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“Moving Towards a Minimalist and Transformative Criminal Justice System”: Essay on the Reform of the Objectives and Principles of Sentencing

Marie-Eve Sylvestre,
Vice-Dean of Research and Full Professor in the
Civil Law Section of the Faculty of Law,
University of Ottawa

Research and Statistics Division
Department of Justice Canada

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In the desire to curb crime, it has to be understood at all levels, from the legislative chamber to the street, that the coercive power of the criminal law and its agents and processes have to be used with restraint or they may further injure the social fabric. What is designed to create order may in fact create disorder. What is at heart an expression of responsibility may in fact become an inducement to irresponsibility when rules are used not as guides to resolve problems honestly but as shields against an understanding of the problems that confront us.

Law Reform Commission of Canada
A Report on Dispositions and Sentences in the Criminal Process – Guidelines
1976

Introduction

This essay is the result of over 15 years of research and reflections on criminal law and the criminal justice system, and particularly on the devastating and disproportionate effects that our system has on poor and marginalized people, including the homeless, alcohol and drug users, persons living with mental health issues, racial and ethnic minorities and Aboriginal people. My research is based on field studies involving stakeholders who work within the justice system and individuals affected by criminalization: over a period of 10 years, I conducted roughly a hundred interviews with poor people who have a criminal record as well as with police officers, judges, prosecutors and lawyers, in addition to offering close to 60 hours of training for the above groups in five Canadian cities (Montréal, Québec, Ottawa, Toronto and Vancouver). This not only allowed me to collect some extremely valuable information, but also gave me an opportunity to be directly involved in various processes seeking solutions to these pressing problems.

I am proposing that criminal law be applied with extreme moderation and with due regard for fundamental rights and human dignity. The purposes and principles of sentencing should be substantially amended in order to prioritize the following values: conflict resolution, pardon and reconciliation, reparations for harm caused, individual and collective responsibility and the transformation of communities. These objectives require us to completely rethink our conception of crime, punishment and responsibility and how justice is served.

This essay is divided into three parts. Based on the premise that any reform exercise must be conducted in a meaningful way, we believed it would first be necessary to take a critical look at the underlying principles of the criminal justice system and how the system works. Part One led us to conclude that it is essential to reconsider some of the core principles of the system and that the reform exercise should remain mindful of the realities and practices of the administration of justice (Jodouin and Sylvestre, 2009). We then proposed a certain number of recommendations for modifying the objectives and principles of sentencing and concluded with a list of legislative amendments required to implement this project.

Part One: Current landscape

In Part One, we have attempted to briefly respond to two sets of questions: first, what are the core and legitimate principles that form the basis of the State's powers to mete out punishment within our

justice system; and second, what is the actual context in which this power is exercised?

The first series of questions require us to re-examine the very notions of crime, punishment and criminal responsibility. We will then formulate a certain number of findings about the administration of justice by answering the following questions: *who* is subject to incarceration and for *what type of offence*; what *types of sentences* are imposed and what are the *procedural* and *systematic contexts* in which sentencing decisions are made.

1. *The founding and legitimizing principles that form the basis of the State's power to mete out punishment: the liberal model*

In our society, the legitimacy of the State's power to punish is based on one of the following two justifications: first, we punish because it is useful and only insofar as it is useful in promoting general welfare—*utilitarianism*;¹ and second, we punish because the offender deserves it and only insofar as the punishment is rightly deserved—*retributivism*.²

Although they differ in many different ways, these theories have a certain number of points in common and are based on a series of premises specific to political liberalism, including (a) the notion of crime being associated with the State; (b) individual and personal responsibility; (c) the understanding that human beings exist independently of the society in which they live and that they are free, intelligent, rational and equal; (d) sentencing conceived of as infliction of suffering; (e) a claim of universalism; and (f) protection of the rights of the accused.

(a) *Crime and the State*

The two theories are based on the notion of “crime” or “criminal offence” which can be defined as an individual's transgression against a legal order established by the State at a specific point in its social, economic and political history. In this sense, crime is a “construct”, that is, the result of choices made by this State and its representatives in a certain context. Moreover, our conception of crime is closely linked to the public nature of prosecutions: therefore, starting in the 19th century and with only a few exceptions, the State assumed full responsibility for resolving what had originally been private conflicts and did so at the expense of the other parties directly involved, namely, the victims, the offenders and communities (Christie, 1977). In this sense, our conception of crime is also distinct from our broader and more comprehensive understanding of *conflict* or *problem*. Criminal law does not necessarily seek to resolve conflicts, but instead seeks to punish crimes that are perceived to violate the interests and values that the State is trying to protect.

(b) *Individual and personal responsibility*

The criminal justice system advocates *individual responsibility*. Unlike our civil liability system,³ there is no mechanism for sharing or allocating responsibility among certain individuals. Consequently, responsibility is not shared based on the fault or negligence of each of the parties.

¹ From Beccaria to Bentham to the most recent proposals concerning the economic analysis of law: Kaplow and Shavell.

² From Kant to Hegel (suggesting that punishment is an offender's right so that the offender can reintegrate into society). See more recently Von Hirsch and Ashworth, 2005. Hart, 1968, suggested that punishment could be justified based on a combination of these two main theories. See also Lacey, 1998.

³ In common law, shared responsibility corresponds to the concepts of “contributory negligence” and “apportionment of damages”.

Moreover, even though this was the case at a certain point in time, the individual's family or community, whether it is religious, ethnic or political, does not assume any responsibility for its members. Responsibility is therefore strictly personal, and there is no vicarious liability or collective responsibility. Lastly, responsibility is generally expressed in absolute and binary terms—responsible or not responsible, guilty or not guilty—and therefore does not allow for consideration of degrees of responsibility or diminished responsibility (Sylvestre, 2013). This conception of crime as reflecting a personal and individual choice has a direct impact on sentencing: we try to blame *someone* for *his/her* choices or we try to influence these choices in the future, rather than consider the situation as a whole, its social context and the interpersonal dynamics that contributed to the perpetration of a criminal act.

On the contrary, when we envisage crime as a conflict and we take the prevailing social and interpersonal context into consideration, it is possible to contemplate both the responsibility and the status of the victim on a scale or spectrum. As a result, the artificial opposition created between the victim and the offender tends to disappear either partially or completely. We will return to this point a little later.

(c) *Assumptions about human beings and their environment*

The liberal model is based on four underlying principles. First, individualism: there is a distinction and separation between society and the individuals which make up society, who have divergent and opposing interests. Second, rationality: humans are rational beings who value reason at the expense of their emotions or intuitions; they have all the information and skills required to take the necessary measures to achieve their goals. Third, free will: human beings live in a universe without constraints, and they are free to make choices. Lastly, formal equality: human beings are equal, have the same opportunities and must be held responsible for their actions (Lacey, 1988; Sylvestre, 2010). The liberal model therefore focuses on the individual at the expense of and in opposition to society and the social context and does not allow for the inclusion of collective values and common property. However, these assumptions do not correspond to the human experience and have little or no empirical foundation. In reality, individuals and their community are interdependent. The choices that people make in a world of possibilities are more or less limited by their position in the social space, which is determined not only by their social class, place of birth, religious, cultural or racial origin, gender and sexual orientation, but also by the capital accumulated and skills developed in a particular field (e.g., Bourdieu, 1980). They are therefore profoundly unequal in terms of power and opportunities. Although rational and capable of calculation and strategy, human beings are also impulsive and emotional and do not always have the information, intellectual capabilities and skills required to make their choices (Sylvestre, 2010). It is therefore my opinion that the social context and the social objectives of sentencing should be re-evaluated and reconfigured.

(d) *Sentencing*

Lastly, in order to achieve its intended purposes, the criminal justice system gives high priority to sentencing (conceived of as a means), which imposes *suffering* on an individual who is held responsible for an action (the offender). It is therefore structured around negative and afflictive values. It is based on “modern penal rationality”, which is informed by modern sentencing theories (deterrence, denunciation, retribution and rehabilitation within the penitentiary) (Pires, 2001). Each of these theories articulates an *obligation to punish*, through afflictive sentences, at the expense of the values of pardoning or reconciliation, which are covered only marginally; they promote the

punishment and social exclusion of the offender rather than the offender's reintegration into the community and reparations for harm caused. Exclusion and marginalization are affecting a growing number of individuals and are increasingly taking on an aura of finality in our society. Indeed, the criminal system produces effects which endure over time and through space, most notably due to criminal records and the proliferation of various orders such as supervision, civil incapacity, administrative and penal orders associated with sentencing. This conception of a sentence as imposing suffering and leading to social exclusion does not encourage acknowledgement of responsibility by offenders, who instead try to avoid being convicted at any cost. However, it is possible to conceive of a sentence or a criminal trial process as having a different outcome, of being positive and transformative.

(e) *Universalism*

Criminal law has a *universal* and *hegemonic* mission owing to the fact that it remains closely tied to the sovereign power of the State and the legitimate use of force. However, in order to maintain its authority and legitimacy, criminal law must allow for a certain number of concessions and accommodations. For example, the State has adopted a series of measures or programs intended to mitigate the effects of imposing Canadian law on Aboriginal people since the colonial era, either by trying to improve understanding of State laws among Aboriginal people (e.g., the Aboriginal Courtwork Program) or by adapting State practice of the law (e.g., itinerant courts, sentencing circles, consideration of Aboriginal status under paragraph 718.2(e) of the *Criminal Code*).

(f) *Protection of the rights of the accused and moderation in criminal justice matters*

Lastly, although the liberal values underlying the criminal justice system provide the basis for responsibility and its universal application, they also ensure a certain level of *protection* for the *accused* or the offender against the punitive intervention of the State. This protection takes the form of principles of fundamental rights or legal safeguards which are claimed at different stages of the criminal justice process. Theoretically, this legal guarantee presumptively conveys more positive values by calling for a minimum of or more moderate criminal law. In this regard, we would point out that the two main sentencing theories mentioned above include a principle of moderation in criminal justice matters. Therefore, punishment should be meted out only when it is useful to do so, and only insofar as it is rightly deserved. However, as suggested later in this essay, these moderate principles are often sidelined in favour of repressive principles and should once again become the central focus of analysis. Moreover, fundamental rights have only had a minimal influence at the sentencing stage, versus other stages of the criminal process, like standards of behaviour or rules of procedure (Garcia, 2014).

All of these core and legitimate principles allow the State to justify imposing suffering on an individual while also making the individual *bear the full weight of responsibility for the social conflict* at the root of the criminal intervention: an individual committed a crime, and the State is justified in imposing a sentence on this individual. However, despite the fact that there is some data showing that criminal justice interventions and sentencing have normalizing and stabilizing effects for certain individuals,⁴ there is no empirical evidence to show that this solution is generally effective in preventing crime,⁵

⁴ For example, there are some people who, in various contexts, will report that the criminal justice system allowed them to "get their act together". This is probably be due to (some kind of) support rather than a direct consequence of a sentence.

⁵ During the 1980s, the Canadian Sentencing Commission compiled close to 700 studies on crime prevention and concluded that sentences did not have a dissuasive effect: see also Anthony Doob & Cheryl Webster, "Sentence Severity and Crime:

much less in resolving conflicts within communities (although this was not its objective), nor would this solution be the most effective in this context.

In contrast, there are several studies on the destructive and counterproductive effects that the criminal justice system has on accused persons, victims, families and communities.⁶ Various studies thus demonstrate that the criminal justice response, particularly incarceration, contributes directly to recidivism, criminality and the creation and perpetuation of social inequalities.⁷ However, these collateral effects of sentences are not taken into consideration during sentencing. As an example, we should mention how the Supreme Court, in *Pham*,⁸ limited the scope of the promising concept of “indirect consequences” of a sentence to “factors related to the offender’s personal circumstances” versus the consequences for families, society and communities. In contrast, judges are often quick to attribute full responsibility for social conflict to the individual, as highlighted in cases where judges justify the imposition of a more severe sentence because of the “social evil” represented by drugs or driving while impaired, for example.⁹ Consequently, the social context is primarily used to increase the severity of sentences and not to mitigate responsibility.

In closing this section, we will use four cases drawn from case law to illustrate the importance of reconsidering these principles.

Case 1

In a region far away from urban centres where there is no public transit system, three youths went out to celebrate at a bar one Saturday evening. At the end of the evening, one of the youths, the one who had consumed the least amount of alcohol, took the wheel of the car in order to drive his two friends home. In the car, the passengers encouraged the driver to go faster. The driver lost control of the vehicle and caused an accident, killing his two friends immediately. The “designated driver” was charged with impaired driving causing death. The parents of the deceased youth were devastated but asked the prosecutor to withdraw the charges.

Case 2

One fine morning, an Aboriginal man, who was a homeless addict, went into a supermarket, took some frozen meat and cheese valued at \$45 and then left without paying before being stopped by a security officer. Intoxicated and agitated, he scuffled with a peace officer during his arrest and kicked the officer. He was charged with theft under \$5,000, simple assault and three counts of breaching a condition of probation (keeping the peace, abstaining from intoxicating substances and refraining from going downtown).

Case 3

A man and a woman had lived together for two years, and their relationship was particularly stormy

Accepting the Null Hypothesis”, (2003) *Crime and Justice* 30 143-95, which concludes that we should accept the null hypothesis indicating that “sentence severity has no effect on the level of crime in society”; and Deirdre Golash (2005), *The Case against Punishment - Retribution, Crime Prevention and the Law*, New York: NYU Press, 2005.

⁶ See most notably American literature on the collateral consequences of sentences: Mauer (ed.), 2003; The sentencing project (Marc Mauer, Executive Director). In the Canadian context, see for example: Lafortune, 2005; see also The Canadian Families and Corrections Network.

⁷ Gendreau, Goggin and Cullen, 1999; see also the links between incarceration and creation of homelessness: John Howard Society, 2010, and the links between breaches of undertakings and probation and the creation of “repeat offenders”: Sylvestre et al., 2015.

⁸ *R. v. Pham*, 2013 SCC 15, para. 11.

⁹ *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Lacasse*, 2015 SCC 64.

and abusive. They each took turns insulting, threatening and screaming at the other. One evening, things came to a head, and the situation degenerated. The woman took refuge in the bathroom and called the police, who proceeded to arrest the man, who would later be charged with assault and simple possession of cannabis found on the premises.

Case 4

In the context of social strife in Quebec, hundreds of students demonstrated against tuition fee hikes. After issuing a notice indicating that the demonstration was being held in violation of municipal regulations (non-disclosure of route and wearing a mask), the police declared the demonstration to be illegal and proceeded to arrest 15 people for unlawful assembly and obstructing a police officer.

In each of these cases, we can ask ourselves the following questions: What is a crime? Who is the victim? Who is the aggressor? What effects would criminal charges have on those who have been characterized as offenders, those who have been characterized as victims, their families and the communities concerned? How useful is the punishment? Considering the social context and environment, how could we approach the situation differently besides engaging the criminal justice system?

In the first case, the victims and the offender knew each other, and in a way, their status is interchangeable, even though two of them obviously lost their lives while one survived. In such cases, it is not unusual for the parents of the victims to be able to identify with the parents of the offender. However, the offender is likely to obtain an exemplary sentence in the hope that it serves as a lesson to others by making the offender bear the full weight of responsibility for the social conflict, irrespective of the effects on the life of this offender. Moreover, one could ask what the specific deterrent effect of the sentence would be if the scenario of *killing two of his friends* was not enough to deter the offender in this case. Lastly, what proportion of past or future responsibility is borne by the victims, who contributed to creating the context in which the offence was committed; by automobile manufacturers, who foment a culture of excessive speed; or even by municipalities, which fail to offer alternatives in terms of public transit or a safe ride program for clients leaving bars, or our system of raising children, which develops models of masculinity involving such a performance? This does not necessarily mean blaming each of these entities or placing responsibility on individuals; instead, it means taking a different and decompartmentalized approach to viewing this tragic incident. Collectively, would it not be possible for us to take preventive and transformative measures to ensure that these types of cases never happen again?

The questions raised by the third case are similar to those raised by the first: even though women are still more likely to be victims of domestic violence than men, this phenomenon is also often the result of marital dynamics and interpersonal problems. Although this does not mean blaming the victim for beatings (just like a victim of sexual assault should never be blamed for how she was dressed or her sexual past), what proportion of responsibility should each of the partners in this relationship bear in terms of resolving this conflict which escalated? How can the system of justice be useful to them when it all too often proposes radical solutions involving criminal records and separation of families, solutions which have significant psychological and economic effects on spouses and children? Consequently, the system does not have a dissuasive effect on the violence itself, but on the capacity of families to obtain assistance and resolve their problems. What proportion of responsibility is borne by our health systems and social services when they are ill-equipped to manage the psychological and mental health of the public, or by a society which cultivates gender inequality?

In the second case, the social context surrounding this offence, namely, colonialism and its destructive effects on Aboriginals, and considerations related to social inequalities and the creation of poverty and homelessness in our societies, serve to blur the lines between the perpetrator's status as a victim and offender. Even though neighbouring businesses reported significant losses related to shoplifting, it would be appropriate to reflect on the proportion of responsibility attributable to the State and to communities which fail to provide members of the public with minimum and basic conditions for subsistence, and to the justice system, which imposed conditions of release that were not only difficult to respect, but also problematic for the social reintegration of the offender.¹⁰ If this individual is found guilty in this case, he will probably be subjected to new conditions for release and/or a short term of imprisonment in addition to a surcharge based on five charges, a sentence which is not only excessive, but also likely to add to his criminal record and have an adverse effect on his efforts to survive and reintegrate into society.¹¹ How useful is this sentence? Does it actually serve to reduce shoplifting and poverty?

Lastly, the fourth case reflects a situation in which only a few individuals are held responsible for a fundamentally collective event, a demonstration. When individuals are prevented from expressing their views peacefully and delivering their political message, who are the victims, if not the demonstrators themselves and the entire democratic system? Whose interests are we trying to protect? The interests of the State, under the pretext of ensuring the free flow of road traffic?¹² What proportion of responsibility is borne by police officers who sometimes use their discretionary powers in a somewhat arbitrary or discriminatory manner, or by society which does not allow for the collective expression of dissent? If the mass crackdown on demonstrators has a dissuasive effect on the capacity to demonstrate, are we really winners as a society, and have we resolved the underlying social problem?

We therefore believe that it is necessary to reconsider all these core principles, including what constitutes crime, a sentence and responsibility.

2. *Administration of justice: implementation of police power and managerial justice*

Although core principles offer a reference framework and make it possible to justify State intervention, in practice, however, administration of justice seems more reflective of "police" logic, i.e., a mode of governance of the population and maintenance of public peace and order, as defined by Markus D. Dubber (2005). According to Dubber, two models of governance co-exist within our criminal law. The legal model seeks to manage conflicts by protecting the interests of the political community and victims and purports to punish an individual for wrongdoing committed by violating the established order on completion of an adjudication process that respects the principle of legality and individual rights. By contrast, the police model places greater emphasis on the role of the State as head of the family who protects the interests of the home to the point of blurring the lines between the interests of the community and victims with its own interests. The players who exercise police power must have broad discretion and rely on vague and imprecise rules. They aim to dispose of and administer matters based on a managerial approach, rather than by attempting to convince or influence the conduct of individuals with specific rights (see also Kohler-Hausmann, 2014 on managerial justice). They take pre-emptive action by focusing on the threats that certain groups of individuals pose to their

¹⁰ See CCLA - Deshman and Myers, 2014.

¹¹ For example, *R. v. Michael*, 2014 ONCJ 360.

¹² Police officers often claim that this is for safety reasons and to avoid hindering road traffic.

interests, rather than simply relying on *ex post facto* repression of wrongful conduct. In an era of new penology, this model encourages prevention of crime and recidivism based on predictions, control of high-risk behaviour and the surveillance of certain groups of individuals who present identifiable characteristics (Harcourt, 2007).

This second model of governance, which is more bureaucratic and managerial and focuses on threats to and the interests of the State, is more reflective of the reality of practices surrounding sentencing. In Canada, the administration of justice is characterized by the intense criminalization of minor and non-violent social problems, including too many offences against the administration of justice itself, and the disproportionate effects on the poor, minorities and Aboriginal people (a to c). These individuals are primarily sentenced to probation or given short prison sentences but are subjected to such measures repeatedly. Prison serves many other purposes besides punishment, and so-called alternative sanctions (probation, conditional sentence and, to a lesser extent, fines) are often complementary to incarceration (d). Lastly, sentences are generally imposed in a context of overcriminalization and legislative inflation, in a bureaucratic and automatic manner, following a guilty plea and without effective protection of fundamental rights (e). In closing this section, we will address the issue of the diminished view of the justice system and assume the role of spokesperson for a growing number of stakeholders in the legal system and victims who are generally dissatisfied with the justice system and have concerns about its effectiveness and legitimacy.

Note: Even though the administration of justice falls primarily within the jurisdiction of the provinces, with the exception of offences under the jurisdiction of the Attorney General of Canada, we believe that it is essential to consider these realities, given that they arise, in part, from federal legislative provisions and have a direct impact on the effectiveness of the reform of the principles and objectives of sentencing. Indeed, the reform of some of these principles will have an impact that is so significant that it will be able to give due consideration to the practice of the administration of justice and existing systemic barriers.

(a) Prosecution and criminalization of minor and non-violent problems related primarily to poverty, social inequalities and occupation of public spaces.

Far from being a solution of last resort, our system of justice constitutes the main system used to deal with and regulate poverty, social problems and conflicts associated with the use of public spaces. Historically, these are not new phenomena (Dubber, 2005; Fyson, 2006; Poutanen, 2015). As one of the only services that remains open 24 hours a day, through the police service, the criminal justice system serves as both a safety valve and a catalyst for problems afflicting our society, as a gateway and even a single point of access for various social and health services in the context of its regular courts or alternative programs for treatment of addiction or mental health issues, or even in the context of detention in open or secure custody. For example, it is not uncommon to meet families who are resigned to filing complaints against certain family members in order to obtain mental health services.

(b) Who is subject to incarceration?

The federal and provincial prison populations reflect these realities: the poor, homeless and unemployed, low income individuals with low educational achievement or individuals who did not graduate, Aboriginal people, Inuit and Métis, visible minorities, who are also much more likely to be poor, and individuals suffering from physical health problems (such as dementia or brain injuries, including foetal alcohol syndrome), mental health issues and drug or alcohol addiction are largely

overrepresented and form what can be called the regular clientele of the criminal justice system (Sylvestre, 2015; Collin and Jensen, 2009; Moore, 2003).¹³

(c) *For what offences?*

The main offences managed by the justice system constitute another indicator of the regulatory role that it exercises. Moreover, 76% of cases resolved by the courts for adults in Canada concern minor and non-violent crimes; this rate is 71% in the case of youth courts.¹⁴ Specifically, 23% of cases resolved concern property-related offences (including theft: 10.1%), and 23% of cases constitute offences against the administration of justice (including 9.8% for breach of undertaking whilst on release and 8.7% for breach of probation, offences generated by the system of justice itself). Driving-related offences represent 13%, including 10.7% which concern driving while impaired. Statistics for violent offences include 9.3% that are classified as simple assaults. However, these general statistics are likely to vary when the alleged offender is of Aboriginal descent. For example, Aboriginal people are overrepresented in rates for alleged perpetrators of homicides (they are also overrepresented in rates for victims).¹⁵

(d) *What sentences and terms are involved?*

Even though it has been elevated to the status of the quintessential punishment within the criminal justice system, imprisonment is not the sentence that is imposed most often. Instead, it is probation which is imposed in 42.8% of cases, for an average term of one year, in addition to various other orders imposed in 55% of cases, including prohibitions and conditional discharges, which also constitute a form of probation.¹⁶ Besides serving as punishment, prison also has many other virtues. It is primarily used as a temporary detention measure, i.e., while waiting for a court appearance or for trial, thereby accounting for close to 60% of admissions to correctional services at the provincial and territorial level, compared with 33.8% of admissions following convictions.¹⁷ Prison is also used for the purpose of investigation and for enforcement of a sentence, including for non-payment of fines.

With respect to imprisonment, it is important to note that 87% of individuals sentenced to detention served a sentence of six months or less.¹⁸ However, this statistic masks two phenomena.

First, there is the fact that long-term imprisonment is disproportionately imposed on certain individuals: a review of 635 decisions rendered between 2012 and 2015, i.e., after the judgment rendered by the Supreme Court in *Ipeelee* concerning sentencing for Aboriginal offenders, demonstrates that they are disproportionately subjected to prison sentences, i.e., in 87.7% of reported decisions. Moreover, long-term sentences (two years or longer) were imposed in more than 60% of

¹³ Aboriginal people represent 25% of admissions at the federal level and up to 80% of admissions in certain Canadian provinces while they only represent 4% of the Canadian population: Correctional Investigators Office, 2015. In Quebec, less than 40% of inmates in provincial prisons completed their secondary school education as opposed to almost 65% in the general population; 52% were receiving social assistance at the time of arrest: Giroux, 2011. A previous study revealed that 26% indicated that they did not have a permanent home: Robitaille, Guay and Savard, 2002. There were similar findings in Ontario: Kellen et al., 2010.

¹⁴ Maxwell, 2015; Alam, 2015.

¹⁵ Miladinovic and Mulligan, 2015

¹⁶ Maxwell, 2015

¹⁷ Maxwell, 2015

¹⁸ Maxwell, 2015. In Quebec, for example, 35.6% of inmates received a sentence of imprisonment of less than 30 days in 2007–2008, and 10.6% of these inmates received a sentence of just one day: Giroux, 2011.

these cases (Denis-Boileau and Sylvestre, 2016).

There is also the “revolving door” phenomenon: a very large number of individuals remain under judicial or custodial supervision without necessarily committing new substantive offences through breach of bail conditions, primarily at the time of release but also during probation. In this sense, the justice system contributes directly to creating criminals that are repeat offenders. In a research project conducted in four Canadian cities on conditions for release imposed on marginalized individuals,¹⁹ we found that numerous interventions and arrests, repeated appearances before the court and increased supervision through the addition of extremely restrictive conditions of supervision which are often impossible to respect, contribute directly to recidivism (Sylvestre et al, 2015).²⁰

(e) *In what context are these sentences imposed?*

- *Legislative inflation and penal populism*

Between 2006 and 2013, the federal government tabled close to a hundred bills concerning criminal justice and public safety. These bills generally included one of the following objectives: increase the severity of sentences and aggravating circumstances, including by adding mandatory minimum sentences and by extending the effects of the sentence over time; limiting access to alternative measures or community programs while encouraging imprisonment; limiting the discretionary power of judges while strengthening the powers of the executive (including the powers of police forces); resorting to other normative systems, such as regulatory penal law and administrative law, in order to diversify the tools used to control and prevent crime; and lastly, modifying the rules of procedure and evidence, in order to make it easier to obtain convictions for certain offences. Moreover, lawmakers did not hesitate to resort to criminalization on an ad hoc basis in order to respond to various events that were particularly shocking to public opinion. The media also contributed to the formation of this public opinion (Roberts, 2003).

- *High rate of convictions*

Close to two thirds (63%) of cases resolved by the criminal courts in Canada end with a guilty verdict, while 32% end with charges being withdrawn or a stay of proceedings.²¹ Only 4% of cases resulted in acquittal. Moreover, minor infractions are much more likely to end with a guilty verdict than violent offences.²²

- *Guilty pleas and the lack of effective protection of individual rights*

We estimate that close to 90% of individuals plead guilty (Sylvestre and Jodouin, 2009). A very large number of these individuals plead guilty while effectively compelled to do so. Such is the case for too many individuals detained as a preventive measure for several days and who plead guilty in order to be

¹⁹ This project was funded by the Social Sciences and Humanities Research Council of Canada and was conducted in Montréal, Ottawa, Toronto and Vancouver.

²⁰ The most common and most problematic conditions are those related to abstinence or conditions prohibiting the offender from consuming certain substances, contacting certain individuals or banning the offender from going to particular locations strategic to survival, such as parks or downtown areas.

²¹ Rates for cases that are withdrawn are particularly high in provinces where police officers are directly responsible for laying charges.

²² Maxwell, 2015

released and are sometimes given a retroactive term of imprisonment corresponding to the period spent in preventive custody.²³ There are also some individuals who choose not to exercise their rights because it would be too expensive to do so from a material and financial point of view (costs related to the justice system and ineligibility for legal aid; loss of working days and costs related to travel), from a personal point of view (time, energy and anxiety caused by uncertainty and a lack of understanding of the process or even multiple constraints related to conditions for release), and also because they are more likely to obtain a reduced sentence when they waive their right to a trial, not to mention those who believe that it is not worth the risk.²⁴ For all these individuals, the criminal justice process is part of the sentence.²⁵ Moreover, this accelerated and highly ritualized process offers only a limited space for challenges that would allow individuals to assert their rights, which are hardly ever invoked at the time of release or sentencing (Sylvestre et al., 2015; Garcia, 2014).

- *Discretion*

Representatives of the State, particularly the police and Crown prosecutors, exercise their discretion based on institutional and bureaucratic imperatives and not necessarily based on legal imperatives, and there are few mechanisms for judicial review of this discretion. For example, police may in some cases not exercise their discretion when a complaint is filed as a criminal matter or when it involves an offence related to the administration of justice for fear of disciplinary reprisals even though the law would permit them to do so,²⁶ and there is the practice of overcharging for an offence, which consists of accusing an offender of a more serious offence than the offence that can actually be proved, most notably when there is a minimum sentence, or when charges are unduly tacked on for a single criminal act.²⁷ In this context, mandatory minimum sentences serve to encourage deals and guilty pleas, in addition to limiting the discretionary power of judges.

- *Bringing the justice system into disrepute: systemic pressures and dissatisfaction of victims*

A growing number of judicial stakeholders are expressing concerns about the systemic problems afflicting the justice system. Despite the enthusiasm which some of them have demonstrated for

²³ Moreover, in Quebec, 10.6% of individuals were sentenced to one day in prison in 2007-2008: Giroux, 2011

²⁴ For example, *R. v. Hanemaayer*, 2008 ONCA 580. In this case, a construction worker pleaded guilty to the offence of break and enter with intent to commit a criminal act, i.e., assault and assault involving the threat to use a weapon. At trial, the victim and her mother had identified Hanemaayer as being responsible for this attempted sexual assault. However, 15 years later, the police obtained irrefutable evidence that the crime he was accused of committing had actually been committed by Paul Bernardo. The Court of Appeal set aside the guilty plea even though it had been deemed to be valid. In so doing, the Court explained how innocent people are incentivized to plead guilty: "In an affidavit filed with this court, the appellant explained why he changed his plea. In short, he lost his nerve. He found the homeowner to be a very convincing witness and he could tell that his lawyer was not making any headway in convincing the judge otherwise. Further, since his wife had left him and wanted nothing more to do with him, he had no one to support his story that he was home at the time of the offence. He says that his lawyer told him he would almost certainly be convicted and would be sentenced to six years imprisonment or more. However, if he changed his plea, his lawyer said he could get less than two years and would not go to the penitentiary. The appellant agreed to accept the deal even though he was innocent and had told his lawyer throughout that he was innocent."

²⁵ The process is the punishment: Feeley, 1979

²⁶ *R. v. Beaudry*, (2007) 1 S.C.R. 190

²⁷ See *R. v. Rodgeron*, 2015 SCC 38, and *Public Prosecution Service of Canada Deskbook*, guideline 6.2 – Mandatory minimum penalties for particular drug offences, pp. 2-3, which require prosecutors to favour offences containing a minimum sentence: "Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed." <http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p6/ch02.html>

courts focused on resolving social problems,²⁸ we should not forget that these stakeholders also denounce the prosecution of social problems and the instrumentalization of the judiciary by the executive branch.²⁹ Ultimately, these social problems should be addressed by other institutions which are better equipped than the judicial system to deal with such problems. Moreover, the challenges are not just political; they are also pragmatic. The system is being overwhelmed by minor offences, and prisons are overflowing with offenders who do not pose any risk to public safety, while wait times for a trial, most notably a trial by jury, continue to grow and the courts are struggling to focus on files which demand their attention. The judgment recently rendered by the Supreme Court in *Jordan* has only increased the pressure in this regard.³⁰ What is at issue is the legitimacy and reputation of the justice system.

Victims often express frustration with the criminal justice process and the outcome. Many deem that sentences imposed are not significant: very often, this search for meaning is not closely tied to the severity of the punishment or recourse to long-term imprisonment, but to the lack of actual acknowledgment of responsibility and reparation for the harm caused. As an example, one need only refer to the case of the alleged victims of Jian Gimeshi. In this case, the prosecution used a two-step process. First, Gimeshi had to defend himself against charges of sexual assault involving three separate victims; he was ultimately acquitted of these charges after a particularly humiliating and painful trial for the victims who testified. However, the fourth victim, Kathryn Borel, did not have to suffer a similar fate. The charges in that case were withdrawn by the prosecution after Gimeshi accepted responsibility, apologized and signed an undertaking to respect the peace under section 810 of the *Criminal Code*. He also made a highly publicized public statement which was broadcast repeatedly in social media. I use this example not because the second solution was perfect in terms of respecting the rights of the accused or even the conflict resolution process, but because it appeared to be entirely more satisfactory for the victim, most notably due to the acknowledgement of responsibility.

Lastly, we note that even though some of these problems have been accentuated over the past few decades, historically, they are stable and recurrent phenomena, which suggests that they are closely linked to the very functioning of the criminal justice system rather than the result of isolated acts committed by certain particularly zealous stakeholders, or even occasional lapses (e.g., Fyson, 2006).

Preliminary findings

1. Two models of governance coexist within the criminal justice system, namely, political liberalism, in terms of the founding and legitimizing principles; and police power and managerial justice, which is more reflective of the reality of practice. The administration of justice in particular produces systemic effects with respect to policing, regulation of poverty and control of petty crime and deviance, which results in poor and marginalized populations being viewed as threats and having them kept under judicial supervision for several years.

2. Considerable legislative inflation has stimulated overuse of and even abusive recourse to the

²⁸ Canadian Association of Provincial Court Judges, "La résolution de problèmes et les approches thérapeutiques à la justice dans les tribunaux canadiens", summer 2014, vol. 37(1) *Provincial Judges Journal*.

²⁹ Canadian Association of Provincial Court Judges, "Criminalisation des questions sociales: une crise des droits de la personne", winter 2015, vol. 37(2) *Provincial Judges Journal*.

³⁰ *R. v. Jordan*, (2016) SCC 27.

criminal justice system. Moreover, the dearth or complete lack of resources for alternative and prevention measures remains a non-issue, since resources are primarily allocated to enforcement services and particularly to offences committed by poor and marginalized people in society.

3. The criminal justice system has contributed to developing a culture of blame rather than one which promotes acknowledgement of responsibility and reparation. It does not encourage conflict resolution, and in many cases, the sentences that are imposed are not deemed to be meaningful by the parties concerned, including the victims.

4. The impact of modern penal rationality and the primacy of individual responsibility act as impediments to innovation: stakeholders have great difficulty imagining sentencing in a non-afflictive manner and cannot conceive of responsibility beyond individual responsibility at the expense of shared and collective responsibility.

5. The criminal justice system has disproportionate effects on Aboriginal people.

Part Two: Proposals for reforming the principles and objectives of sentencing

Several individuals, organizations and commissions have examined sentencing and its guidelines over the past few decades. In particular, we should mention the work of the Canadian Committee on Corrections (the Ouimet Report, 1969), the Law Reform Commission of Canada (1971–1989) and the Canadian Sentencing Commission (Archambault Commission, 1987), which offer a wealth of information. We are most notably relying on some of the recommendations of the Law Reform Commission and particularly its report on sentencing and dispositions (1976) in order to formulate the following proposals for reform. We believe that the proposed reforms require a profound change in mentality vis-à-vis crime and ways to intervene.

In Part Two, we will first examine how the founding principles should be reviewed in light of the statements made in Part One (a); we will then formulate a certain number of proposals directly related to the review of the objectives and principles that should serve to guide sentencing (b and c). Lastly, we will emphasize the need for transversal application of these proposals to ensure that they leave a mark at all stages of the criminal justice process.

(a) Review of founding principles

Crime and State. Crime should be conceived of as a manifestation of social problems and situations of conflict, and we should start to question the systematic recourse to the State's criminal justice system in the vast majority of cases. It is important to note that the notion of "conflict" differs from the notion of "abuse": conflicts within a society are not in and of themselves unhealthy and should not automatically be repressed or criminalized in the absence of abuse (Schulman, 2016). According to Christie (1977) and contrary to what one might think, there are not too many conflicts in our society. In fact, there are not enough and we all too often try to avoid them, circumvent them or neutralize them by resorting to the criminal justice system. Our society must allow for democratic spaces for debate where differences can be expressed and even encouraged in some cases, without the need to resort to criminal law.

Individual responsibility. Individual responsibility should be challenged while also encouraging offender accountability. Each crime must present an opportunity for us, as a society, to reflect on different levels and degrees of responsibility and ways to prevent these conflicts collectively.

Sentencing and modern penal rationality. The concept of modern penal rationality should be reconsidered, which means (1) re-evaluating the punitive nature of sentences; (2) reconsidering from a moral point of view the need or obligation to punish in all circumstances, and not just in the context of assessing whether or not to prosecute based on a calculation of costs and benefits; (3) excluding punitive theories on sentencing and ensuring that they do not contaminate efforts to explore alternative measures, as has been the case to date (for example: probation and conditional sentencing); (4) exploring alternative measures to criminal law in order to encourage conflict resolution by relying on positive theories of sentencing.

Interestingly, these measures are already accepted within our current system in two situations: first, when judicial stakeholders can self-identify with the offender, i.e., when the social proximity between the judge and/or prosecutor, on the one hand, and the offender, on the other hand, is such that the stakeholders can identify with the offenders or express feelings of empathy towards them, or even when they have sufficient context regarding the offender and the offence to understand the offender's experience and who the offender is. As a result, the stakeholders can give greater weight to situational factors (context) as well as personal factors concerning the gravity of the offence.³¹ Second, the positive values of sentencing are taken into consideration when the system of justice benefits, for example, in the case of an informer. These positive values should be extended.

(b) General and specific objectives

*Criminal justice should be used with **moderation**, as an alternative and as a last resort, with respect for human dignity, human rights and the intrinsic value of each member of society. Its objective should be to support and encourage conflict resolution structures and mechanisms within Canadian society and do so in order to encourage **pardoning, reconciliation and reparation** of harm caused to the victims, and to encourage offender **accountability** and the **transformation** of communities. In some exceptional cases, it should also be used to isolate and neutralize certain individuals who pose a real danger to the public and to victims.*

- *Transversal nature of objectives*

In order to achieve this objective, it is essential that the values of *moderation, reparation, reconciliation, accountability and transformation* which lie at the heart of the proposed reform be implemented both upstream and downstream from intake into the criminal justice system and the sentencing process. First and foremost, they should guide the actions of Parliament, which should not yield to penal populism and the temptation to tag on offences or increase maximum and minimum sentences following the slightest increase in the crime rate or the occurrence of some new fact. Criminal justice should not be structured around extreme cases which make the headlines, since rules set out in the context of indignation always end up having a direct impact on the regular clientele of the criminal justice system.

³¹ Christie, 2003; Albonetti and Hepburn, 1996; Hogarth, 1971

The values set out above should then serve to guide the exercise of discretion by police and prosecutors prior to intervention by the criminal justice system. Minor and non-violent offences related to survival strategies or cohabitation in public spaces and offences against the administration of justice, such as theft and subsistence fraud, breach of conditions and undertakings, possession of and trafficking in drugs, prostitution, obstructing a police officer, mischief and simple assault should only be prosecuted in certain specific cases. Minor deviance, marginalization, poverty, mental health problems and addiction should not be perceived as threats to the State or the established order. In certain cases, these situations could quite simply be decriminalized and, in others, could be the focus of diversion measures which allow for conflict resolution, referrals to social services including community and health organizations (physical and mental) and families (insofar as they are supported) and prevention of recidivism by the transformation of communities.

That said, the gravity of the offence should not present an obstacle to the application of principles related to moderation and reparation. On the contrary, these principles truly make sense in such situations because violence is often symptomatic of situations which should be defused. However, we note that most of the time, violent offences, sexual offences and offences which pose a real threat to the safety and integrity of victims and communities should first be subjected to police and judicial intervention intended to neutralize an actual threat while encouraging conflict resolution and implementation of community prevention measures whenever possible, in order to avoid recidivism and facilitate the transformation of communities. This is particularly true when the parties concerned are of Aboriginal descent, since members of this group are more likely to be accused of serious or violent offences (please refer to information on 718.2 (e) of the *Criminal Code* provided further below). In some cases, we should be able to contemplate the idea of not intervening, even when violent acts are committed, when the situation does not involve an abusive relationship: for example, fights on high school grounds, fights outside a bar or isolated displays of anger towards children or spouses resulting from a particular incident or circumstance rather than a history of violence, domination or intimidation, by referring these types of situations to other regulatory systems such as the extended family, the school or communities. Clearly, the police and prosecutors already exercise their discretion in this way, even if this is not done systematically.³²

Therefore, any decision by justice system players—a decision concerning whether to subject an offence to the criminal justice system, to resort to community-based conflict resolution systems (for example, mediation in criminal cases) or alternative measures, or to impose coercive measures—should take the following elements into consideration:

- (1) events following the offence and particularly the reparation, rehabilitation and reconciliation measures put in place;
- (2) ties between the parties;
- (3) the true nature of the threat which the offender poses to the victims, regardless of the gravity of the offence—consequently, a serious offence should not prevent recourse to diversion measures, while a minor offence could also prompt an intervention;
- (4) the possibility of managing the conflict or resolving the problem through community conflict resolution mechanisms or other dispositions and by implementing prevention measures to avoid recidivism for this type of conflict; and
- (5) the costs as well as the destructive and counterproductive effects which repressive criminal justice intervention could have on victims, offenders, their families and their communities.

³² In certain cases, zero tolerance policies prevent them from exercising their judgment.

Lastly, these values must be respected on completion of the judicial process, most notably by eliminating the criminal record and reviewing prohibitions. According to recent estimates, over 4 million individuals have a criminal record in Canada.³³ The consequences of having a criminal record are numerous and insidious for offenders as well as for their families and communities. They include severe restrictions with respect to employment and employability, volunteer work (including at schools their children attend but also at certain organizations), cross-border travel, housing (including for the offender's family) and insurance. Prohibitions also involve significant restrictions concerning mobility and the ability to communicate with various individuals. For example, this is the case when the offender is prohibited from going to places known to be frequented by children, when such locations are extremely common, most notably in certain urban centres.

- *Definition of specific objectives: moderation, pardon, reparation, reconciliation, accountability and transformation*

Even though they are not fundamentally repressive from an ontological point of view,³⁴ the sentencing objectives set out in paragraphs (a) to (f) of section 718 and in sections 718.01 and 718.02 of the *Criminal Code* have been interpreted as reflecting negative values of affliction and punishment. Moreover, they are presented in no particular order of priority and in a non-hierarchical manner, such that they are invoked to neutralize and contradict each other, making interventions a lot less effective. Consequently, even the objectives that are more likely to express positive values, namely, paragraphs (d), (e) and (f) of section 718 (social integration, responsibility and reparation) become secondary to the first three (i.e., paragraphs (a), (b) and (c): denunciation, deterrence and isolation), are marginalized or have been interpreted in the context of an afflictive and punitive logic (for example, to incarcerate or inflict a heavy fine in order to hold the offender accountable).

Moreover, the objectives set out in sections 718, 718.01, 718.02 and 718.1 of the *Criminal Code* as well as the aggravating circumstances in section 718.2 of the *Criminal Code* focus primarily on punishment of the offence and the need to reflect its gravity (objective and subjective, related to the harm caused) or the threat that it represents (related to the anticipated harm caused), rather than on the offender and the social or family conflict at the root of the crime. Every time that a value advocating moderation is introduced in these sections (e.g., the notion of degree of responsibility based on the principle of proportionality and paragraphs 718.2 (d) and (e) of the *Criminal Code*), it is counterbalanced by a punitive and afflictive value. Moreover, the objectives do not make any distinctions based on whether the offender is rich or poor, Aboriginal or non-Aboriginal, male or female, the level of danger presented by the offender or mental health conditions.

The same is true for the aggravating circumstances and other sentencing principles provided in section 718.2 of the *Criminal Code*, which we will return to a little later. Subparagraphs (a)(i) to (v) contain a list of offences which appear to prevail over the objectives and principles of sentencing and neutralize any attempt to resolve the conflicts or underlying problems related to the offence.

The purposes and principles should be reformulated and presented in a hierarchical and specific

³³ RCMP, 2009; Bernheim, 2010

³⁴ As mentioned earlier, the utilitarian philosophy underpinning the objectives of deterrence and rehabilitation contains a principle of moderation because it states that the sentence should not be imposed unless it is useful and only insofar as it can be useful.

manner by distinguishing between two situations: first, regular situations of conflict which involve implementing principles of conflict resolution, regardless of whether they are addressed outside the justice system (through diversion measures) or subject to the supervision of the justice system (in court); and second, more exceptional situations where it is necessary to use security measures and, in some cases, a sentence in order to neutralize and isolate offenders and ensure the safety of victims and communities.

What do we mean by moderation, pardon, reconciliation, reparation, accountability and transformation?

Moderation: It is important to resort to criminal justice carefully and conservatively. This means re-evaluating the principle of subsidiarity as it applies to criminal law and its minimalistic aspect. This principle should be expressed by the decriminalization of a wide variety of conduct, through clear directives to federal and provincial prosecutors, requiring them to encourage diversion measures as well as support for alternative measures and community conflict resolution mechanisms. As mentioned earlier, the gravity of the offence should not constitute the decisive factor used to justify decisions.

At present, alternative and diversion measures for adults are unusual within the justice system, particularly in regular courts. There are a growing number of specialized courts in Canada (for example, to deal with homelessness, addiction, mental health issues, Aboriginal issues and domestic violence) which offer more or less innovative measures depending on the case. One particularly innovative program deserves to be highlighted: the *Programme d'accompagnement justice – itinérance à la cour*, a legal support program for homeless people at the Municipal Court in Montréal.³⁵ Under this program, homeless individuals with a criminal record can have all criminal charges and convictions withdrawn in exchange for participating in an integration process supervised by a community organization and the Municipal Court. Even though, in our opinion, many of the offences for which homeless individuals are convicted should simply be decriminalized, this program is reflective of a truly diversionary approach. Indeed, unlike other programs such as the Downtown Community Court in Vancouver or the courts which handle treatment of addiction and mental health issues in Montréal, Toronto or Ottawa, for example, this does not mean releasing an individual subject to various conditions or sentencing the individual to probation with conditions for reintegration or treatment when the risk of failure to comply is high and contributes directly to the issue of revolving doors (the stick). It instead means offering services in collaboration with the community sector and a reward for the action undertaken upstream by withdrawing the file once this process is successfully completed (the carrot). We believe that this type of initiative could be encouraged in other sectors by an amendment to subsection 720(2) of the *Criminal Code*.

Apart from the specialized courts which focus on problem resolution, alternative measures for adults all too often boil down to issuing a warning advising the offender that the prosecutor chose not to present the matter in court. In practice, this type of warning is only issued once, but there is no reason to indicate that this will in fact be the case. Moreover, it would be appropriate to provide mechanisms for more complex diversion measures.

Furthermore, the system should also reflect the fact that many conflicts are resolved between the parties after the fact, and that we are all better served by these conflict resolution mechanisms as long as the parties concerned are satisfied and the destructive and counterproductive effects of

³⁵ This is a reference to the PAJIC program: <http://ombudsmantemontreal.com/wp-content/uploads/2016/01/PAJIC-ENG.pdf>. We note that the Municipal Court in Montréal is a summary conviction court under part XXVII.

criminalization and sentencing are avoided.

Reconciliation and reparation: Mediation and conflict resolution processes should be supported and funded. In many cases, community and other government organizations associated with health and social services may work alongside one another, independently of the justice system, in order to address problematic situations. These initiatives and services must be adequately funded.³⁶ In other cases, the justice system may wish to supervise processes involving alternative measures and entrench and supervise the application of a range of dispositions and remedial measures which would be approved. A range of these measures should be proposed and should encourage acknowledgement of responsibility, reconciliation and reparation for harm caused to victims and communities. In the case of property crimes and crimes against persons, they should include restitution, work intended to provide reimbursement, or reparation based on the needs of the victims and the abilities of the offenders.

Pardon: Our criminal justice system should also include the option of not prosecuting or imposing any sanction at all. The *Code of Canon Law* applicable to the Catholic Church also provides for such a possibility.³⁷ In the context of processes concerning alternative measures or court-related proceedings, the parties and the system should be able to choose not to sanction a specific behaviour and to pardon it following a process which encourages acknowledgement of responsibility. Moreover, this value should guide the measures taken on completion of the judicial process when an individual has participated in a conflict resolution process or has served the sentence imposed.

Individual and collective accountability: The criminal justice system must encourage acknowledgement of wrongdoing and accountability rather than blame on the one hand and denial of responsibility in order to self-protect against the affliction of suffering and protect personal rights on the other hand. This principle includes integrating various degrees of responsibility into criminal theory, not only at the guilt determination phase but also when establishing other different types of verdicts, rather than maintaining the guilty versus not-guilty dichotomy. We will return to this point in the section on the principle of proportionality below. It is also essential to consider that acknowledgement of responsibility could be the culmination of a process and should not necessarily be a condition of eligibility for conflict resolution programs.

Transformation: Each crime, conceived of as a conflict, must present an opportunity for us, as a society, to reflect on the proportion of responsibility that we should have to bear collectively for the crime committed and on ways to prevent these conflicts and problematic situations collectively. An interesting parallel can be drawn with investigations conducted by coroners or medical examiners at the provincial level. Most provincial laws provide the coroner with the option of conducting an investigation which not only examines the causes and circumstances of the death, but also proposes recommendations to ensure better protection of human life and prevent similar deaths from occurring, without making any findings concerning the civil liability or criminal responsibility of the parties

³⁶ The costs are not necessarily prohibitive. On the contrary, savings are often realized when a problematic situation is transferred from the justice system, particularly from the correctional system to other social systems, as they are generally considered to be extremely expensive. For example, with respect to homelessness, several studies show that it is much less expensive to invest in housing and community services than in police and correctional services: Sylvestre and Bellot, 2014; Novac et al., 2006, and Gallant et al. 2004 (in the Toronto region, correctional units for adults and youth cost \$3,720 and \$7,917 per month respectively, while a supervised housing unit with community services costs roughly \$1,000 per month).

³⁷ Canon 1344: http://www.vatican.va/archive/ENG1104/_INDEX.HTM

involved (e.g., the *Act respecting the determination of the causes and circumstances of death*, R.S.Q., ss. 2 and 3, and the *Coroners Act*, R.S.O., ss. 15, 18 and 31). In the context of informal conflict resolution or court-related processes, community organizations, prosecution services and courts should therefore have the option of issuing a series of recommendations intended to prevent crime in the community and transform communities on a structural level. These recommendations could include simple, low-cost measures as well as more structuring and structural measures, such as awareness-raising campaigns against discrimination and in favour of equality, and anti-poverty programs.

Let us look at just one example among many others: several years ago, a child was killed by a school bus when getting off the school bus. The child had slipped under the bus, and the driver did not see the child. A coroner's inquest followed and made a series of recommendations which completely changed school transportation in Quebec. These include requiring vehicles driving in all directions to stop at flashing lights or risk being assessed nine demerit points; having a barrier installed in front of the bus to prevent children from slipping under the bus; and assigning a responsible person to accompany the children to a safe location after getting off the bus. Not only did these practices help reduce the likelihood of incidents which could result in charges of criminal negligence, but they also helped save lives. This example involves simple measures, but other more complex measures could be contemplated in order to explore systemic causes and structural measures that could be put in place.

(c) Sentencing principles

- *The principle of proportionality: section. 718.1*

As a fundamental sentencing principle, this principle can have both a moderating effect, by imposing a ceiling for sentences and requiring the degree of responsibility to be taken into consideration, as well as a repressive effect, by imposing a minimum sentence and therefore an obligation to punish and consider the gravity of the offence and the degree of moral blameworthiness of the offender. In fact, this ambivalence has resulted in the gravity of the offence being prioritized over the degree of responsibility. In other cases, consideration of the degree of responsibility served as an aggravating factor, was mitigated by the principle of parity in sentencing,³⁸ or was limited to consideration of the degree of participation in a crime committed by a group under the rules of criminal participation (Sylvestre, 2013).

We suggest incorporating the possibility of giving full weight to the idea of degrees of responsibility in the context of conflict resolution processes and during sentencing. To achieve this goal, we could establish responsibility on the basis of a scale or spectrum by drawing inspiration from civil law and the award of damages amongst the parties, or even from the *common law* principles of contributory negligence and apportionment of damages. Proportions may or may not be established (25%, 33%, 50%, 75%) considering the fact that it is highly unusual for anyone to be found 100% responsible. The idea of decompartmentalizing and expanding the concept of responsibility should not be viewed as an opportunity to blame victims or, even worse, to expand the criminal net in order to hold certain individuals criminally responsible when they would not currently be found to be criminally responsible due to issues relating to admissibility or evidence. Shared responsibility would simply act as a principle of moderation applicable to the offender him- or herself.

³⁸ See the decision of the majority in *R. v. Lacasse*, (2015) SCC 64 (per Wagner J.).

The notion of the degree of shared responsibility should be expanded to include the State. In *Ipeelee*,³⁹ the judges subscribing to the majority opinion and the dissenting judges recognized that there was a link between the reprehensible conduct of representatives of the State and the concept of degree of responsibility⁴⁰. However, Justice LeBel went even further. He indicated that the courts must consider the historical, social and political context when determining the proportionality of the sentence. In this case, this means expanding this reasoning even further so that the State assumes its share of blame and responsibility for creating conditions which generate situations of conflict, if applicable. If the State has a clear responsibility with respect to Aboriginal peoples, then it also has a clear responsibility in other contexts, most notably for failing to offer a decent income to all citizens, for failing to recognize the right to housing or, owing to its actions and policies, for contributing to racism and gender inequality, rooted in part in violence against these groups.

This fragmented notion of responsibility should also facilitate recognition of collective responsibility. In a complex society such as ours, certain risks must be assumed collectively. Therefore, regardless of the share of responsibility that the State may assume for past actions, there are certain situations in which collective choices have been made (for example, with respect to driving a vehicle and firearms) and for which we should all bear partial responsibility for the consequences.

Lastly, we note that the measures and sentences imposed should also be proportional to human dignity. This means asking yourself how you would want to be treated in a similar situation. In a society based on the rule of law, punishment and sanctions should not only refrain from being “cruel and unusual” within the meaning of the Canadian Charter, but should also respect the rights and dignity of individuals targeted by measures restricting their freedom. This addition to the analysis of the principle of proportionality would also ensure a moderate and restorative dimension.

- *Paragraph 718.2(e) of the Criminal Code and criminal justice in the Aboriginal context*

Paragraph 718.2(e) of the *Criminal Code* proposes a principle of penal moderation as a counter to modern penal rationality. It also constitutes a form of resistance to legal monism and the Canadian State’s monopoly over resolving conflicts involving Aboriginal peoples, most notably due to the second part of the analysis of 718.2(e) of the *Criminal Code* proposed by the Supreme Court in *Gladue*,⁴¹ that is, the possibility of incorporating certain types of procedures and sanctions which take Aboriginal heritage into account. However, as the Supreme Court noted in *Ipeelee* in 2012, this section has not succeeded in reducing incarceration rates among Aboriginal peoples, which only continue to rise.

A comprehensive review of 635 decisions rendered after *Ipeelee* demonstrates that trial and appellate court judges continue to resist the innovations proposed in this section: over 40% of the compiled decisions (252) do not mention paragraph 718.2(e) of the *Criminal Code*; 65% of decisions do not mention the preparation of any kind of *Gladue*-type report; and judges conducted an in-depth examination of the background and systemic factors in just one in five decisions (20%), because in most cases, they were content to set aside these factors due to the “gravity of the crimes”. In addition, we were only able to identify 30 decisions which applied the principles of restorative justice and 7 decisions

³⁹ *R. v. Ipeelee*, (2012) SCC 13

⁴⁰ See Sylvestre, 2013, pp. 475 et seq., which refers to *Ipeelee*, paras. 154-56 (Rothstein J., dissenting) and paras. 67, 73, 77 and 96 (LeBel J.). This link was also recognized in *R. v. Nasogaluak*, 2010 SCC 6.

⁴¹ *R. v. Gladue*, [1999] 1 S.C.R. 688: In this decision, the Court proposes a two-part analysis, i.e., consideration of the background and systemic factors which led to the perpetration of the crime (part 1) and consideration of appropriate sentencing procedures and sanctions for individuals of Aboriginal heritage (part 2).

in which the judge tried to adapt the type of sanction and procedure to the Aboriginal heritage of the accused.⁴²

Although several legal constraints have not made it possible to give full weight to this section over the last decade (e.g., minimum sentences, restrictions on conditional sentencing), it is now obvious that justice system players hesitate to challenge the universalism of the criminal justice system and the Canadian State's monopoly on punishment. However, this resistance must be overcome by supporting the efforts of a number of creative judges, as well as the efforts of Aboriginal communities involved in revitalizing their legal systems, by allowing these communities to assume a greater responsibility for conflicts which afflict such communities and ensuring better co-ordination of these efforts with the justice system. This starts with recognition of legal pluralism and the direct consequences that colonization and the residential school policy had on the destruction and neutralization of Aboriginal legal systems.

This is consistent with recommendation 50 of the Truth and Reconciliation Committee, which states as follows:

In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.⁴³

The various prosecution services should make a meaningful commitment to concluding co-ordination agreement with Aboriginal Nations without automatically excluding cases of "serious crimes", most notably domestic and sexual violence, which lie at the heart of problems experienced by Aboriginal communities.

Since 2013, we have conducted a research project in partnership with the Atikamekw Nation.⁴⁴ We recently attended sentencing submissions in *Neashish*,⁴⁵ the case of the former chief of police of the Wemotaci community and chief negotiator of the Atikamekw Nation, found guilty of committing sexual assault against five victims, including children. For many, these convictions were just the tip of the iceberg, as he was not formally charged in connection with several other allegations. In this case, the prosecution requested seven years in prison due to the numerous aggravating circumstances (children, position of authority, recidivism, etc.), while the defence suggested a provincial sentence. Mr. Neashish continues to deny the facts and his responsibility.

Among the Atikamekw people, *Neashish* did not leave anyone indifferent, as his actions affected a

⁴² *R v Simms*, 2013 YKTC 60; *R v Tom*, 2012 YKTC 55; *R c Kawapit*, 2013 QCCQ 5935; *R. v. McCook* 2015 BCPC 1; *R v McNabb*, 2014 MBPC 10; *R v Elliot*, 2014 NSPC 110; *R v Knight* 2012 MBPC 52. There is certainly a larger number of cases than those reported in the case law, but the fact that so few provided written reasons has had a considerable impact on the criminal justice system and most notably on the nature and range of sentences imposed.

⁴³ Truth and Reconciliation Commission of Canada: Calls to Action, 2012, recommendation 50, pp. 5-6.

⁴⁴ This project, funded by the Social Sciences and Humanities Research Council of Canada, is part of a series of projects involving the Indigenous Law Research Unit of the University of Victoria, which is currently conducting projects to revitalize Aboriginal law in more than ten communities in Canada.

⁴⁵ The sentencing decision has been reserved, but the judgment concerning responsibility can be consulted: *R. c. Neashish*, Court of Quebec, District of Saint-Maurice (La Tuque), December 9, 2015, Nos 425-01-007524-116 and 425-01-008060-128.

large number of people directly or indirectly. Although opinions are divided on the need to be able to resort to the legal system of the State in order to deal with cases of violence, many people recognize that there is a significant difference between imposing a sentence, especially a sentence of imprisonment on completion of the State legal process, and Atikamekw law. Many questioned the rationale of imposing a seven year sentence in La Tuque in a foreign language and in compliance with legal principles which are also foreign and even imposed. Would it not be preferable for the victims, who demand that the offender acknowledge his responsibility and, in so doing, also acknowledge the suffering and prejudice that they suffered, that Mr. Neashish be subjected to a community process in the context of which he would be confronted by his actions, on the territory of the reserve, in his language and in compliance with its legal rules, thereby allowing the community to take charge of the situation, to discuss respective proportions of responsibility (the accused, the State, families who sometimes turn a blind eye out of fear or despair, etc.), to impose appropriate sanctions, to break the silence surrounding systemic acts of violence and demand changes at different levels?

Recourse to imprisonment

There is widespread consensus in the literature and among legal practitioners that imprisonment is an expensive, ineffective and counterproductive system with devastating and disproportionate effects. Like many commissions and organizations, we believe that it is necessary to radically limit recourse to imprisonment. A first step in this direction would be to practically eliminate detention in custody, except in cases when the individual's detention is necessary to ensure attendance in court or when the individual presents a real risk to the safety of victims and the public. It would subsequently be necessary to completely eliminate the possibility of resorting to imprisonment for crimes with no victims.⁴⁶

We would maintain imprisonment in closed custody in just two situations:

- (1) For purposes of neutralization: when it becomes necessary to detain an individual in order to protect the victims and the public from a real and imminent threat and the available dispositions and conflict resolution processes are not deemed to be sufficient or appropriate. Imprisonment in closed custody would therefore serve primarily as a safety measure rather than an actual punishment imposed to inflict suffering *per se*.
- (2) As a measure of compulsion: in order to enforce measures imposed on completion of the conflict-resolution process or court-related proceedings, when it is clear that the offender is refusing to comply with these measures and does not have any good reason, whether material or physical, to justify the refusal to do so.

The issue of fundamental rights upon sentencing and respect for human dignity

At this point, we would reiterate that the processes and measures imposed should always give due regard to human dignity and fundamental rights, in compliance with Charter-protected rights. The right to a fair and proportional sentence (and not just protection against cruel and unusual punishment) should be assured and serve to limit to use of the State power to punish and intervene in the lives of citizens. The tenets of restorative justice have often emphasized the fact that measures taken should take the needs of victims and offenders into account. In our opinion, however, we should not

⁴⁶ This recommendation was made most notably by the Archambault Commission (1987); the notion of a victim should have a narrow interpretation.

substitute the notion of rights for the notion of needs and allow them to take precedence throughout the conflict-resolution process, whether or not the case concerned is brought before the courts. The notion of rights should also include social and economic rights related to the transformation of communities.

Part Three: Legislative constraints on implementing these principles and objectives of sentencing and the necessary reforms

In this final section, we are proposing a series of substantive legislative changes required to implement the proposal presented in this essay.

1. *Amendment of founding principles.* In the absence of a general section or an amendment to section 2 of the *Criminal Code*, section 716 of Part XXIII should be amended in order to redefine the following notions for sentencing purposes:
 - (a) “criminal offence”: conceived of as reflecting a problematic situation or a situation of conflict;
 - (b) “degrees of responsibility”: in order to provide for the possibility of integrating shared responsibility (contributory liability) and collective responsibility (collective liability);
 - (c) “sanction”: the notion of a sentence should be distinguished from the notion of a sanction, which could include both measures involving deprivation of liberty (sentences) and dispositions for conflict resolution.
2. *Criminalization.* Several offences under the *Criminal Code* could be eliminated or revised in order to limit their scope of application and the discretionary power of peace officers and prosecutors, with the goal of decriminalizing and applying diversion measures to certain social problems. In this context, we are thinking of the following offences: offences against public order and against the administration of justice (illegal assembly, breach of undertaking, obstruction and offences related to peace officers), offences contrary to public morals and concerning disorderly houses (vagrancy, nuisance, disturbing the peace, gaming and betting, prostitution), offences related to drugs, offences against the person (assault) and property-related offences (theft, fraud, mischief).
3. *Directives for prosecution services* in the context of exercising their discretion. With respect to the Public Prosecution Service of Canada (PPSC), this would not only mean amending Directive 6.2 on the application of minimum sentences, but creating new directives for diverting criminal files and resorting to alternative measures.
4. *Situation-specific categories.* Add a section in order to identify problematic situations which should trigger conflict resolution processes and distinguish those that will need to be subject to judicial supervision from those that will not, and to identify more unusual situations which require a sentence to be imposed and the application of security measures.
5. *Intervention criteria.* Add a section in order to identify the criteria which should guide the exercise of discretion by prosecutors and judges in the context of choosing to resort to supervised or unsupervised conflict resolution measures or to litigate a situation of conflict. As mentioned earlier, these criteria should include due consideration of events which followed the offence and, in particular, measures related to reparation, rehabilitation and reconciliation that were put in place; the ties

between the parties; the nature of the threat which the offender actually poses to victims and the public; and the possibility of managing or resolving the problem through community conflict resolution mechanisms or other dispositions and through implementation of prevention measures to avoid recidivism for this type of conflict. Consideration should also be given to costs and to the destructive and counter-productive effects that repressive criminal justice intervention can have on victims, offenders, their families and communities. This assessment should not take the gravity of the offence into consideration.

6. *Alternative measures.* Amend section 717 to facilitate the use of alternative measures without the restrictions provided in paragraph 717(2)(a) requiring prior acknowledgement of responsibility, as this can be obtained on completion of a process or procedure.

7. *Objectives.* Amend section 718 as suggested earlier in order to promote the principles of moderation, pardon, reconciliation, reparation, accountability and transformation of communities.

8. *Aggravating Circumstances – objectives.* Repeal sections 718.01 and 718.02, which focus on afflictive and negative theories of sentencing regardless of the circumstances.

9. *Principle of proportionality.* Amend section 718.1 to include all sanctions imposed or decisions made in the context of the conflict resolution process; include the possibility of shared responsibility and include the responsibility of the State and collective responsibility; also mention the fact that sentences and other measures should be imposed proportionally and with respect for each person's right to human dignity.

10. *Aboriginal context.* Amend paragraph 718.2(e) to entrench the court's obligation to conduct a two-part analysis in compliance with the guidelines provided by the Supreme Court in *Gladue*. Offer additional provisions to allow Aboriginal communities to assume responsibility for conflicts which concern them, with respect for their own legal systems and based on agreements signed with the provinces and the federal government, in compliance with areas of jurisdiction.

11. *Aggravating circumstances – principles.* Abolish all aggravating circumstances provided in paragraph (a) of section 718 in order to allow for full implementation of the proposed principles advocating moderation and reparation, based on context rather than on the type of offence in question.

12. *Sentencing process.* Amend subsection 720(1) to allow the court to make recommendations on the structural causes and circumstances surrounding the perpetration of offences, with the goal of preventing a recurrence of these conflicts, helping to make communities safer and transforming these communities.

13. *Adjournment.* Amend subsection 720(2) to enable the court to delay sentencing in order to allow the parties to participate in a community conflict resolution process or a social program.

Other legislative constraints

14. *Interim release.* Amend subsection 515(10) to limit detention in custody to cases where detention is necessary to ensure attendance in court and where the accused presents a real threat to

public safety and to victims. This means abolishing paragraph (c) and the reference to the idea of a repeat offence in paragraph (b). Moreover, the release should be unconditional in the vast majority of cases, except if there is the possibility that the accused would flee the jurisdiction or poses a real safety threat. This will reduce the number of breaches of undertaking and offences against the administration of justice. Detention in custody and release conditions should not be considered as punishment prior to judgement. This is consistent with subsections 515(1) and (2) of the *Criminal Code* and paragraph 11(e) of the Canadian Charter, which provides for the right to reasonable bail.

15. *Minimum sentences.* Abolish all minimum sentences, including those for murder and the victim surcharge, and particularly those included in federal legislation (most notably fines), including the *Controlled Drugs and Substances Act*. In two recent judgements, the Supreme Court opened the door to allow lawmakers to maintain certain minimum sentences in order to serve as benchmarks for judges, while affirming the residual discretionary power of judges under justifiable circumstances.⁴⁷ However, we believe that the idea of a minimum sentence is incompatible with the idea of proportionality proposed in this essay.

16. *Life imprisonment.* Abolish life imprisonment as a radical sentence⁴⁸ that is contrary to human dignity and provide for maximum periods of detention for purposes of neutralization or compulsion. For comparison purposes, we should mention that countries can generally be placed in one of four categories. First, certain countries have actual sentences of life imprisonment without any possibility of release (for example the United States). Others, like Canada, have compressible sentences of life imprisonment with the possibility of release after a short or long period of time. Canada is among those countries with a lengthy minimum term of imprisonment as opposed to Germany, Belgium, Finland, Denmark and Sweden with shorter minimum terms of imprisonment, ranging between 10 and 15 years.⁴⁹ Lastly, several countries do not have any life sentence, but instead have maximum sentences, which vary from 40 years in Spain (even though in reality, a longer sentence is generally imposed symbolically), 30 years in Brazil and Columbia and 21 years in Norway, one of the least repressive countries in the world. In 1976, the Law Reform Commission recommended a maximum sentence of 20 years in cases of imprisonment as a means of neutralization and six months in the case of imprisonment as a way to compel the enforcement of certain measures.⁵⁰ Consequently, section 745 would need to be amended.

17. *Pardon.* Amend the *Criminal Code* and the *Criminal Records Act* to allow for the actual pardoning and reintegration of individuals rather than just classification of their files. Before 1955, section 1089 of the *Criminal Code* provided that a sentence served was equivalent to a pardon under the great seal. This provision mysteriously disappeared during the review conducted in 1955. We believe that this provision should be reintegrated and that the *Criminal Records Act* should be amended in order to protect the rights of individuals who have served their sentence or participated in other dispositions required to obtain a true pardon.

⁴⁷ *R. v. Nur*, 2015 SCC 15, and *R. v. Lloyd*, 2016 SCC 13

⁴⁸ I borrow this concept from Alvaro Pires.

⁴⁹ For Germany and Belgium, 15 years; 12 years for Finland and Denmark, and 10 years for Sweden.

⁵⁰ Law Reform Commission, 1976, p. 27

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