has demonstrated that, while many rehabilitative programmes have failed in the past because they were poorly thought out or inadequately implemented, rehabilitation and treatment can work. Certain strategies for carefully selected offenders when properly carried out yield significantly positive results.⁷⁴ Rehabilitation or treatment as purposes for the criminal sanction are alive and well, though tamed.

(v) *Compensation and Victim/Offender Reconciliation*

A final purpose for the criminal sanction, which in the minds of many is

69. Francis Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," (1959), 50 J. of Crim. L., Criminology and Police Sci 226-232; and Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, Yale U. Press, New Haven, 1981.

70. American Friends Service Committee Working Party, *Struggle for Justice: A Report on Crime and Punishment in America*, Wang and Hill, New York, 1971.

71. L. Sechrest, S. White and E. Brown (eds.) *The Rehabilitation of Criminal Offenders*, National Academy of Sciences, Washington, 1979; D. Lipton, R. Martinson and J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*, Praeger, New York, 1975.

72. R. Martinson, "What Works? Questions and Answers about Prison Reform" (1974), 35 *The Public Interest* 22-54.

73. See Correctional Law Review, Working Paper No. 1, *Correctional Philosophy*, Ministry of the Solicitor General, Ottawa, 1986.

74. Paul Gendreau and Robert R. Ross, "The Revivification of Rehabilitation: Evidence from the 1980's" (1987), 4 *Justice Quarterly* 349; and Francis T. Cullen and Karen E. Gilbert, *Reaffirming Rehabilitation*, Anderson Publishing, Cincinnati, 1982.

linked to rehabilitation, has emerged from the margins of criminal law doctrine to a prominent place much closer to the centre. This is the matter of compensation and restitution to victims of crime. In the 1970's and 1980's the victims rights movement conducted a successful crusade against the state-centred image of criminal justice which treated victims as mere witnesses in the process and relegated reparation primarily to the civil sphere through tort law.⁷⁵ While some critics have pointed to the spectre of victims perverting the criminal justice system in a private quest for vengeance,⁷⁶ the renewed place of the victim in the criminal code is assured through improved mechanisms for compensation,⁷⁷ as well as victim impact statements.⁷⁸ The link to rehabilitation is achieved through victim/offender reconciliation schemes which are now being run in many Canadian jurisdictions.⁷⁹ Though largely restricted to non-violent offences,⁸⁰ these programmes are designed not only to meet the needs of the victim, but to ensure that the offender comes to terms with his or her responsibility for anti-social conduct as a crucial step in a rehabilitative strategy.⁸¹

The foregoing truncated catalogue of the purposes of the criminal sanction has intentionally avoided discussion of how these purposes are related to the task of the sentencing judge. The reason for this is to highlight the distinction which ought to be made between these *purposes* of the criminal sanction and the *principles* which should govern sentencing. Purposes of the sanction and sentencing principles are closely related, but not identical, as the next section will attempt to demonstrate.

2. *Principles for Determining Severity of a Sentence*

The "just deserts" proponents demonstrate convincingly that the traditional utilitarian purposes for the criminal sanction provide no adequate basis for determining the relative severity of the sentence which

75. I. Waller, *The Role of the Victim in Sentencing and Related Processes*, Dept. of Justice, Ottawa.

76. For example, see [1940] 3 D.L.R. 606 (Que. K.B., App. Side).

77. Criminal Code, s.725. Note there are extensive unproclaimed amendments enlarging this provision via Stats. Can. 1988, c.30, s.6.

78. *Ibid.*, s.7.

79. See John Eckstedt and Margaret Jackson, *A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues*, Department of Justice, Ottawa, 1988.

80. But see the "Genesee Justice" programme which seems successful in reconciling victims and offenders even in serious crimes of violence. Brochures available from the Community Service/Victim Assistance Programme, Genesee County Sheriffs Department, County Building #1, Batavia, N.Y., USA 14020-3199.

81. This approach was greeted with enthusiasm in the Sixth Report of the Standing Committee on Justice and the Solicitor General (The Daubney Committee), *Taking Responsibility*, House of Commons, Ottawa, 1988, pp. 97-98.

ought to be meted out to a particular offender.⁸² The interests of general deterrence may justify the imposition of a far harsher penalty than the gravity of the offence or the degree of the offender's culpability would otherwise warrant.⁸³ Similarly, if an offender needs rehabilitation in order to enable him or her to conform to the dictates of lawfulness in society, the period of time required to accomplish such a complex task may be far longer than that of any period of incarceration or control forced upon the offender under a just deserts scheme.⁸⁴ Conversely, is it self evident that where two accused have jointly committed a criminal offence, the one who has found a job and has good rehabilitative prospects should receive a lesser penalty than his or her colleague who languishes on unemployment insurance? Finally, the potential injustice in an incapacitative purpose as the determinant of sentencing severity is manifest in a system where there is no assurance that our capacity to predict dangerousness has any substantial degree of accuracy. This is not to say that the utilitarian purposes for the criminal sanction have no importance for the choosing of sentencing options or the methods of imposing sanctions. Rather, it points to the fact that these purposes do not provide an adequate principle of determining the severity of the sentence.

(i) *Proportionality, Equality and Restraint*

Justice requires that proportionality, restraint and equality be the primary determinants of the severity of a sentence. Recent Canadian proposals for reform all recognize this reality.⁸⁵ The principle of proportionality, from which the corollary principles of restraint and equality are derived, has most usefully been stated thus:

“The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.”⁸⁶

This principle requires the court to consider aggravating and mitigating

82. In particular, see Von Hirsch, *supra*, footnote 57.

83. This, of course, was the gravamen of the charges laid against indeterminate sentencing systems in the United States. See Allen, *supra*, footnote 69.

84. Canadian courts of appeal leave open the possibility of sacrificing an offender for the general good in this fashion. See *R v. McKimm*, [1970] 1 C.C.C. 340 (Ont. C.A.).

85. This was the case with the Criminal Law Reform Act, 1984, (Bill C-19) derived from work by the Law Reform Commission of Canada which died on the order paper. It is found in the “Declaration of Purpose and Principles of Sentencing” of the *Canadian Sentencing Commission Report*, *supra*, footnote 44, at pp. 153-155; and it was adopted in the Report of the Daubney Committee, *supra*, footnote 81, pp. 246-247.

86. Bill C-19, *supra*, footnote 85, in proposed Criminal Code section 645(3)(a); Sentencing Commission Declaration of Purpose and Principles, *supra*, footnote 85, section 4(c); and *Daubney Committee Report*, *supra*, footnote 81 recommendation 9, p. 248.

circumstances relating to the seriousness of the crime,⁸⁷ and the accused's degree of culpability.⁸⁸ The principle of restraint is variously described as requiring that "a sentence should be the least onerous sanction appropriate in the circumstances",⁸⁹ that "the maximum penalty prescribed for an offence should be imposed only in the most serious circumstances",⁹⁰ and that "the nature and combined duration of the sentence and any other sentence imposed upon the offender should not be excessive".⁹¹ The principle of equality must be asserted in determining severity of sentence in order to minimize disparity flowing from the sentencing process. A sentence must "be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances."⁹²

The principle of proportionality or just desert appears to be receiving the imprimature of the Supreme Court of Canada as a matter of constitutional doctrine.⁹³ In striking down penal laws invoking the combination of absolute liability and imprisonment,⁹⁴ conviction for murder without requiring proof of fault,⁹⁵ and automatic minimum penalties with no regard to the gravity of the offence or degree of culpability of the offender,⁹⁶ the court has repeatedly invoked the principle of proportionality. This approach by the court seems rooted in its apparent acceptance of the fact that "punishment" is an inevitable aspect of our criminal law.⁹⁷ Moreover, it is consistent with public views

87. Both the Canadian Sentencing Commission and the Daubney Committee, *supra*, footnote 85, have proposed specific tests of aggravating and mitigating factors drawn from judicial experience; such as use of violence, cruelty to a victim, evidence of organized criminal activity, breach of trust, etc.

88. Degree of culpability might include such standard factors as the existence or absence of previous convictions, physical or mental impairment, the age of the offender, or the offender's role in the offence. The issue of race will be addressed subsequently.

89. Both the Canadian Sentencing Commission and the Daubney Committee, *supra*, footnote 85, have proposed specific tests of aggravating and mitigating factors drawn from judicial experience; such as use of violence, cruelty to a victim, evidence of organized criminal activity, breach of trust, etc.

90. Canadian Sentencing Commission Declaration, section 4(b); Daubney Committee, recommendation 6(b).

91. Canadian Sentencing Commission Declaration, section 4(c)(iii); and Daubney Committee, recommendation 6(c).

92. Canadian Sentencing Commission Declaration, section 4(c)(iii); Daubney Committee, recommendation 6(a).

93. See Bruce P. Archibald, "Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada", (1988), 22 *Revue juridique thémis* 307.

94. *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

95. *Vaillancourt v. The Queen* (1987), 81 N.R. 115 (S.C.C.).

96. *Smith v. The Queen* [1987] 1 S.C.R. 1045.

97. The word "punishment" is used by Wilson, J. in the B.C. Motor Vehicle Reference case, *supra*, footnote 94 at pp. 533-534, as does Lamer, J. in *Vaillancourt*, *supra*, footnote 95, at pp. 131-132, although in association with the words "stigma" and "penalty".

of the purpose of the criminal sanction and the sentencing reform proposals described above.

In this context, the utilitarian approach of some Canadian courts of appeal is potentially contrary to the principle of proportionality, and thus constitutionally suspect. For example, in the *Grady* case, the Nova Scotia Appeal Division finds that the primary purpose of sentencing is the protection of the public, and that this aim is to be achieved through (a) deterrence (general or particular) or (b) reform and rehabilitation or a combination of (a) and (b).⁹⁸ As a principle for determining the *severity* of the criminal sanction this approach is inadequate. It ignores the principles of proportionality, restraint and equality, and as such may be thought a possible basis for depriving someone of their liberty other than in accordance with principles of fundamental justice.⁹⁹ Of course Nova Scotian courts in reality ignore the *Grady* decision. After an abstract recital of the famous passage from *Grady*, sentencing courts look to the appropriate guideline judgment from the Court of Appeal for the type of offence in question,¹⁰⁰ and then consider the various aggravating and mitigating factors arising from the evidence. In other words, they consider the principle of proportionality as they should. The difficulty, however, is that where general deterrence is over-emphasized restraint may be sacrificed, and where the rehabilitative potential of the offender is over-emphasized equality may be sacrificed. The *Grady* decision reinforces this dichotomy between deterrence and rehabilitation which has been shown to be a primary source of sentencing disparity.¹⁰¹

(ii) *Limiting Retributivism or Hybrid Sentencing Principles*

The reconciliation of proportional sentencing principles with utilitarian purposes of the criminal sanction is possible. Often this reconciliation is identified by the designation "limiting retributivism",¹⁰² although the Canadian Sentencing Commission and the Daubney Committee proposals both attempt to introduce variants of this kind of solution without using the label. The fundamental basis for the compromise is that principles of proportionality or just desert are primary in determining the

98. *Grady*, *supra*, footnote 48.

99. This, of course, is the constitutional standard of Charter section 7.

100. The guideline judgment in robbery matters, for example, is two to six years, six to ten for robberies committed in financial institutions or private dwellings. See *R. v. Leet* (1989), 88 N.S.R. (2d) 161 (C.A.).

101. This is the problem researched by Hogarth, *supra*, footnote 45, and Polys and Divorski, *supra*, footnote 45.

102. This phrase is used by Nigel Walker, *supra*, footnote 51; and is approved in Andrew Ashworth, *Sentencing and Penal Policy*. (George Weindenfeld and Nicolson, Ltd., London, 1983). See also Norvell Morris, *Madness and the Criminal Law*. (Chicago: Univ. of Chi, 1982.)

severity of the sanction, however, within these outer limits, utilitarian purposes, particularly rehabilitation and victim offender reconciliation, ought to be given full scope for implementation. Thus the Canadian Sentencing Commission proposes that within the confines of sentencing options determined by proportionality, restraint and equality, "the court may give consideration to any one or more" of the following:¹⁰³

- "(a) denouncing blameworthy behavior;
- (b) deterring the offender and other persons from committing offences;
- (c) separating offenders from society, where necessary;
- (d) providing for redress for the harm done to individual victims or to the community;
- (e) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in the rehabilitation as productive and law-abiding members of society."

Some writers recognize that in such a hybrid system, proportionality may sometimes have to give way to pressing utilitarian concerns.¹⁰⁴ However, the main difficulty in implementing such an approach is to set out a range of sentencing options capable of achieving the utilitarian purposes which can be evaluated against one another in accordance with the principles of just desert. These matters are canvassed in the next section.

3. *Proportionate Sentencing Options*

The sentencing options available to Canadian criminal courts, in formal terms, are imprisonment,¹⁰⁵ fine,¹⁰⁶ fine options,¹⁰⁷ suspended sentences,¹⁰⁸ probation orders,¹⁰⁹ compensation orders,¹¹⁰ and conditional and absolute discharges.¹¹¹ While this might seem a limited range of alternatives, they can be applied in such a manner as to provide a good deal of flexibility to the court in seeking to achieve one or more of the purposes of the criminal sanction discussed earlier. The way in which the Criminal Code is drafted, however, has tended to reinforce the notion that imprisonment is the "normal" sanction and that all others are

103. Canadian Sentencing Commission, Declaration, section 4(d).

104. Paul H. Robinson, "Hybrid Principles for the Distribution of Criminal Sanctions", (1988) 82 Northwestern U.L. Rev. 19.

105. Criminal Code, ss.717, 730-734.

106. Criminal Code, s.718, 719.

107. Criminal Code, s.718.1.

108. Criminal Code, s.737.

109. Criminal Code, s.737.

110. Criminal Code, ss.725 and 726.

111. Criminal Code, s.736.

“lesser” alternatives.¹¹² Harkening back to the *Grady* principles of sentencing, this has meant in practice that when a court sees deterrence as the primary applicable goal in the circumstances it imposes a term of imprisonment; when the goal is rehabilitation a non-carceral sanction is imposed.¹¹³ Indeed, Canadian sentencing reformers have been quite adamant that “a term of imprisonment should not be imposed, nor its duration determined, solely for the purpose of rehabilitation”.¹¹⁴ While this view is sound, in that prisons have been found not to be rehabilitative environments, it has reinforced the view that non-carceral sentences are not *really* punishment. This view can even be inferred from much work done in the field of sentencing reform where sophisticated sentencing guidelines have been developed to adjust length of prison sentences to principles of just desert while leaving non-carceral sanctions in the unstructured discretion of the courts.¹¹⁵ But some non-carceral sanctions are clearly more punitive or restrictive of an offender’s liberty than others, and an attempt must be made to work out equivalencies. Moreover, as the principle of restraint and the dictates of financial constraints on governments conspire to put emphasis on non-carceral sanctions, their place in the proportional or just deserts scheme of things will have to be worked out with considerable care.

(i) *Rating the Relative Severity of Community Sanctions*

The first step in this process must be to work out the relative levels of severity among the sanctions or sentencing options available to the courts. It may be helpful to look briefly at incarceration prior to examining the more difficult issues in rating severity of community sanctions. The initial response on the imprisonment side is to say the system is capable of making quantitative judgments only and not qualitative ones. We know that spending 90 days in jail is worse than spending 10 days in jail, but we are unable to determine (at least formally) whether spending 18 months in the Halifax Correctional Centre is worse than 2½ years in Springhill Institution or vice versa.

112. Criminal Code, s.718 indicates that fines are “in lieu of any other punishment” or “in lieu of imprisonment”.

113. This is the phenomenon described in Hogarth, *supra*, footnote 45, as well as R. Paul Nadin-Davis, *Sentencing in Canada* (Carswell, Ottawa, 1982).

114. See Canadian Sentencing Commission Declaration, section 4(c)(iv), or the Daubney Committee Report, recommendation 6(d) and 6(e).

115. While the Canadian Sentencing Commission has put more emphasis on what it called “community sanction” than most of its analogues in other jurisdictions, the Commission acknowledges the limitations of its work, and proposes that the task of rationalizing community sanctions be undertaken by a permanent sentencing commission. See Canadian Sentencing Commission Report, pp. 372 and 373.

Similarly, it would depend on an offender's individual circumstances whether serving thirty days consecutive time is more harsh than spending 30 days in jail intermittently served on weekends and holidays. Given these difficulties, the system may have to be content with assuming that a day in jail is a day in jail for calculating relative proportionality, although it would clearly be in accordance with the principle of restraint to take into account the offender's preferences where feasible. It seems that sentencing guideline systems whether of statutory or judicial origins have nowhere attempted to make explicit qualitative judgments about time served in different institutions.¹¹⁶

If calculating severity and proportionality in relation to prison terms is not without its difficulties, non-carceral sentences or community sanctions pose greater problems by virtue of their diversity. But a rational approach to the retributive as well as rehabilitative or reconciliatory nature of community sanctions is key to having community sanctions accepted as sentences in their own right — not just alternatives to the so-called *real* penalty of imprisonment. If community sanctions are to be imposed in a manner consistent with principles of proportionality, equality and restraint, the system must have a way to evaluate their relative retributive weight. What is required is a table of equivalencies for community sanctions.

In order to enforce the possibility of creating a table of equivalencies for community sanctions, it is necessary to describe the available alternative community sanctions in more concrete terms. A recent study of alternative sentencing programmes in Canada lists the major options as fine options, community service orders, restitution programmes, victim-offender reconciliation programmes and attendance programmes.¹¹⁷ The Canadian Sentencing Commission also considers fines and probation as falling under the rubric of community sanctions, since they are non-carceral even though they are not so "innovative".¹¹⁸ Community service orders, victim/offender reconciliation programmes and the various

116. It is beyond the scope of this paper to consider the impact of the parole system on the manner in which one calculates the severity of imprisonment. The Canadian Sentencing Commission Report canvasses this problem in considerable detail under the heading "the meaning of a sentence of imprisonment" and concludes that full parole release ought to be abolished as being in conflict with the principle of proportionality, pp. 233-267. The Daubney Committee did not recommend abolition of parole, but proposes that the eligibility period for full parole release be increased from one third to one half of the period of imprisonment. See its recommendation 47.

117. John Ekstedt and Margaret Jackson, *A Profile of Canadian Sentencing Programmes: A National Review of Policy Issues*, Dept. of Justice, Ottawa, 1988, and also their *Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives*, Dept. of Justice, Ottawa, 1988. Both are research papers conducted for the Canadian Sentencing Commission.

118. Canadian Sentencing Commission Report, pp. 353-4, 374-388.

attendance programmes are not sentences in their own right, but are imposed in the discretion of the court by means of conditions in probation orders¹¹⁹ and conditional discharge orders.¹²⁰ This secondary status is thought to have limited their attractiveness and credibility as sentencing alternatives in the eyes of many judges.¹²¹

Fines are clearly a punitive measure usually imposed with a view to deterrence, but with virtually no rehabilitative characteristics. It is said that in Canada “over 90% of convictions in summary conviction matters and up to one third of convictions in indictable offences result in the imposition of fines.¹²² Unlike some countries Canada gives very little statutory guidance as to how heavy a fine to impose in relation to particular offences committed in particular circumstances.¹²³ Canada has a system of “global fines” which notionally suggest that a particular offence in certain circumstances is worth “X dollars”. The tariff ranges within statutory maxims are the product of individual judicial decisions, informal judicial consultation, use of precedent and minimal guidance from courts of appeal. Setting the amount of the fine in terms of the accused’s ability to pay has been formally rejected by courts of appeal on the grounds of “equality before the law”.¹²⁴ Reformers have consistently argued that a system of “day fines” be adopted as in many other countries¹²⁵ whereby an offender would be fined “x days’ income”.¹²⁶ By abandoning formal legal equality in favour of a system which would distribute deterrent penalties in accordance with calculable economic differences among offenders, such a system, if widely adopted in Canada,¹²⁷ would break certain conceptual barriers and taboos about

119. Criminal Code, 2.737. Restitution requirements may also be included in probation orders.

120. Criminal Code, s.736.

121. Canadian Sentencing Commission Report, pp. 347-349.

122. Simon Verdun-Jones and Teresa Mitchell-Banks, *The Fine as a Sentencing Option in Canada*, Dept. of Justice, Ottawa, 1988.

123. See Calvert R. Dodge, *A World Without Prisons: Alternatives to Incarceration throughout the World*, Lexington Books, Lexington, 1979.

124. *R. v. Natrall* (1972), 9 C.C.C. (2d) 390 (B.C.C.A.); *R. v. Johnson* (1971), 5 C.C.C. (2d) 541 (N.S.C.A.); *R. v. Johnson and Tremayne*, [1970] 4 C.C.C. 64 (Ont. C.A.); and *R. v. Carroll* (1980), 27 Nfld. & P.E.I.R. 159 (P.E.I.C.A.).

125. Day fine systems, first introduced in Finland, are now operative in Sweden, Denmark, Peru, Costa Rica, Bolivia, West Germany and Australia. See Verdun-Jones and Mitchell-Banks, *supra*, footnote 121 at p. 42.

126. For a description of one of the most successful systems, see Hans Thornstedt, “The Day Fine System in Sweden” [1975] *Crim. L. Rev.* 307-312.

127. The Canadian Sentencing Commission Report, p. 378 recommends use of a day fine system pursuant to study by a permanent sentencing commission and advocates pilot projects in the province. For similar recommendations see: Law Reform Commission of Canada, *Guidelines, Dispositions and Sentences in the Criminal Process*, Ministry of Supply and Services, Ottawa, 1977.

punishment having to be “neutral on its face”. But whether one fines in global dollars or day fine units, the notional application of the principles of proportionality, restraint and equality can be worked out quite systematically — the more serious the offence the higher the fine and vice-versa.

Probation orders may be imposed in conjunction with conditional discharges, suspended sentences, fines, or imprisonment on an intermittent basis or straight time of less than 2 years.¹²⁸ Being both ancillary to other measures and of such flexibility, it is difficult to evaluate the probation order per se in terms of just desert. Standard conditions in probation orders include reporting regularly to probation officers, providing support to dependents, abstaining from use of alcohol, prohibition of ownership or possession of a weapon, restitution to victims, remaining within the jurisdiction, and making reasonable efforts to find suitable employment.¹²⁹ Probation orders are thus measures of social control with a re-integrative, if not rehabilitative, twist. A probation period is limited to a maximum of three years, and as such is at the lower end of the punitive scale.¹³⁰ On the other hand, there is no doubt that the offender’s liberty is being curtailed and the recipient is suffering retribution for the offence committed even if rehabilitative measures are in the minds of the judge or the probation staff.¹³¹ Thus a probation order connected with a suspended sentence or conditional discharge, even with the least onerous standard conditions, can be rated on a “table of equivalencies” ordered in accordance with proportionality, equality and restraint. Probation orders are not simply non-entities from the retributive perspective. The point here, however, is that probation orders can be rated according to limiting retributivist *principles* of sentencing while being directed to utilitarian *purposes* of the criminal sanction within those limitations.

Community service orders are non-custodial dispositions whereby the offender serves his sentence by performing a number of hours of work in non-profit community projects as designated by the court. Community service orders emerged in the late 1970’s and 1980’s¹³² as a result of

128. Criminal Code, sections 736 and 737.

129. These are the conditions listed in Criminal Code section 736.

130. Criminal Code, section 738(2).

131. It is said that the current ratio of offenders on probation in Nova Scotia in relation to those in custody is approximately 10:1 — the highest in Canada. Nova Scotia Department of the Solicitor General, *Correctional Services — Department of Solicitor General — Overview*, unpublished departmental manuscript, 1988.

132. An extensive bibliography of Canadian government documents describing the use of community service orders is found in Ekstedt and Jackson, *A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues*, Dept. of Justice, Ottawa, 1988 at pp. 223-225.

judicial creativity in the interpretation of the Criminal Code provision authorizing as the term of a probation order “. . . such other reasonable conditions as the Court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences”.¹³³ The purposes of the community service order include punishment, reparation and rehabilitation.¹³⁴ Their popularity of late, however, is in no small measure due to the fact that they potentially alleviate jail over-crowding¹³⁵ and are a means by which to reduce the costs of corrections.¹³⁶ From a rehabilitative point of view community service orders allow for redevelopment of improved work habits, acquisition of new skills and the cultivation of helpful contacts in the general community. This is accomplished in a manner which avoids the negative aspects of institutionalization from prison culture.¹³⁷ In addition, the offender may creatively “pay the debt” he or she owes to society — with attendant material benefit to the community and possible psychological benefit to the offender.¹³⁸ From the retributive angle the accused is penalized through restrictions on his or her liberty and the requirement to contribute his or her efforts to the community project. Most importantly for our discussions here, *hours* of community service are quantifiable. While there may be qualitative differences between various community projects, the yardstick of hours of service can be used in calculating proportionality, equality and restraint in relation to other forms of sanction.

In so far as calculating “just deserts” are concerned, victim/offender reconciliation programmes can be perceived as specialized forms of community service orders with particular correctional goals. Proponents of such programmes argue strongly that they humanize the criminal justice system, are effective in rehabilitating certain classes of offenders,

133. This use of Criminal Code section 737(2)(h) received court of appeal approval in *R v. Shaw and Brehn* (1977), 36 C.R.N.S. 358 (Ont. C.A.) *inter alia*.

134. For a succinct discussion of these purposes, see Ekstedt and Jackson, *supra*, footnote 132 at pp. 23-26, as well as their subsequent descriptions of programmes in all Canadian provinces where they are operative.

135. The Canadian Sentencing Commission Report pp. 367-371 cautions about the problem known in the literature as the “widening of the net” whereby community sanctions are used not to reduce imprisonment but rather to impose more onerous sanctions on persons who might otherwise receive less intrusive conditions in probation orders.

136. It has been estimated that for Ontario in 1979 imprisonment of an offender cost \$50 per day while supervision via a community service order cost only \$2.35: Ekstedt and Jackson, *ibid*, at p. 25, citing M.L. Polanoski, *The Community Service Programme in Ontario: A Description of the Initial Cases*, Ministry of Correctional Services, Toronto, 1979.

137. On the devastating effects of prison culture in general see L.H. Bowler, *Prison Societies and Corrections: The Science and the Art*, MacMillan, Toronto, 1982. For description closer to home, read Michael Harris, *Justice Denied: The Law versus Donald Marshall*, MacMillan, Toronto, 1986, *passim*.

138. For a discussion of this side, see

provide reparation to victims, and improve the criminal justice system in the eyes of victims and the general public.¹³⁹ From a retributive point of view they constrain the offender's freedom, and impose losses in terms of time which can be computed in the same manner as hours of community service. Depending upon how positively the system evaluated the goal of victim/offender reconciliation, a premium or bonus might be added in relation to "time served" in this way.

(ii) *The Fine Option Programme and Conversion Tables*

Lest it be thought that the exercise of creating equivalents between sanctions is an unattainable goal which can only be advocated for some upcoming utopia, let us recall that the future is now partly with us in the form of the fine option. Criminal Code section 718.1 creates the possibility for an offender who has been fined to "discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose . . .". Such programmes have been set up in a number of Canadian provinces, following the lead of Saskatchewan in 1975.¹⁴⁰ The recent case of *Hebb v. The Queen* in Nova Scotia¹⁴¹ gives a constitutional push for the creation of fine option programmes in those provinces which have not yet established them. The Criminal Code also states that these programmes ". . . shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program."¹⁴² In other words, programmes must work out on principles of proportionality, equality and restraint according to a table of equivalents for converting fine amounts into hours of community service and vice versa.¹⁴³ This is currently being done in Ontario, Manitoba, Saskatchewan, Alberta and the Northwest Territories.¹⁴⁴

139. The Daubney Committee Report is most enthusiastic about victim/offender reconciliation programmes, at pp. 90-97. For a description of Canadian programmes see Ekstedt and Jackson, *supra*, footnote 132, p. 30-32.

140. For a description of Canadian programmes see Ekstedt and Jackson, *supra*, footnote 132 p. 20-23. *passim*.

141. Supreme court of Nova Scotia, per Kelly, J., in *R. v. Hebb* (1989), 89 NSR(2d) 137 (S.C.) wherein the court struck down those words in Criminal Code section 718(10) which directed courts to consider ability to pay prior to imposing imprisonment in default of the payment only in cases where the accused was between 16 and 21 years of age. The court held this must now be done in all cases.

142. Criminal Code, section 718.1(2).

143. Criminal Code section 722 authorizes reduction of imprisonment for part payment, while section 718.1 gives the fine option to an offender . . . "whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine".

144. John Ekstedt and Margaret Jackson, *Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives*, Dept. of Justice, Ottawa, 1988, pp. 54-55.

It is a short step from a conversion table for fine amounts and community service hours, to a table which would include time served in prison as well. In fact this step is implicit in the Criminal Code which now allows proportionate reduction of time served in default of fine payment through part payment of the fine *or* by community service in a fine option programmes.¹⁴⁵ In fact, Ekstedt and Jackson assert:

“There is an informal set of standardized equivalences between monies paid, community hours worked and time spent in jail in Saskatchewan, according to the [Saskatchewan] Corrections Branch, although few knew of it or whether it is used by the courts. The Corrections Branch also suggested that some of the judiciary were reluctant to accept such a request for equivalencies from Corrections as they were concerned about being influenced by a government department.”¹⁴⁶

These same Canadian provinces are close to attaining a “standard sanction unit” of sentence severity by which to equate time served in jail, time served in community sanctions and fine amounts.¹⁴⁷ Canada seems further advanced than many other jurisdictions in this regard, although there are many problems yet to resolve.¹⁴⁸

It ought to be stressed here that a conversion table, or table of equivalences, is in no way counter to the accused’s right to individualized justice.¹⁴⁹ Judicial discretion to assess the degree of seriousness of the offence and the degree of the accused’s culpability including all aggravating and mitigating factors is left intact.¹⁵⁰ In such a system, judicial discretion is not fettered, but its meaning is explained in terms of its effect in relation to other sentencing options. It is important however that judicial input be obtained in the creation of the conversion tables so

145. For a conceptual approach to this issue see Martin Wasik and Andrew von Hirsch, “Non-Custodial Penalties and the Principles of Desert” [1988] *Crim. L.R.* 555.

146. *Supra*, footnote 144.

147. *Supra*, footnote 145.

148. Not the least of which is how to gauge appropriate levels of severity and weight the different sanctions in relation to one another. Some empirical work has been done on seeking public perceptions on these issues. See L. Sebba, “Some Explorations in the Scaling of Penalties” (1978), 15 *J. of Research in Crime and Delinquency* 247; L. Sebba and G. Nathan, “Further Explorations in the Scaling of Penalties” (1984), 24 *Brit. J. Criminology* 221; A. Kapardis and D. Farrington, “An Experimental Study of Sentencing by Magistrates” (1981), 5 *Law and Human Behavior* 107; and N. Walker and C. Marsh, “Do Sentences Affect Public Disapproval?” (1984) 24 *Brit. J. Criminology* 27. The Canadian Sentencing Commission Report, pp. 386-387 proposes a system for equating fines and time served in default.

149. For a discussion of the constitutional nature of the right to individualized justice see Bruce P. Archibald, “Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada” *supra*, footnote 93.

150. For a standard list of the factors affecting sentencing, see Ruby, *Sentencing, supra*, footnote 20, pp. 139-192. Of course, a thorough-going application of the principles of proportionality and equality might make consideration of some of these factors inappropriate. See Archibald, *supra*, footnote 149.

that those whose decisions will be implemented in accordance with it will have confidence in the system's fairness.¹⁵¹

The importance of these nascent conversion tables for coping with problems of racial discrimination in the justice system is that they allow for tailoring various utilitarian strategies of rehabilitation, crime reduction, and perhaps even affirmative action, while maintaining a precise understanding of how these actions would impact on notions of just desert. They permit multiple approaches to the *purposes* of the criminal sanction, while not sacrificing the sentencing *principles* of proportionality, equality and restraint. An attempt to elaborate on these ideas follows.

IV. *Equality and Affirmative Action in the Choice Among Sentencing Options*

It is the intent of this section of the paper to examine the two objectives mentioned earlier, that is, egalitarian sentencing and ameliorative sentencing. In other words, how can racial bias or perceptions of racial bias in sentencing be eliminated, and how can systemic discrimination be reduced, while maintaining adherence to the principles of sentencing just discussed? To do this, approaches to sentencing members of visible minority groups will be analyzed firstly on the assumption of formal equality, and secondly on assumptions of social and economic inequality calling for affirmative action. It may be useful to point out at this juncture that systemic discrimination in the criminal justice system can also be addressed to some extent through prosecution policy. That is, problems may be ameliorated through diversion programmes or measures designed to respond to systemic discrimination by withholding or terminating prosecutions in this public interest as a matter of prosecutorial discretion. The elaboration of principles by which to structure public interest factors in prosecution policy for this purpose is beyond the scope of this paper.¹⁵² This discussion is limited to the stage of the prosecution which follows a finding of guilty — egalitarian and ameliorative sentencing.

1. *Sentencing Visible Minority Accuseds on Assumptions of Formal Legal Equality*

(i) *Colour Blind Sentencing Principles*

To sentence a member of a visible minority on assumptions of formal

151. The Canadian Sentencing Commission Report, pp. 435-456 would solve this problem through judicial involvement in a permanent sentencing commission. Interim measures on a provincial basis however, are possible and some are suggested below under the heading "Allocating Responsibility . . .".

152. These matters are discussed in Bruce P. Archibald, *Prosecuting Officers and the*

legal equality is to assume that racial discrimination is not causally connected in any way to the accused's criminal behavior. In other words, the accused's race is irrelevant to the *principles* of sentencing, in so far as determining the *severity* of the sanction is concerned. Normal principles of proportionality in relation to the gravity of the offence and the degree of culpability of the offender are in play, and the accused is given a sanction equivalent to any other offender for similar offences committed in similar circumstances. In the absence of proof that race was causally related to the crime (such as perhaps a racial insult provoking an assault), or in the absence of a policy of affirmative action sentencing to be discussed below, sentencing on the assumption of formal equality in accordance with general principles ought to be the norm.

(ii) *Racially Sensitive Purposes and Options*

While visible minority status is irrelevant for determining sentence severity on assumptions of formal legal equality, it may be quite relevant for choosing an appropriate sentencing option among a range of those of equivalent severity. Where there are fears that there may be racial bias in sentencing, and where the legal system through applying laws "neutral on their face" may be perpetuating existing social and economic inequality, adopting utilitarian sentencing strategies which are sensitive to racial and cultural differences will increasingly be seen as a measure of the adequacy of the criminal justice system in a multi-cultural and multi-racial society.¹⁵³ This can be done without fear of a white majoritarian backlash against "special treatment" if a table of equivalences is available.¹⁵⁴

In concrete terms this strategy stresses the value of community sanctions as a primary strategy for the criminal justice system in general, and recognizes the necessity for community sanctioning options tailored to minority needs in particular. Community service orders can be arranged so as to involve work for black or aboriginal communities or charitable organizations which have their roots in these communities. Fine option programmes will, of course, have to be structured along similar lines. Probation orders involving conditions other than

Administration of Justice in Nova Scotia, a forthcoming study conducted for the Royal Commission on the Donald Marshall Jr. Prosecution in Nova Scotia, the Report of which is expected in late 1989.

153. Many of the sentencing alternatives which have been experimented with in western Canada have their origins in concerns as to how the justice system can more adequately respond to the needs of aboriginal offenders and aboriginal communities. See the works by Ekstedt and Jackson, *supra*, footnote 116, *passim*.

154. Recent news reports of racially rooted disturbances at a high school in Cole Harbour, Halifax County, Nova Scotia indicate that some sectors of the public thought Black "instigators" were getting special treatment.

community service can take into account the offender's particular needs as derived from his or her status as a member of a visible minority group — particular counselling services with expertise in relating black and minority problems would be particularly apposite.

Victim/offender reconciliation programmes may pose special opportunities for dealing with racial discrimination. Where victim and offender are from the same aboriginal community, for example, village elders might be recognized as appropriate mediators in a victim/offender reconciliation programme. A sensitive mediator particularly skilled in victim/offender reconciliation might effect particularly helpful results in inter-racial and inter-cultural understanding as between victims and offenders of differing ethnic groups. On the other hand, a botched attempt at victim/offender reconciliation in this context might have particularly damaging results for race relations.¹⁵⁵

How the system can move toward these racially sensitive sentencing options will be discussed below. But it is clear that adopting rehabilitative *purposes* for criminal sanctions, with a content which takes into account the needs and resources of visible minority communities and their individual members, can be one without necessarily abandoning *principles* of formal legal equality. Proportionality, equality and restraint can predominate in sentencing while using sentencing options designed to alleviate systemic discrimination in society, particularly in a system making use of community sentencing options with an accepted set of standardized equivalent sanctions. Of course racially sensitive programming can and ought to be adopted within the correctional system as well. However, when the gravity of the offence or the needs of particular deterrence or incapacitation dictate a term of imprisonment, the sentencing judge loses capacity to control and individualize sentencing purposes when he or she commits the offender to the care of correctional officials. The use of correctional programming in the struggle against systemic discrimination would be the subject of another paper.

2. *Sentencing Visible Minority Accuseds on Affirmative Action Assumptions*

Affirmative action involves special treatment to alleviate the problems of groups disadvantaged because of previous adverse treatment or limiting circumstances.¹⁵⁶ Charter section 15(2) provides that the equal protection provision of the constitution:

155. Human Rights Commissions may have valuable expertise to impart to criminal justice professionals in this regard.

156. For a brief treatment see Dale Gibson, "Canadian Equality Jurisprudence: Year One" in Sheilah L. Martin and Kathleen E. Mahoney, *Equality and Judicial Neutrality*, Carswell, Calgary, 1987, at pp. 142-143.

“... does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Thus Canadian legislators and policy makers are more sheltered than their American counterparts in protecting affirmative action programmes from charges that they are constitutionally prohibited “reverse discrimination.”¹⁵⁷ At issue in most of the American jurisprudence is whether visible minorities can be given preferential access to certain privileges or advantages not whether such minorities can be sheltered from general penalties which might otherwise fall upon them with unequal incidence.¹⁵⁸ At issue in this section is the question whether Canadian sentencing policy can proceed from an affirmative action foundation.

(i) *Social Responsibility for Crime Causation*

Individualistic assumptions about crime causation and personal responsibility for intentional, or at least fault-based, behavior are in seeming contradiction with the use of affirmative action principles in sentencing.¹⁵⁹ If a resident of Canada has committed an offence, ought not that person to be sentenced according to the gravity of the offence and the degree of his or her culpability like any one else regardless of race or colour? But it is in the phrase the “degree of culpability of the offender” that is found the key to reconciling affirmative action with the principles of just deserts. Any decision to treat certain visible minorities differently in the sentencing process must be based on the idea that society at large shares in the responsibility for the systemic discrimination which is evidenced in the criminal justice system by such factors as disproportionate incarceration rates.¹⁶⁰ From this premise follows the corollary that it is fair to alleviate the severity of a criminal sanction to be imposed upon a member of a visible minority group if it can be said that general social responsibility for his or her community’s disadvantaged state reduces his or her degree of culpability for the offence.

157. See J. Ely, “The Constitutionality of Reverse Discrimination” (1974), 41 U. of Chicago L. Rev. 723. For a rosy interpretation of U.S. affirmative action jurisprudence see Lawrence H. Tribe, *American Constitutional Law* (2nd Ed.), Foundation Press, Mineola, 1988, pp. 1521-1544.

158. See Tribe, *ibid.*

159. As was mentioned earlier, Canadian sentencing law is, at first blush, “colour blind”. Texts do not mention the topic, see texts in footnote 20, *supra*.

160. This notion of social responsibility for certain aspects of crime causation has been recognized to some degree in Scandinavian criminal justice systems. For a Canadian discussion see “A Social Responsibility Approach to Criminal Justice, National Associations Active in Criminal Justice, Ottawa, 1988.

(ii) *Affirmative Action Sentencing Programmes*

Were individual judges to make such affirmative action decisions according to their own personal standards of whether a particular accused was led to crime by virtue of cultural, social or economic circumstances linked to racial discrimination, charges of reverse discrimination would probably arise from the sentencing disparity that such a situation would likely engender. Such an approach might be unconstitutional in any event. Charter section 15(2) only allows such action as a part of a “law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.” If an alternative sentencing option programme were devised for, say, aboriginal offenders with a view to improving the lot of the offender as well as the aboriginal community as a whole, such a programme would appear to fall within the ambit of section 15(2). It would be constitutional even though it might be thought a less onerous form of criminal sanction, and therefore contrary to principles of proportionality, equality and restraint if these are to be viewed from an individualistic perspective. An individual judge’s decision to merely “go easy” on a particular aboriginal offender might not withstand such scrutiny.¹⁶¹

Quite properly it would seem that an affirmative action sentencing programme is a matter for politicians and policy makers rather than for judicial initiative. Weighing the proper circumstances for the recognition of social responsibility for crime causation and not merely individual culpability is a politically sensitive issue. Charter section 15(2), in speaking of a “law program or activity” of an affirmative action type would seem to require a coherent and structured strategy rather than a mere accretion of individual sentencing decisions with such a goal. Early constitutional litigation over section 15(2) indicates that a mere declaration of legislative purpose that a programme has as its object the amelioration of conditions of disadvantages individuals or groups may not be sufficient to enable it to qualify for the affirmative action exception to general requirements of formal legal equality.¹⁶² It has been held that

161. For conflicting judicial approaches to this issue see *R v. Firemain* (1971), 4 C.C.C. (2d) 82 (Ont. C.A.) and *R v. Naqitarvik* (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.).

162. See *Apsit v. Manitoba Human Rights Commission* (1987) 7 A.C.W.S. (3d) 179 (Man. Q.B., Simonsen, J.) where a plan giving preferred rights to native people in the production and harvesting of wild rice was held not to meet the requirements of Charter section 15(2) notwithstanding its approval as an affirmative action programme by the Manitoba Human Rights Commission. Note, however, that this was the confining of a privilege upon the disadvantaged group and not the withholding of a penalty. The decision was overturned on procedural grounds only. See *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1988) 55 Man. R. (2d) 263 (Man. CA.) See also *Harrison v. U.B.C.; Connell v. B.C.*, [1988] 2 W.W.R. 688 (B.C.C.A.).

the form of ameliorative action must be rationally related to the cause of the disadvantage.¹⁶³

In order for an affirmative action sentencing programme to validly operate, one might have to demonstrate not only that the visible minority group in question had historically suffered disadvantages, but that these disadvantages are causally related to crime of certain types *and* that the sentencing options envisaged by the programme will strike at the roots of this causal problem. Meeting these stringent criteria would not be easy given the present state of understanding of crime causation.¹⁶⁴ However, it is possible to think of a pertinent example. It seems relatively clear that high rates of certain types of crime among aboriginal peoples are causally related to the destruction of aboriginal economic, social and cultural patterns through federal government policies in relation to the creation and management of reserves established pursuant to the Indian Act, as well as provincial policies limiting aboriginal hunting and fishing.¹⁶⁵ It may be that a separate aboriginal justice system involving the restoration of aboriginal patterns of social control and social reconciliation could be upheld under Charter section 15(2) regardless of progress, or lack thereof, with respect to the recognition and enforcement of aboriginal rights under Charter section 25.

A more limited version of such a programme might involve continued jurisdiction of general criminal courts with special sentencing options, which might be less severe than the table of equivalencies would normally demand, for aboriginal offenders involved with certain crimes under particular circumstances. The sine qua non of such sentencing options, would seem to be that they would effectively assist aboriginal offenders in overcoming the disadvantages resulting from systemic discrimination. Until such programmes develop a track record for reducing recidivism rates, this latter requirement might have to be accepted as an article of faith. However, if the rational connection can be demonstrated between the programme and the cause of the disadvantaged under Charter section 15(2) they would pass constitutional muster.

V. *Allocating Responsibility for Alleviating through Sentencing Systemic Discrimination and Perceptions of Racial Bias*

While the foregoing analysis is optimistic in tone, one must be quite clear

163. *Apsit v. Manitoba Human Rights Commission* *ibid*, per Simonsen, J.

164. See Vold and Bernard, *Theoretical Criminology*, *supra*, footnote 63.

165. See the Report of the Canadian Bar Association. *Aboriginal Rights in Canada: An Agenda for Action*, Ottawa, 1988 for a general discussion of the situation of native communities from a legal perspective. More importantly see Michall Jackson, *Locking Up Natives in Canada*, A Report of the Canadian Bar Association Committee on Imprisonment and Release, 1988.

about the limitations of sentencing as a means for alleviating problems of systemic discrimination. As was described in Part I, over representation of visible minorities as accused persons or prisoners is not caused simply by sentencing judges. The social, economic and cultural conditions in a society characterized by systemic discrimination which disadvantage visible minority groups cannot be overcome by judges or sentencing alone. Yet all those involved in the sentencing bear a responsibility to bring about the kind of improvements in the criminal justice system which are discussed here. In the final analysis, however, the judiciary bears a special responsibility since judges are at the symbolic focal point of the sentencing process. This concluding section will suggest a tentative allocation of responsibilities for change, and make some comment on the particularly difficult situation of the judiciary.

1. Allocating Responsibility for Change

The most far reaching and comprehensive solutions to the problems discussed here would come from a permanent sentencing commission with authority to issue guidelines on sentencing issues, do research on the empirical effects of alterations in sentencing policy, and adjust guidelines to reflect improvements in sentencing knowledge and the practical experience of courts and correctional personnel. That luxury is not available, but the problems of systemic discrimination exist and successful constitutional challenges to vulnerable aspects of the criminal justice system are forcing us to take immediate remedial action. Policy makers, crown prosecutors, defence counsel, judges, correctional personnel, legal researchers, and most importantly, leaders of visible minority communities, all have a role to play in this process. Egalitarian and ameliorative sentence developments will come through co-operative effort among all those involved in the criminal justice system.

Policy makers in the Attorney General's Departments and the Solicitor-General's Departments must create a joint task force to flesh out the presently existing skeletal framework of community sentencing options and equivalences among those options. A conversion table allowing for the evaluation of the relative severity of alternative dispositions is within grasp. Moreover, this can be done without in any way adversely affecting the judicial role in providing individual justice in particular cases. Both departments must be involved so that "crime and punishment" are not artificially separated by different responsibilities for prosecution policy and correctional policy. On the other hand, the Solicitor General's department and in particular those responsible for community corrections will bear the brunt of identifying and working

with appropriate representatives of visible minority communities to elaborate the details of community sentencing options.

Leaders and organizations within the visible minority communities have the responsibility to press the advantages which are apparent in the present climate of change within the criminal justice system. Rhetorical criticism, satisfying though it may sometimes be, must be abandoned in favour of the elaboration of pragmatic, economical proposals for community sentencing options. These options must be grounded in sound correctional principles and be supported by community organizations committed to assisting in their implementation. Community service placements, victim/offender reconciliation programmes and resources for specialized probation supervision must be among the options considered. The privatization of some correctional services is being actively considered in many quarters, and those capable of influencing events in visible minority communities ought not to miss this window of opportunity.

Once the groundwork has been laid at the policy level and within the community, those closest to the sentencing process — crown prosecutors, defence counsel and judges — have a responsibility to make egalitarian and ameliorative sentencing alternatives available to appropriate offenders. These players can be assisted in this task by well directed professional education programmes involving participation from policy makers and visible minority community representatives. The annual seminars of crown prosecutors and provincial court judges must make room on their agendas for the topic of implementation strategy for special sentencing measures for certain offenders who are members of visible minority groups. The Barristers Society or the Criminal Law Subsection of the Canadian Bar Association will have opportunities to contribute to this process through their continuing legal education programmes and meetings.

Finally, it is important that legal researchers and social scientists be involved from the outset in the elaboration of sentencing projects and their evaluation. Correctional literature is replete with examples of programmes which, while based on good ideas, have been inadequately executed or not evaluated so that the benefits or drawbacks were either not explored or not fully analyzed for the edification of subsequent generations. The resources of the universities, and in particular those of the institutes of criminology ought not to be ignored.

It is only through such a multifaceted strategy that the causes of systemic discrimination can in any way be alleviated through the sentencing process. However, by outlining these inter-connecting roles and responsibilities, the difficulties ought not to be exaggerated. A few

key individuals with the will to bring about change, and with the proper institutional resources and community connections, could accomplish a great deal. Setting attainable goals, perhaps through pilot projects in the early stages, may be the only realistic way to assure success in the long run.

2. *The Symbolic Importance of the Judiciary*

The co-operative process described above for implementation of egalitarian and ameliorative sentencing strategies regarding disadvantaged visible minorities could have an impact on systemic discrimination. But the judiciary is still the focus for the *perceptions* of racial bias in the criminal justice system. There may be nothing that can be done to prevent people from drawing the erroneous conclusion that because there are more visible minority offenders sentenced or imprisoned that sentencing judges are racial prejudiced as a group. Nevertheless, judges, as most well know, must be constantly vigilant to see that inadvertent remarks or insensitive bureaucratic practices do not lead to misinterpretations. Anecdotal isolated incidents of racial discrimination, or rude or insensitive treatment of even a few minority offenders can cause extraordinary damage to the reputation of the criminal justice system. A routine part of orientation training or continuing judicial education seminars might usefully be the introduction of judges to visible minority cultures and minority perceptions of the criminal justice system. The resulting sensitivity might reduce the judicial *faux pas* which are at the root of some perceptions of racial bias in the courtroom.

Finally efforts must be made to ensure that our court houses are reflections of the preservation and enhancement of the multi-cultural heritage Canadian society which is guaranteed by section 27 of the Charter of Rights and Freedoms. The effect of the impression that court rooms and court houses are white majoritarian institutions cannot be over-estimated. Greater representation of visible minorities individuals as judges, court reporters, and court administrators can have a *visible* effect on changing the ambience of judicial institutions. Moreover, this not merely a matter of appearances. Prejudiced individuals who may be working in the system will be much more circumspect about airing unacceptable racist views when in the presence of colleagues and co-workers from disadvantaged visible minority groups.

Egalitarian and ameliorative sentencing policies and programmes may help to alleviate some of the causes and effects of systemic discrimination in the criminal justice system. But judges still occupy the symbolic focal point for demonstrating that justice is seen to be done for visible minorities in Canadian society.