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# Crime and Sentencing in Canada: Parallels and Differences

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## EDITOR'S OBSERVATIONS

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# CRIME AND SENTENCING IN CANADA: PARALLELS AND DIFFERENCES

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In this Issue FSR casts its gaze more widely than usual and examines the sentencing system across our northern border in Canada. Comparative research is nothing new in that country, report Anthony Doob and Julian Roberts, for Canadians have long taken advantage of their front-row seats to study the experiments and innovations of our fifty states and federal government. Public policy makers in the United States are less accustomed to drawing on the experiences of other countries, even neighbors so near as Canada. That provincialism is unfortunate because the basic similarities of culture, demographics, and crime give each country much to learn from the other.

Our contributors, all deeply immersed in Canadian sentencing, paint a fascinating portrait of their system and of the larger political scene in which it operates. Many elements of the picture look familiar, such as Allan Manson's report that incarceration rates continue to climb just as crime has dropped. Other elements may appear surprising, such as his observation that, two decades after Canada's abolition of capital punishment, fewer murders are committed than ever.

To situate us in this unfamiliar terrain, Allan Manson offers a short overview of Canada's criminal law and sentencing regime and provides some empirical data on punishment. The other articles in this Issue examine recent legislative developments in that country. Unlike much of the United States, Canada has retained its discretionary sentencing system. But many of the same political pressures that have prompted reforms in the United States are causing radical changes to the Canadian system.

## I. The Role of the Legislature in the Sentencing Process

Although the Canadian Parliament has become increasingly active in the sentencing field over the last decade, not until 1996 did it undertake major reform. In 1984, when the Congress passed legislation establishing the U.S. Sentencing Commission, the Canadian Parliament created a Commission of Inquiry to propose changes to their sentencing system. The semi-guideline structure it advocated, however, was eventually rejected by Parliament. As a result, Canadian courts have continued to be restrained in their sentencing decisions only by wide, legislatively set sentencing ranges. Thus, as Anthony Doob notes, the only guidance trial courts receive in setting sentences within the statutory range comes from appellate court decisions.

In 1996, however, Parliament enacted bill C-41, which may mark a shift in the legislature's role in sentencing matters. The bill set out in some detail a list of aggravating factors for sentencing certain offenders. For example, the legislature resolved a split among the appellate courts as to whether the fact that a murder victim was the offender's spouse represented a mitigating or aggravating factor. Another recently enacted bill adopts mandatory minimum sentences, establishing, for example, a minimum sentence for the use of a firearm in an offense.

As in the United States, the legislature's intervention in sentencing matters reflects the public's growing concern about violence and crime. Julian Roberts believes that such pressure is more directly exerted on Canadian legislators since they are not insulated by a sentencing commission. However, the U.S. experience with Congress's penchant for minimum sentences, without any consideration of whether they interfere with the guideline scheme, suggests that a commission may not be able to solve the dilemma.

## II. Crime Control and Individual Liberty

In reacting to public pressure to be "tough on crime," the United States has enacted legislation that increases penalties and intrudes on civil liberties.[1] Among other things, the "War on Drugs" has resulted in the imposition of long minimum sentences even on relatively minor offenders. More recently, public attention has come to focus on sexual offenders, for whom almost no form of punishment seems severe enough.

The climate is similar in Canada, although concern about crime may not be at quite the same level of hysteria as in the United States. As Isabel Grant indicates, efforts have been made to keep serious offenders, such as murderers, in prison longer by interpreting or manipulating fairly vague statutory criteria. Available data indicate that the National Board of Review, which exercises power over the eventual release of prisoners, has used its statutory authority to keep offenders in prison for longer. Legislation allows for the postponement of parole release not only for murderers but also for other violent and drug offenders.

Canada's preventive detention legislation—which is similar to habitual offender laws in the United States—is a particularly notable example of this trend. Habitual offender laws apply primarily to violent and sexual offenders but have also been extended to serious drug offenders. While violent offenders can be incarcerated indefinitely if found to

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constitute a threat to public safety, sexual offenders can be held to expiration of the sentence, instead of the otherwise mandatory release date (at two-thirds of their sentence).

A proposed bill would further restrict individual liberty in exchange for crime control. It would allow for up to ten years of community supervision akin to intensive probation after the expiration of the imprisonment component of a sentence. During that time period, even some non-criminal conduct could lead to reincarceration. The bill also would permit the incarceration of individuals whose behavior *may* threaten the safety of society if they fail to post a peace bond or recognizance. This policy, as Michael Jackson states, "redraw[s] the precarious balance between the state and individual freedom away from the adjudication of demonstrated blameworthiness and due process in favor of the prediction of future dangerousness and crime control." Is this a type of legislation we should expect as well?

**III. Increased Flexibility in the Sentencing Process**

Perhaps in reaction to Parliament's new "tough on crime" efforts, the judiciary in Canada has taken the lead in trying to introduce at least a measure of flexibility into the sentencing system.

**A. Alternatives to Incarceration**

First, courts have shown a renewed appreciation for the use of alternative, non-prison sentences, for non-violent and less serious offenders. Indeed, Canadian courts seem inclined to create alternative sentences even without explicit legislative authorization. To allow courts to fashion alternatives more effectively, Canada has also adopted the so-called conditional sentence, which is a kind of suspended fixed sentence. Manson views the conditional sentence as the most innovative and potentially most effective agent for change in Canadian sentencing since it helps structure judicial discretion.

The increased use of alternatives faces certain obstacles unique to Canada. Particularly problematic is the way correctional resources are allocated in Canada. Because providing those resources is left to provincial and territorial entities, it is subject to regional disparities. The consequence, according to Allan Manson, is that "the absence of resources may render some sentence options meaningless or unattractive." This might be particularly true with respect to the conditional sentence and similar alternatives which rely on supervision and demand heavy community investment.

The allocation of responsibilities between federal and regional units and the subsequent impact on the availability of alternatives may disproportionately affect aboriginal people, who often reside in less affluent parts of Canada—a striking parallel to the problem of funding public schools from local property taxes in the United States. The sentencing reform legislation makes special mention of aboriginal people: "[A]ll available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." While aboriginal people are vastly over-represented in Canada's federal and provincial correctional institutions, similar to the situation of minorities in the United States, naming a minority group directly in reform legislation is different from the U.S. experience. Native Americans especially are often a forgotten group in analyses of our federal guidelines.[2]

**B. Standard of Appellate Review**

Although the Supreme Courts of Canada and the United States rarely hear sentencing appeals, both Courts recently issued decisions concerning the standard of review in sentencing appeals that may introduce new flexibility into the system. Like our Court in *Koon v. United States*,[3] the Canadian Court opted for a deferential standard that appears to increase the discretion of district courts in the sentencing process. Canada's Court supported a subjective approach to sentencing at the trial level, insulated from appellate review unless "the sentence [is] 'clearly unreasonable,' 'manifestly excessive' or based on erroneous principles." However, as Gary Trotter notes in his article on the role of Canadian appellate courts, appellate reaction to the decision has been mixed. In our next Issue (9.6), FSR will look at the impact *Koon* has had on appellate and trial courts in the United States.

**IV. Striving for a Theory of Sentencing**

Given the enormous change in Canada's sentencing system in recent years, scholars and policy makers have expressed the need to identify and articulate a coherent theory of sentencing to guide reform efforts.

In the United States, which has undergone similarly dramatic changes, Congress has made only a half-hearted effort to articulate an integrated sentencing theory. Indeed, one of the long-standing complaints levied against our federal sentencing guidelines and their implementing legislation is the absence of a clearly enunciated sentencing purpose. Rather than focusing on one primary and possibly one or more secondary purposes,[4] the legislation merely recites the traditional purposes of deterrence, retribution, denunciation, rehabilitation and incapacitation.[5] Commentators in the United States contend that sentencing has in fact become centered around retribution and incapacitation.[6] Despite concerns about the lack of a clearly defined goal, most proposals have focused on fine-tuning individual guideline provisions rather than developing a consistent framework on purposes.

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By contrast, as the commentators in this Issue observe, Canadian legislators have supported attempts to articulate a theory of punishment to guide sentencing policy. However, despite Canada's more deliberate focus on theory, as Julian Roberts remarks, the outcome in the two countries has not been too different. Parliament adopted an explicit statement of principles in the Sentencing Reform Act of 1996. While well-intentioned, that statement simply restates all known sentencing purposes, as well as a few new concepts such as "the maintenance of a just, peaceful and safe society." Roberts believes that it provides little guidance to the courts and will have a marginal impact on sentencing.

Indeed, even our commentators disagree over how the new principles should be interpreted. Roberts views them as reflecting a just deserts approach which allows judges to pursue utilitarian goals. Allan Manson, on the other hand, cites an appellate decision which characterizes sentencing reform as moving away from the just deserts philosophy toward a more subjective and individualized model of sentencing.

### V. Conclusion

The United States and Canada find themselves in an era of public hysteria about crime, and the legislative reaction has been similar. Even after the first wave of reform, however, some striking differences remain. Canada has dedicated itself to lowering its prison population and developing a set of purposes to govern sentencing. Canadian prison sentences are still substantially shorter than those in this country. And Canada has retained its ban on capital punishment. For each country, increased exposure to the other system may well yield further changes and perhaps a new awareness of legislative and judicial options it did not realize it had.

### NOTES

[1] *See, e.g.*, Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

[2] *See* Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with "Reservations,"* 9 FED. SENT. R. 144 (1997).

[3] 116 S.Ct. 2035 (1996).

[4] *See* John Kramer, *Offender Characteristics and the Purposes of Sentencing*, 9 FED. SENT. R. 127 (1997).

[5] *See* 18 U.S.C. § 3553(a)(2) (1997).

[6] *See, e.g.*, Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).