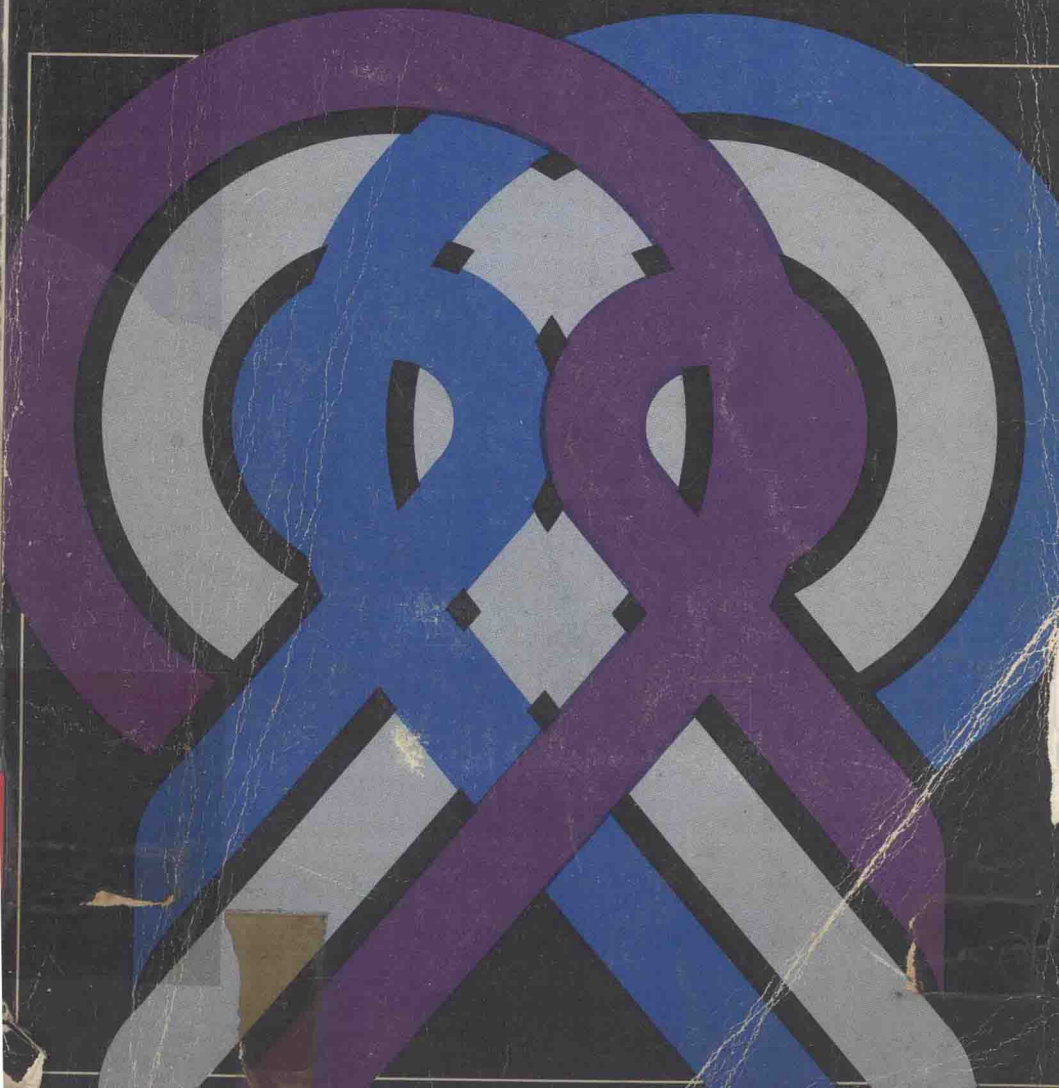
New Directions In Sentencing

BRIAN A. GROSMAN



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Preface

During the last week in May of 1979, a distinguished group of participants attended a conference "New Directions in Sentencing" held in the attractive western City of Saskatoon. Ideas were exchanged in a congenial, yet intellectually stimulating atmosphere unlike that prevailing in most courtrooms across the land where exchanges are of a more adversarial nature. In addition, courtroom battles tend to concentrate on immediate problems rather than the long-term implications of the process. Busy people, from time to time, have to set aside a few moments to re-examine goals and objectives in a broader context than that available on a day-to-day basis in individual professional contexts. The conference provided such a forum.

This gathering was organized in co-operation with Dean Clark and the College of Law of the University of Saskatchewan, with the assistance of the Law Foundation of Saskatchewan. It was structured in order to be self-financing, an important principle in times of increased economy. Universities and governments are less able or willing to sponsor such conferences. The interest in the topic itself brought together 200 participants, who, by their individual subscriptions made the meeting, for the most part, financially independent of funding agencies.

The assistance of Margaret Sarich, the conference co-ordinator and my secretary, Debbie Feader is gratefully acknowledged. My wife, Penny-Lynn, lent her gracious charm and competence to the overall organization of the program activities. The success of the conference was largely due to the co-operative efforts of these people as well as friends and colleagues who wished to make the participants feel welcome in Saskatchewan.

Good friends with great expertise travelled many miles to join us. Their presence added an important international perspective to a problem which is not changed by crossing a border. They provided insights into developments in their own jurisdictions which were directly relevant to our discussions.

On a more personal note, these materials have been assembled and edited at a time when I have just left the contemplative life available in the groves of the academe for the legal skirmishes that are part of a busy barrister's practice in the

City of Toronto. More important, I have exchanged my role as Professor of Law for that of a full-time practitioner of those theories which I propounded to captive law students. The judges before whom I now appear are not always sympathetic to legal theories attractive in a classroom setting, because sentencing is not merely an intellectual exercise, but is the practical "lawyer-stuff" of day-to-day courtroom contact. To some extent this volume attempts to reflect the best of both these worlds, that of the academic and of the practitioner.

No one understands the inherent dichotomies between lawyer and academic more than my law partner and friend, Morton Greenglass, Q.C. who must cope with my dual loyalties. I express my thanks to him for the time made available to me from our law practice in order to complete this book. Thanks are also due to Judith Osborne for her editorial assistance.

Brian A. Grosman
October, 1979
Toronto, Ontario
Canada

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INTRODUCTION

Brian A. Grosman

The criminal justice process is not logical or systematic but is a valiant attempt to combine a wish to control crime with a concern for the protection of individual rights. That combination, to some minds, represents an impossible dream. Impossible because of a lack of consensus about strategies and goals. Each actor on the criminal justice stage carries with him attitudes and viewpoints which are particular to his training and which tend to isolate him from those working within the system who do not share those views. Different attitudes about the values and ends to be promoted in the system leads to problems in communication and understanding between different professional groups dealing with the same situation — crime and its aftermath, sentencing.

Prosecutors fight crime by convicting offenders most efficiently. Defence lawyers ensure that their clients are acquitted or only convicted if the evidence establishes every ingredient of the charge beyond a reasonable doubt. The police wish to see the streets free of crime and of those who they believe criminal. Police have difficulty when they have made a professional judgment that a person ought to be arrested and charged, in understanding that the evidence available may be insufficient to justify a conviction. Those police and prosecutors, who see their central role as that of fighting crime and convicting the guilty have a particular perspective with regard to the role of the criminal justice system which often differs from that of the defence lawyer, and even the Judge.

These differences are, for the most part, invisible to the general public, yet they persist and influence each stage of the process from the arrest through to the conviction and sentence. When the sentencing stage of the process is reached, one's orientation becomes critical and most obvious. It is during the

sentencing process that, for the first time these disparate viewpoints coalesce in a determination which vitally affects both the offender's and the public's interests.

Debate has raged for centuries about the appropriateness of a sentence, whether it be for a man convicted of stealing a loaf of bread to feed his hungry family, a vicious gangland killer, or a murderer of a prison guard or policeman. Apart from these dramatic examples, there is the everyday ongoing sentencing of thousands of individuals in courts across the land by judges who are attempting to cope, often on the basis of their own experience, attitudes and approaches with a most difficult exercise of judicial discretion.

The conference titled "New Directions in Sentencing," held in Saskatoon in May of 1979, was an attempt to bring together professional persons who are major actors in the criminal justice system to exchange ideas and perspectives in order to break down parochial viewpoints by subjecting them to careful consideration and criticism by others. The conference brought together law professors, criminal defence lawyers, prosecutors, psychologists, psychiatrists, criminologists, sociologists, prison administrators, senior police administrators, parole and probation officers, governmental policy planners, legislators, and judges from every level of the courts in Canada. The papers presented a variety of viewpoints. They illustrate professional perspectives sometimes as much by way of what is left unsaid by a particular contributor as by the contribution itself.

It was felt that a collection of presentations given at the conference would provide readers with insights into the thought processes and viewpoints of those who play key roles in this most sensitive area of the administration of criminal justice. The papers may also highlight some of the controversies which surround sentencing by pointing up themes raised by social scientists and law teachers which may be unfamiliar to the general reader. Hopefully, some of the contributions also indicate the kind of thinking which is proceeding on the frontiers of the criminal justice community and thus provide some insight into the directions which may be taken in the future. There are those contributors who decry present directions and argue that the present tide is misdirected and ought to be reassessed.

Part 1 of the book deals primarily with new directions as viewed by the leading writers and commentators in the field of sentencing in North America. Part 2 deals with sentencing reform by those who have been most deeply involved in the reform of sentencing laws. Part 3 considers sentences in the past and the controversy surrounding capital punishment as well as new kinds of sentences which seem to be part of a future trend. The sentencing of specific offenders like juveniles and sexual offenders is treated in Part 4. Part 5 provides some insight into the viewpoints of the defence lawyer, and the final Part is devoted to the practice of sentencing in the criminal courts.

A number of the contributors react to what they view as the excesses exhibited by the pursuit of the treatment philosophy in sentencing, to the open endedness and the kinds of sentencing disparities it produces. That reaction has

been characterized by a resurgence of a call for deterrence and the reassertion of fundamental principles of punishment and security rather than the ephemeral adjustment of sanctions to meet the particular "needs" of the individual. Currently there seems to be a consensus among the public and the legislators that there is a need to eliminate wide variations in the sentences handed down by the courts. In order to do so, fixed or mandatory sentences, "flat sentencing," are being advocated and introduced. These are sentences which proceed on a tariff basis, oriented to the seriousness of the crime committed without any major consideration of the individual, his particular background or suitability for rehabilitation. Another aspect of this movement results in making the length of confinement more certain by way of legislation, and argues for the abolition of parole boards. Overall, this new direction in sentencing encourages the elimination of much of the discretion currently involved in the sentencing process.

Those contributors who addressed themselves to this development are unanimous in their condemnation of it. Dr. Cressey asserts that inflexible sentences produce more injustice than is present in the current process. Dr. Kittrie argues that "flat" or "tariff" sentencing is for the most part, in the hands of the legislature, and, accordingly, is in danger of becoming more overtly political. This means less flexibility as the political system cannot respond to unique and difficult situations as can an informed judiciary. Both argue that once sentences are fixed the courts are unable to respond to changing societal expectations; rigid sentences offer no incentives to the inmate to rehabilitate himself and will, eventually, denigrate the important role of judicial discretion and expertise in the criminal justice system.

These and other contributors feel that a fixed sentence appropriate to the crime is an unattainable ideal. It cannot be achieved, not merely because of the peculiar circumstances of a particular case which may demand mitigation or aggravation of the penalty, but also because judges are not automatons. The judiciary make it clear in their presentations that they value the exercise of their discretion as an essential sentencing component. Unless their role in the criminal justice system is to be radically redefined, the judiciary are unlikely to co-operate in the reduction or elimination of their exercise of discretion in sentencing.

A variation on this same theme is reflected in the concern about sentencing disparities which are seen as a product of wide judicial discretion. These complaints about unstructured judicial decision-making have led to the call for sentencing guidelines. These proposals start from the premise that discretion cannot be effectively eliminated, that some measure of flexibility is still desirable, but that the judiciary cannot continue along their present path, exercising wide discretion often on the basis of very particularistic or idiosyncratic attitudes. The argument is that judicial discretion needs to be more structured and better controlled by the legislature.

This theme is developed by Professor Kress, in his contribution, where he draws attention to the myriad sentencing practices in the United States. In his

view, these wide ranging practices need some common factor to bind them together, to provide a common reference base and some measure of consistency. He argues that this can be done by providing some general form of sentencing principles or guidelines. Professor Jobson views the enunciation of sentencing guidelines as being the only way to get the Canadian judiciary to halt their questionable practice of sending vast numbers of minor offenders to prison. He feels that without this impetus, they are unlikely to change their habits which rely, for the most part, on outdated concepts and traditions. Some of the judiciary themselves would probably agree in some measure with Professor Jobson that their role has to be readjusted so that sentencing reform can become a reality. Judges can be innovative in an individual case, depending upon the circumstances, but they are reluctant to adopt innovative general policies. Chief Justice Culliton of the Saskatchewan Court of Appeal points out that judges must act within the current legislative framework. They can interpret and apply, but they cannot legislate.

Dr. Mohr argues that the "new directions" may all be just a tempest in a tea pot, that in reality there are no new directions in sentencing. Instead we are moving in a circular pattern from deterrence to rehabilitation and then back to an emphasis upon deterrence once more. Certainly the flat sentencing approach, which is offence and not offender related, does smack of a reassertion of a "just desserts" philosophy. For those who reach the formal sentencing stage, and this represents only a small proportion of those persons actually involved in crime, the attempt to deter does prevail. This is so much so that we are seeing a reawakened interest in the imposition of the death penalty. At the same time there is an increasing emphasis on keeping as many people as possible out of the formal criminal justice system by diverting them to probation officers and social welfare departments where the emphasis is on rehabilitation. Thus, there exists here at least two major philosophical approaches based upon different ideals, values, practices and consequences.

Currently, considerations relating to the need for more deterrence or more rehabilitation are not the major shaping forces in sentencing policy. More pragmatic considerations are affecting sentencing policy as the public becomes more aware of the economic factors involved in the cost to the community of imprisonment. Prosecution and incarceration are both extremely expensive in terms of time, manpower and taxpayer's money. In times of economic restraint, the courts and the corrections system cannot operate on the basis that moneys will always be found to do the job. New ways to reduce expenditures in these areas are being sought. There are two immediate ways in which this can be accomplished: screen out of the system a number of people who might otherwise come to trial; and utilize lower cost alternatives to imprisonment. Thus, as Dr. Cressey points out, there are financial limitations on the enforcement of criminal law and on sentencing which may provide the catalyst for innovative approaches. Although the social scientists seem to be concerned with the financial limitations of the system and the development of the "flat sentencing" principle combined with the public attitudes calling for more deterrence in

sentencing, the judiciary represented in this collection still see the rehabilitative principle as paramount in their own courts.

Public loss of confidence in the sentencing process, in its sufficiency or severity, may result in a number of by-products. Police may resort to their own sanctioning system when dealing with juvenile and other offenders who they feel will be inadequately punished by the courts. Pre-trial detention is an obvious way in which an individual who police feel may face inadequate punishment can at least suffer some deprivation and sanction in advance of any assessment of his guilt or innocence by the courts. An accused who is remanded into custody so that he is subjected to detention prior to trial is indeed, at this early stage, being sentenced. Deprivation of liberty is a severe sanction, whether it is imposed pre-trial or post-trial. Punishment before conviction is particularly heinous in a situation where an individual may never suffer the conviction but is punished nonetheless.

It is the exception rather than the rule for there to be special, separate facilities for holding pre-trial detainees. In general, people remanded in custody spend the period before trial in a local jail alongside those serving short prison sentences. Many of the provincial institutions used to house those awaiting trial in custody are old and poorly equipped. Sanitation and living conditions are primitive; segregation is difficult and the security provisions, designed to meet the requirements of the most difficult inmates, must apply to all.

Although public safety demands that some dangerous or itinerant persons must be confined before trial, the effects of pre-trial punishment should be minimized. Although they often share the same facilities, the conditions of incarceration applicable to convicted prisoners and those merely accused of crime should be differentiated. There should be parity, not between convicted and unconvicted prisoners, but between those released on bail and those remanded in custody. The basis for according different treatment, as between those awaiting trial in prison and those doing so without restraint, is that maintaining the custody of the former is felt to be necessary to ensure their appearance at trial or to avoid danger to the public. Many of these persons detained prior to trial, on whatever basis, suffer a sentence in advance of trial, which is only compensated for if the accused person is found guilty and his pre-trial detention is applied to reduce his post-trial sentence.

Another area where sentencing takes place without the necessity of a trial is in those situations where an individual has pleaded guilty as a result of a plea bargain. Plea bargaining is not strictly the imposition of a sanction without trial, but represents a sentence imposed by short circuiting the formal criminal justice system. There has been, in recent years, a lively debate about the merits and utility of plea negotiation and the resulting diversion of offenders from the trial process by the encouragement of the entry of guilty pleas in return for a reduced charge.[1]

There is an assumption that those who plead guilty will be subjected to more lenient sentences because it is felt they have saved the taxpayer money and the court time by avoiding a lengthy trial. Accordingly, accused persons may feel,