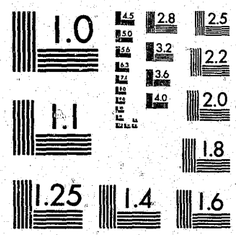


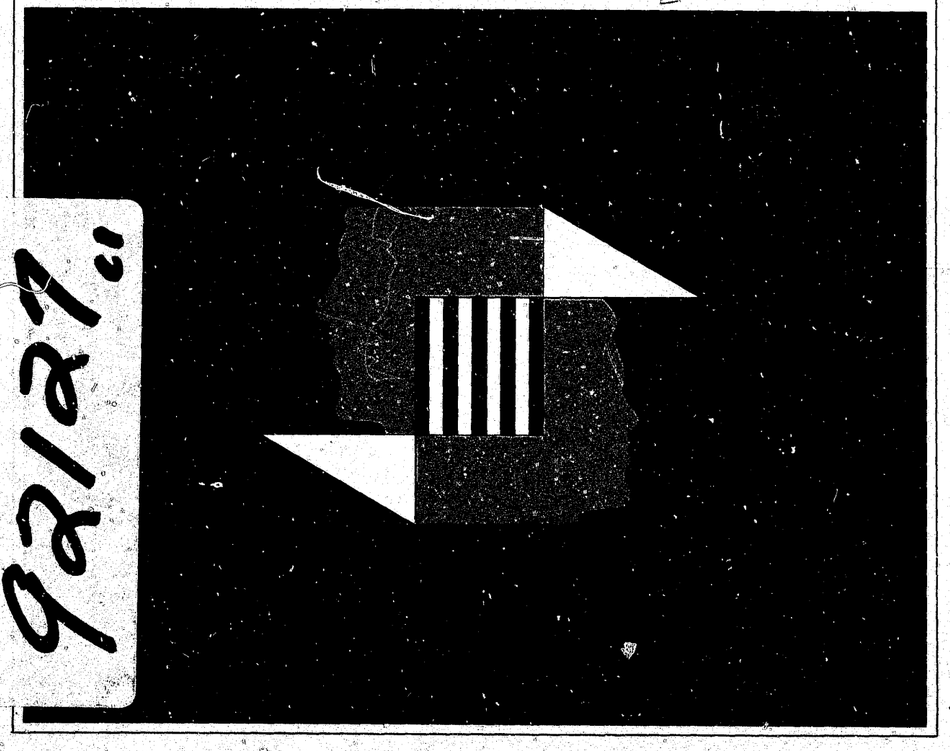
Government of Canada / Gouvernement du Canada

National Parole Board / Commission nationale des libérations conditionnelles

The National Parole Board Report

on the Conference on Discretion in the Correctional System

Nov. 17-18-19, 1981



Canada

Published March 1983

This publication is also available in French:

Le rapport de la Commission nationale des libérations conditionnelles sur la Conférence sur les pouvoirs discrétionnaires dans le système correctionnel Nov. 17-18-19, 1981

Catalogue: JS 92-17/1983E
ISBN: 0-662-12561-4

For Further Information Please Contact:

Communications Division
National Parole Board
340 Laurier Avenue West
Ottawa, Ontario
K1A OR1

(613) 995-1308

TABLE OF CONTENTS

PART II: A SELECTION OF PAPERS

ACKNOWLEDGEMENTS

Neither the Conference on Discretion nor the following Report would have been possible without the assistance of a great many individuals. The National Parole Board would like to thank the Departments of Justice and the Solicitor General for their contributions to the planning and funding of the National Conference and the provincial affiliates of the Canadian Assocation for the Prevention of Crime for organizing the regional workshops that preceeded the Conference.

That it was possible to turn an abstract topic into the theme of a National Conference we owe largely to three individuals: Marie-ève Hart, who bore the responsibility for organizing the Conference and for initiating this Report; Thérèse Lajeunesse, who assisted in organizing the Conference and in preparing material for this volume and Sheila Lloyd, who also assisted in the organization of the Conference and was responsible for the final preparation of this report.

Also deserving special mention are Michael Bowness, who did the artwork for the Conference, Susanne Sarda and her staff, who processed the text of this Report, Catherine Oliva and her staff, who prepared the translation, Betty-Lou Edwards, who undertook the responsibility for coordinating the final stages of this publication and Line Audet who assisted in its final preparation.

Finally the Board would like to express its gratitude to the individuals who participated in the Conference and contributed their knowledge and expertise to the discussions.

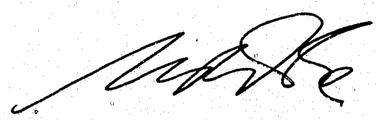
The opinions and ideas expressed herein are those of the authors and other individuals where so attributed and are not intended to reflect the position of the National Parole Board.

A NOTE FROM THE CHAIRMAN

It is my belief that we must achieve a balance in corrections between discretionary power and flexibility on the one hand and rules, uniformity and equity on the other. To do so we must bear in mind not only the negative but also the positive value of discretion. To quote the noted sociologist and a good friend, Hans Mohr, "not to do so would be to invite a tyranny of rules which surely is no less a threat to justice than the tryanny of unfettered discretion".

Out of a perceived need to appraise the positive as well as the negative value of discretion came the initiative for the Conference on Discretion in the Correctional System. We profoundly hope that the discussions that took place laid some of the groundwork needed to achieve an appropriate balance between discretionary power and mechanisms to constrain its use. That much remains to be done is clear but the door has at least been opened, I believe, to an exchange of opinion about one of the most complex and controversial issues facing corrections.

The perceptions that were shared during the Conference about the value of discretion in corrections, the problems associated with its use and the remedies that might be applied form the content of the following volume. It is our hope that the information collected within these pages will serve as a valuable source to those who are concerned about discretion in corrections.



W.R. Outerbridge

INTRODUCTION

The purpose of this volume is to make generally available the opinions and ideas, the analyses and proposals pertaining to the issue of discretion that were presented during the Conference on Discretion in the Correctional System held in Ottawa in November, 1981. Part one contains an account of the proceedings synthesized under several broad headings to provide a comprehensive overview of the ideas and opinions that were expressed about the nature of the controversy over discretion, the measures that are currently being implemented to improve and control the use of discretion and the direction in which we should be headed. Part two contains a selection of papers and addresses delivered at the Conference which are representative of the major themes and arguments raised during the proceedings. We hope that the theoretical and practical perspectives collected within this volume will provide a valuable source of information about one of the most complex and controversial issues facing corrections today.

The National Conference, and the regional workshops that preceded it, demonstrated that many individuals not only in the correctional field but also in the academic and legal professions attach a positive value to discretionary power. We were reminded, often poignantly, that discretion, when properly

exercised, is the source of humaneness and flexibility in our criminal justice system. Without it, we were told, the administration of justice would lack all capacity for human sympathy and could only be rigid and heavy-handed. This attitude stands in stark contrast to the point of view prevalent particularly in the United States, that discretionary power is inherently negative or harmful and should, therefore, be restricted as much as possible.

It was not, however, the only point of view expressed during the Conference. Many of the speakers and delegates put greater emphasis on the inherent potential for the misuse of discretionary power than on its positive value. In their opinion, the discretionary power of correctional authorities should be circumscribed by rules, regulations and guidelines to promote equity, fairness and uniformity in the provision of correctional services. These objectives, they argued, are the ones we should be actively pursuing. The individuals who advocated this approach asked us to reflect on the need for clearly established rules and standards not only to ensure uniformity and equity but also to enable us to assess the performance of the system and to know what improvements are needed.

Those who emphasized the positive value of discretion expressed their concern that efforts to confine, structure and review discretion would affect only the procedural and not the substantive element of decision-making. Objections to due process mechanisms were raised on the grounds that they tend to create an adversarial climate in which the antipathy between offenders and correctional personnel is increased. Others objected to a reliance on rules, regulations and standards on the grounds that the minimum standards they impose soon become the maximum. According to this line of argument, the uniformity that is attained may be comforting to senior management but it creates a rigid system in which efforts are concentrated on abiding by the book and nothing more is done. Yet another concern expressed was that rules, regulations and accountability mechanisms tend to be designed according to the needs of the system rather than those of the offender. As a result, we were told, the quality of services provided to the offender declines rather than improves.

Given the polarity of opinion that has been described, one might wonder if any common ground exists from which to fashion an approach to the problems associated with discretion in corrections. Not infrequently during the proceedings it seemed that the controversy over discretion admits little or no hope of reconciliation and that we may be set for a drawn out battle between the advocates of discretionary latitude on the one hand and of rules, regulations and due process on the other. But to draw such a conclusion would be to ignore the fact that much of the disagreement was largely one of degree, not kind. Few, if any, expressed the extreme view that discretion should be

left unfettered and the vast majority of those who attached some degree of positive value to discretion advocated the use of rules, regulations and standards to promote equity and procedural fairness in corrections. The problem we are faced with, it appears, is not to choose between one approach or the other but to establish an appropriate balance between discretionary power on the one hand and rules and regulations on the other, to ensure that discretion can operate with the least degree of abuse and the greatest possible degree of justice.

It was suggested that the appropriate balance could be attained by implementing a combination of the measures that were discussed during the proceedings, some of which are designed to promote equity and fairness, others to improve the acceptability and quality of decisions. That these mechanisms are not mutually exclusive was stressed many times during the Conference. But if a successful combination of these mechanisms is to be achieved, we were told, we must endeavour to learn more about the use of discretion in corrections and about the way in which it can be used to reflect the needs of those whom the system serves. The task of learning about discretion and how it operates in corrections is far from complete and may well be one that will never reach a final point but the discussions that took place during the Conference suggest that it is an imperative and productive undertaking.

The various points of view and ideas that were expressed during the Conference on a wide variety of topics have been grouped under several broad headings to facilitate a comparison of these ideas and opinions. We hope that this format will acquaint the reader not only with the discrete issues that were discussed but also with the general direction of opinion on broad questions such as the nature of the controversy over discretion, the measures that have and could be implemented to remedy the problems associated with discretion and the direction in which we should be headed. Part one concludes with an attempt to link together the analytical concepts and practical perspectives that were presented during the Conference and to draw out some of their possible implications.

We have endeavoured to include references to as many of the discussions as possible within the first section but considerations of space and the lack of a full transcript have forced us to omit some sessions. Such omissions were not based on the content of the discussions and to those whose remarks may not have been included we extend our apologies.

Part two of this volume consists of a selection of papers and addresses that are representative of the major themes that emerged during the proceedings. The keynote address, given by Hans Mohr, sets out the distinction between rule structures and discretion and raises important questions about

the appropriate scope of each and about the need for a suitable correspondence between the nature of discretion in corrections and the rules by which it might be structured. The factors that have led to the current controversy over discretion and the implications they have for efforts to remedy the problems associated with discretion in corrections are the subject of papers by Stewart Asquith, André Normandeau and Michael Prince. Each of these papers argues that if we are to effectively resolve the controversy over discretion, we must first carefully examine the basic values and concepts that underlie discretionary power.

The duty to act fairly and the role of the courts in corrections were discussed in several sessions and are the subject of papers by Alan Leadbeater, Michael Jackson, Walter Tarnopolsky and Howard Epstein. A related but considerably different approach to this subject is offered by Brad Willis who argues that the role of the courts should not be to merely intervene in cases of possible abuse but to oversee the administration of sentences. The impact of inmates' rights and the duty to act fairly are discussed from the perspective of correctional practitioners in the papers by Jim Phelps and Ken Payne. The importance of parliamentary and departmental initiatives in bringing the duty to act fairly to corrections is discussed by Jim Phelps and the need for enough discretionary latitude to balance the individual rights of inmates against the collective rights and security of those in the institution is discussed by Ken Payne.

John Eckstedt and Tom Ference each discuss the role of discretion in an organization and both conclude that discretion will inevitably be used at all levels regardless of efforts to restrict or prevent its use. The task then is to develop management systems that will promote the type of decision-making throughout an organization for which management is willing and able to be held accountable.

The need for standards, rules and guidelines to ensure that decisions are consistent, fair and defensible is the subject of the paper by Don Yeomans. In his opinion, the size of an organization is a critical factor in determining whether information about what is being and what should be done is communicated informally or through rules, guidelines and standards. The merits and drawbacks of guidelines, accountability mechanisms and standards were discussed at considerable length during the Conference. The papers by Mary Casey, Joan Nuffield, David Cole and David Kennedy represent some of the main arguments that were presented on each side of these issues.

The need to expand our knowledge of the complex interplay of subjective and objective factors that is entailed in the exercise of discretion was a theme that ran through many of the sessions. In the paper by Gerald Gall,

recent developments in decision theory are outlined; the objective steps that can be identified in the decision-making process and the relationship of subjective factors are described. The role of subjective factors, such as personal attitudes towards women and natives, in the exercise of discretion is the focus of the paper by Christie Jefferson. The need to prevent the hidden use of discretion is clearly demonstrated in her paper and reflects a point of view that was shared by many delegates.

The controversy over discretion is by no means confined to Canada. The papers by Olé Ingstrup, Don Gottfredson and Peter Solomon provide an insight into the issues pertaining to discretion and responses to them in Denmark, the United States and the USSR, respectively. These papers indicate that while similar problems have arisen with respect to discretion in corrections in other countries, the responses to them have varied considerably.

The papers and addresses contained in this volume illustrate the diversity of opinion that exists over the subject of discretion and perhaps bear witness to the argument that conflicting concepts of the nature and value of discretion are at the heart of the current controversy. If such is the case, the first step towards a resolution of the current controversy is to clarify what the differences are. We hope that the following volume will contribute to that task.

Sheila Lloyd

PART I

A SUMMARY OF THE PROCEEDINGS OF THE CONFERENCE ON DISCRETION

DISCRETION: HOW IT OPERATES

How discretion operates was described from several different perspectives during the Conference. In one session, recent developments in psychological studies of decision-making were outlined. In another, the question of how discretion operates was discussed from a business management perspective. The findings of research concerning the discretion of probation supervisors were described in a third session. The addresses and discussions that pertained to this subject are summarized below.

In the seminar entitled "Discretion: The Human Dimension", Gerald Gall, a professor of law at the University of Alberta, noted that discretion is an omnipresent feature of our criminal justice system and enumerated some of the key points at which it is exercised.[1] He expressed the opinion that discretion is a valuable feature in that it allows our system to seek the ends of justice through an exercise of flexibility. He went on to examine decision-making from the perspective of the scientific or objective factors and the non-scientific or subjective factors. Drawing on the work of Dr. Elaine Borins and His Honour Judge Stephen Borins, he noted that there are six identifiable steps in the decision-making process:

1. gathering information;
2. interpreting information;

---

[1] For the full text of the address, see Part II.

3. outlining alternatives;
4. weighing alternatives;
5. deciding priorities;
6. making a final choice.

Factors that determine one's ability to make decisions include:

1. the need for information;
2. confidence in the accuracy of one's decisions;
3. perceived ability as evidenced by the willigness to take risks;
4. tendency to defer decisions;
5. the decision-maker's own view of his decision-making ability;
6. peer-rating of decisiveness.

Professor Gall stated that while these factors can be isolated and identified through scientific analyses of decision-making, there are a number of less readily identifiable subjective factors that enter into the process. The human, subjective factors that influence decision-making pertain to all facets of the decision-maker's life including economic background, political and religious beliefs, self-image and the state of his or her emotions. He informed us that several other important, miscellaneous factors have been identified by Dr. and Judge Borins which are likely to influence the exercise of discretion by judges and are equally likely to affect other decision-makers in the criminal justice system. These factors are:

1. a system of precedent and stare decisis under which decisions in similar, previous cases either bind or strongly persuade the decision-maker;

2. public policy which often must be ascertained by the decision-maker and is therefore susceptible to the personality of the decison-maker;

3. the fact that the decision-maker will have an effect on the liberty of the subject; this factor will have a varying effect depending on the decisiveness of the decision-maker;

4. a sense of remoteness and isolation created by the position of the decision-maker itself;

5. the effect of the adversarial process on the decision-maker.

With respect to the latter, Professor Gall pointed out that at least two

studies have suggested that the very nature of the adversarial process works against efforts by the decision-maker to be neutral and detached.

During the same session, Don Andrews, a professor of psychology at Carleton University, outlined his study on the inter-relationship between the personal attitudes of probation supervisors and probationers, their behavior and practices during supervision and recidivism patterns during a three year follow-up period. He began his address by stating that his research clearly demonstrates that, in Ontario at least, the most effective elements of supervision are not legislated but discretionary. He then briefly described the methodology of the research he has done in this area. The study first entailed an assessment of personal attitudes, including:

1. sensitivity to people or empathy;
2. sensitivity to procedures;
3. attitude towards authority (law, police, courts);
4. anti-criminal attitude;
5. self-esteem, sense of personal adequacy;
6. level of anxiety, tension;
7. maturity, adequacy of life-skills;
8. early experiences: positive or negative.

The next focus of his research was the relationship between these assessments and the behaviour of probation supervisors. The work behaviour examined included:

1. communication practices;
2. extent of pro-criminal statements;
3. problem-solving/extent of help provided;
4. references to authority;
5. referrals to other services.

The measurements of these factors were based on manager's reports, evaluations of supervision periods by probation officers, and probationers, and taped interviews of sessions between probation offices and probationers.

In summary, the results which he presented indicate that officers who are relatively sensitive to rules and procedures, who express pro-social attitudes during their sessions with probationers and who engage in directive, problem-solving counselling tend to be those who have a fairly high sense of self-esteem and are relatively free of tension. Measurements of high sensitivity to people, and low sensitivity to procedures, authority and criminal behaviour tended to correspond with a more open, non-directive, "Rogerian" approach to supervision and less emphasis on problem-solving.

He informed the audience that his studies suggest the following: a strong direct correlation between a directive, problem-solving approach to supervision and reduced recidivism amongst the high risk group of probationers; a positive correlation between the use of authority and reduced recidivism amongst the high risk group; and a positive correlation between a strong anti-criminal attitude and reduced recidivism amongst the high and low risk groups of probationers. In turn there seems to be a direct correlation between the empathetic, active-listening approach to supervision and an increased level of recidivism; the higher the level of empathy and active listening, the higher the level of recidivism.

The implications which he drew from these findings are that those selected for the task of probation supervision should be highly socialized, sensitive to rules, procedures, self-assured and able to use their authority. His studies suggest, he said, that training is effective in increasing the level of performance amongst supervisors. They also suggest that supervisors should identify the high risk probationers on their case load and direct most of their attention to them. He cautioned, however, that to do so would probably bring about some drop in the rewards of a supervisor's job since, even with skillful supervision, the high risk group is more likely to recidivate than the low risk group. A final implication which he drew from his research findings was that the performance of supervision officers should be monitored and effective behaviour rewarded.

The second session which focused on how discretion operates was entitled "Organizational Structure and Decision-Making". The first speaker[2], John Eckstedt, a professor of criminology at Simon Fraser University, suggested that the nature of an organization, like that of a living organism, is often revealed by its responses to some form of intervention. He stated that, in the case of correctional systems, interventions that have consisted of program initiatives and the introduction of new services have generally been easily accomodated. However, interventions that introduce changes in the philosophy, method or style of correctional management have generally been successfully resisted. He argued that this resistance, which can be compared to the antibody response of living organisms, suggests that intervention directed at the structure of the system and the decision-making process threaten a vital aspect of correctional organizations. This vital aspect, according to Professor Eckstedt, is the high level of individual discretion that exists within correctional organizations and which stems from the lack of a clearly-defined collective purpose in corrections. "Since it has not been possible to

2 For the full text of this address, see Part II.

come to any clearly-defined, collective agreement about the purpose of corrections work," he stated," the nature of decision-making within corrections organizations is, for the most part, dependent on the exercise of individual discretion." He went on to state that "... it is not surprising that there is resistance to any overall structural innovation, particularly structure innovations which attempt to create a movement away from individual discretion toward corporately defined and enforced goals." The implications which he drew from these observations are that any structural reform of a correctional organization must recognize the nature of the organization and the significant role that individual discretion plays in it. Given this situation, he argued, decentralization will work more effectively than centralization. In his opinion, any structural reform that is undertaken should be directed to support the intelligent and informed use of discretion by the people closest to the client.

The second speaker, Tom Ference, a professor at the Graduate School of Business of Columbia University in New York, contended that discretion will be exercised at all points in an organization regardless of what the policy manual states.[3] He stated that the issue is, therefore, not whether discretion should or should not exist - it simply does - but how to achieve system control over the quality of the decisions that will be taken everywhere in an organization, whether senior management approves or not. He pointed out that the authority (the right to make decisions) and responsibility (the obligation to make decisions) for decision-making can each be delegated but accountability (the receipt of the consequences of a decision) cannot. According to Professor Ference, the result is that managers must be accountable for decisions that are made by others in the organization, a situation with which many are not comfortable. Coupled with this is the fact that most managers of not-for-profit organizations are professionals in the field in which the organization operates and are more comfortable doing than delegating. Their reluctance to delegate responsibility and authority for decision-making is compounded by the fact that they will be held accountable for decisions made by others. But, he argued, since decisions will be made by others, whether the authority to do so is delegated or not, the appropriate task is to ensure that acceptable decisions are made.

He argued that a second reason exists for delegating the authority and responsibility for certain types of decision-making and that is the nature of information flow in an organization. He pointed out that three types of information are pertinent to decision-making:

3 For the full text of the address, see Part II.

1. problem-specific information;
2. contextual information;
3. information about strategy.

He then pointed out that the rate of information loss is much greater when the first type of information is sent from the front lines to the centre of an organization than it is when the other two types of information are channelled outward to the front lines. The quality and timeliness of decisions will be better he stated, if contextual and strategic information is passed to the front lines rather than attempting to send problem-specific information to the management level. The conclusion he drew was that the task of management is not to make individual decisions but to get competence to the point in the organization where the decision will inevitably be made.

According to Professor Ference, the competence or ability to make good decisions at any level in an organization depends on two key factors. The first factor is a clear statement of the mission of the organization. Without this, he stated, decisions will be made in accordance with an individual's perception of the mission of an organization which may or may not coincide with that of the senior management. The second factor, we were told, is the competence or ability to process information. He stated that standards and procedures can be used to improve the processing of information. With respect to standards he stated: "The only kinds of standards that you ought to apply in an organization are those that intellectually reflect the specific objectives you are trying to accomplish. The only objectives that are legitimate are those that reflect the mission and the only mission that is legitimate is that which reflects the needs of the population you are trying to serve, whether it is a customer in a profit institution or a client in a not-for-profit agency. Standards establish the minimum performance that is acceptable." He added that other mechanisms for introducing process-information are in-service training and the professional qualifications process.

The addresses summarized above suggest that while the actual use of discretion is a difficult subject to explore, some success has been met in this area. As we have seen, a number of theoretical models of decision-making are being developed which may help to determine what can be done to improve the use of discretion. In the next section, we turn to the discussions that pertained to the recent controversy over discretion and the factors that have contributed to it.

THE CONTROVERSY OVER DISCRETION

The factors that have led to the controversy over discretion and the issues that are involved were identified by several speakers. Although the analyses varied somewhat, all suggested that the controversy stems from broad social and political changes and that concerns over discretionary power are not unique to the field of corrections. An erosion of confidence in professionals, a distrust of the power they yield and a crisis in the legitimacy accorded to our major social and political organizations were frequently cited as the factors underlying the current debate over discretion.

The first speaker to address this subject was Stewart Asquith[4], a lecturer at the School of Social Administration at the University of Edinburgh, Scotland. In his analysis, the current concern with discretion is not simply about the lack of rules to govern its use but may also reflect more general skepticism about the ideological basis that informs decision-making. To paraphrase the argument he presented, the enormous power that professionals in the social welfare field have enables them to impose or transmit their particular concept of the social order in the process of making decisions that concern the recipients of their services. However, those for whom they make decisions may not share the values or beliefs of these professionals and consequently may not give legitimacy to the discretion they exercise. The conclusion he drew is that what may be at issue is not simply a concern about

4 For the full text of this address, see Part II.

accountability and control mechanisms but the distribution of power and the legitimacy accorded to basic social institutions, such as the criminal justice sytem.

The subject was next addressed by John Hogarth, a professor of law at the University of British Columbia, who began by stating that the conventional wisdom within the academic cum policy-making community is that discretion is bad and should be confined, controlled and structured. He described this attitude as part of a much broader socio-cultural change which consists of a transition from status to contract based relationships in society. In his assessment, this transition is occurring in all aspects of social life including: marriage, parenthood, children's rights and labour relations. This change, he stated, is taking place at a time when people cannot recognize or evaluate the substantive quality of decisions, a fact that has resulted in a retreat into form, indeed a triumph of form over substance.

During the question and answer session that followed these addresses, Charles Reasons, a criminology professor at Simon Fraser University, stated that the problem of discretion stems from the imperialism of professionals and of treatment. He agreed that there is a crisis of legitimacy in our social institutions and maintained that those who are clients of these institutions now argue that things might not be working.

In the session entitled "The Controversy over Delegated Authority", Michael Prince[5], an associate professor of public administration at Carleton University, spoke of the meta-controversy that surrounds the controversy over discretion - the debate over what the problem with discretion really is. He asked us to consider whether the problem is one or more of the following: unease at the growth of discretionary power in general; the loss of parliamentary control over governmental decisions; the lack of public knowledge and openness surrounding the process of delegation; concern over the potential for abuse of discretionary power; concern with procedural and/or substantive fairness. In his opinion, much of the controversy is conceptual in nature and questions of an organizational, legal and procedural nature are secondary issues. The real dilemma facing us stems from the fact that discretion is seen on the one hand as an evil and on the other as something that is essentially good. In the former case, discretion is regarded as a threat to individual rights; in the latter, as the necessary means to achieve creativity in public policy and administration. Behind the controversy over discretion, he stated, is a conflict over human nature. Many people have a pessimistic view

5 For the full text of this address, see Part II.

of human nature and, he said, for them, politicians and bureaucrats cannot be trusted; other people are more willing to trust public officials.

In the session, "Confining Discretion: Are We Headed Towards A More Just System?", Don Gottfredson,[6] Dean of the School of Criminology at Rutgers University, New Jersey, spoke about the controversy over discretion in the United States. He stated that the trend towards a reduction in discretion, particularly with respect to the judiciary and paroling authorities, is but one aspect of two more general trends, the first of which relates to the fundamental purposes of sentencing and paroling, the second towards greater determinacy in sentences. In his assessment, American correctional systems are experiencing a shift away from the utilitarian principles of sentencing towards the principle of retribution or deserved punishment. Punishment in the latter case is justified strictly on moral grounds and not on grounds of effectiveness or utilitarianism. He stated that this trend, and the one towards greater determinancy in sentencing, stem from a perception that the system is not effective in meeting the aim of rehabilitation and that enforced treatment and uncertainty as to sentence length are unfair. Sentences based on the just deserts concept rather than on rehabilitation call for a greater emphasis on similar treatment for similar cases. The discretionary powers justified by individual treatment are no longer considered necessary and, in the opinion of many, he stated, are a threat to the equitable handling of cases. Similarly, the move towards determinate sentencing involves a reduction in the discretion exercised by correctional officials. Professor Gottfredson concluded his remarks with a reference to David Rothman who has suggested that while the concern over equity and fairness are laudable, in proposing these reforms, this generation of reformers has inadvertently pitted rights against needs.

During the session entitled, "The Climate of the Times and its Influence on Discretion", Charles Gordon, an associate professor of sociology at Carleton University, provided additional support for the argument that the concern over discretion stems from a low level of trust in our major political and social institutions. This low level of trust might stem from the fact that our institutions are unable to meet the widely divergent social, economic and political interests that exist today. He noted that the low level of trust exists internally as well as externally in the case of our correctional institutions. Staff do not trust inmates, nor inmates staff. Moreover, in many instances the staff does not trust management and vice versa. He stated

6 For the full text of the address, see Part II

that under such circumstances, the delegation of decision-making authority or discretionary power is likely to be resisted. The low level of trust that exists externally ultimately generates demands for laws to curb discretionary powers.

The factors that have contributed to concerns over correctional discretion in Europe were then discussed by Olé Ingstrup, a Danish prison warden and the President of the Standing Committee on Prison Regimes of the Council of Europe. He stated that the unionization of correctional staff and the formation of inmates' rights groups in Europe has led to pressure for more delegation of decision-making authority. He described the tension surrounding discretionary power in part as a reflection of tension between those who want a voice in the correctional decision-making process and those who are reluctant to delegate discretionary powers.

In his address, Sigmund de Janos, a communications and technology consultant, added another dimension to the argument that a crisis of confidence underlies the controversy over discretion. He argued that the impact of technology and mass communications - particularly that of television - has contributed to an erosion of confidence in our social values and institutions and, in turn, has led to a general sense of cynicism and mistrust.

The foregoing summarizes the analytical assessments of the controversy over discretion that were given during the Conference. In the next section, the discussions that pertained to specific problems associated with discretion are reviewed.

SPECIFIC PROBLEMS ASSOCIATED WITH DISCRETION

To resolve the controversy over discretion we must, as Michael Prince pointed out, determine what the specific problems associated with discretion are and what factors give rise to these problems. In the preceding section, the discussions about the nature of the controversy over discretion and the factors that underlie the over-all debate were recounted. In this section, the specific problems associated with discretion that were presented for consideration during the Conference are reviewed. The remarks selected for inclusion under this heading pertain strictly to difficulties ascribed to discretionary power and not to the measures that have been or might be implemented to circumscribe or improve its use. The discussions about mechanisms to curb or control discretion are presented in two later sections.

In the opening session, Stewart Asquith a lecturer at the School of Social Administration of the University of Edinburgh, spoke about two problems that are associated with discretion, each of which stems from the recent influx of professionals from various backgrounds and disciplines into our government and social agencies. The fact that there is no consensus about the objectives of social services amongst those who provide these services results in inconsistent decisions. Moreover, the lack of consensus may lead not only to inconsistency from one decision-maker to the next but to decisions that are inconsistent with the official objectives of the system. Individuals who belong to powerful professional groups and who do not agree with the official objectives of the system might, intentionally or not, thwart these objectives.

During the same session, John Hogarth, a professor of law at the University of British Columbia, stated that the problem is not one of too much discretionary power in the corrections system. In his opinion, the problem is that line staff do not have enough power and he stated that "There are more bad decisions made because of the lack of discretionary power than there are

bad decisions because of the abuse of discretionary power". The third speaker, André Normandeau,[7] professor of criminology at the University of Montreal, stated that totally unfettered discretion leads to the imperialism of discretionary power; the opposite extreme is the imperialism of legal or quasi-legal power. The problem, therefore, is to establish the delicate balance between the principles of legality and equity on the one hand and the individualization of punishment and the discretionary power it implies, on the other.

In the session, "The Controversy Over Delegated Authority", Alan Leadbeater,[8] Assistant to the Vice-Chairman, Canadian Radio-Television and Telecommunications Commission, stated that acceptability is one problem associated with administrative decision-making and one of the main reasons that acceptability is a problem is the phenomenon of goal substitution. The official, formal goals of an organization are frequently not the ones it actively pursues. Goal substitution results because the tendency of organizations is to attempt to minimize strains and maximize rewards and that dynamic generates goals of its own. "For example", he stated, "efficiency often becomes the goal which an organization is actively pursuing." He went on to point out that efforts to reduce outside criticism might also result in goal substitution. The second problem associated with administrative decision-making, according to Mr. Leadbeater, is that of quality. Decisions of quality, he argued, are not achieved simply by observing the procedural requirements of the adversarial, adjudicative method. "While fairness is not a foil to quality decisions," he said, "it can come into conflict with quality when it is assumed to be best served by observing the procedural requirements of the adversarial, adjudicative method".

During the discussion period, one member of the audience stated that what is most disturbing about discretion is how often administrators fail to reveal or provide the reasons for their decisions. "The use of formula words that have survived judicial review does not lead to the growing evolution of norms in any institution", stated the delegate. Another member of the audience pointed out that whenever there is a review process, decision-makers will try to structure their decisions in such a way as to avoid being overturned and

---

7 For the full text of the address, see Part II.

8 For the full text of the address, see Part II.

that may mean couching the decision in words known or thought to be acceptable to the review body.

In the session, "Confining Discretion: Are We Headed Towards a More Just System?", Bill McGrath, then Executive Director of the Canadian Association for the Prevention of Crime, pointed out that one form of discretion is policy-setting and policy can take the place of the law, one example being decisions about which laws to enforce and when. He also pointed out that one of the serious problems with discretion is that it can open the door to discrimination. Yet another problem, he stated, is that the responsibility of exercising discretion frightens many individuals and precipitates what Eric Fromm has identified as a flight from freedom. In such cases, we automatically seek the security that is offered by regulations. In his opinion, most of the problems associated with discretion stem from the inability of staff to handle a given situation competently. During the discussion period that followed the speakers' presentations, one of the delegates, who identified himself as an ex-inmate, commented that from the perspective of an inmate the problem is not too much but too little discretionary authority in the hands of front-line staff. He stated, "too clearly in the area of discretion, particularly with line staff - classification officers, parole officers, living unit officers - there is not enough discretionary power". He went on to say, "they are dominated by policies made by administrators and there is a definite lessening in the use of discretion".

The need to ensure that discretion is exercised in a way that is acceptable to the public and the problems related to this requirement were the subject of considerable discussion during the Conference. Some of the comments pertaining to this particular problem have already been cited. A number of other statements were made on this subject. During the session, "The Climate of the Times and its Influence on Discretion", Olé Ingstrup,[9] a Danish prison warden and the President of the Standing Committee on Prison Regimes of the Council of Europe, stated that the political and public requirements not to make a mistake are higher in the field of public administration than they are in the management of private sector organizations. As a result, decisions must be easy to explain and the means by which the decision has been taken must be explicable and seem fair to the person in question. The role of the public in determining whether an administrative decision is considered acceptable or not was also discussed in the session on the exercise of administrative discretion and the participants generally agreed that the public's perception is a key factor in determining whether or

---

9 For the full text of this address, see Part II.

not a decision is acceptable. The problem, it was concluded, is not the existence of discretion per se but the need to improve public understanding of the decisions that are made and to achieve decisions that are publicly acceptable.

During the session "Inmates' Rights: The Case Law and its Implications for Prisons and Penitentiaries", Michael Jackson,[10] an associate professor of law at the University of British Columbia, commented that the problem of the erosion of legitimacy stems from the worst abuses of discretionary power and, even if they do not represent the full picture, it is those abuses that inform people's perception of imprisonment. He stated that "the worst parts of a system poison the attempts of those who are trying to achieve the best in a system".

In addition to the problem of public acceptability, another problem cited was that of meeting the often competing objectives established by government itself. In the session, "The Discretion of Policy Makers", Tanner Elton, Director of Criminal Justice Policy for the Ministry Secretariat of the Solicitor General of Canada, pointed out that the discretion of policy-makers differs from that of other correctional workers in that it affects the system at a macro rather than a micro level. The problem confronted by those responsible for policy recommendations is that the recommendations must often reflect the competing economic, social and political goals of government policy.

The problem of openness and disclosure of information was another issue that was raised during the Conference. During the session, "The Discretion of Policy Makers", Ted Harrison, The Vancouver Regional Director of Corrections for the Ministry of the Attorney General of British Columbia, observed that it is difficult to be fully open about policy or decisions if and when they involve sensitive issues such as an individual's performance. In the session that dealt directly with this subject, "How Much Openness Can the System Tolerate?", David Cole[11] was asked to discuss his experience as a practicing lawyer in obtaining information from correctional authorities. His remarks were confined to the federal parole system and were sharply critical of the way that parole officers and Board Members use their discretion to disclose

---

10 For the full text of the address, see Part II.

11 For the full text of the address, see Part II.

information. The problem, as he described it, is one of power tripping by those who hold the power to disclose information. He stated that "...parole officers, and to a lesser extent, Board Members regard issues surrounding the disclosure of information at best as a nuisance and at worst as threatening to what Chief Justice Laskin has referred to as a tyrannical authority." He went on to say that it is simply a contemptuous attitude towards the dignity of the human being to base decisions about freedom on information that is not disclosed.

He attributed the refusal to disclose information to two factors. The first factor he discussed was the presence of some individuals "...who derive almost sadistic pleasure from their power over parolees...". But this, in his opinion, is a problem limited to a few individuals and does not account for most of the difficulty in obtaining information. The more significant factor, in his opinion, is confusion and a sense of threat amongst parole supervisors over the whole question of disclosure.

He went on to identify three specific problems that confront the lawyer who is trying to obtain information. The first is the unwillingness of parole officers to release information gathered from the police. The second is the frequent refusal to release information gathered from third parties and the third problem is the general refusal to release information provided by mental health officials.

He noted that the refusal to release police reports is particularly perplexing since the police are willing to release such reports themselves. Moreover, he pointed out, in Ontario there are legislated measures to ensure that all relevant information be provided to the defence. With respect to information obtained from third parties, the problem created is that allegations made, for example, by a spouse are not disclosed and therefore cannot be tested, yet they may form the basis for a particular release decision. In general, he noted, two reasons are given for not disclosing psychiatric and psychological reports: protection of the person who made the report is one; the other is the argument that the release of such information could adversely affect the therapeutic relationship. That this argument opens the door to professional paternalism and is not acceptable is, he stated, supported by the Krever Report on the confidentiality of health information. In summary, he argued that the refusal to disclose information results in a paternalistic manipulation of information which violates the duty to act fairly and leaves the inmate in a disadvantaged position when it comes to presenting his case.

The next speaker to address the question of openness in correctional systems was Brian Pollick, then Executive Director of the John Howard Society

of Alberta. In his opinion , total openness or disclosure is impossible in today's correctional systems in Canada. That is so, he argued, because openness is a threat to the very basis on which the systems perceive themselves to be operating. According to Pollick, openness is not simply an action or a series of actions but much more - it is a philosophy. It is, he stated, a belief system that is essentially predicated on a positive attitude towards men in general and to the clients of the system in particular. Openness demands both clarity of purpose for the whole exercise of discretion and is predicated on an absence of fear. He contended that there is a basic lack of understanding and a confusion as to the purpose for having discretionary decision-making powers in corrections, a point of view, as we have already seen which was shared by a number of speakers and delegates.

He identified three justifications for discretionary power:

i) the humanization and individualization of judicially ordered dispositions in order to minimize the damaging effects of incarceration and contact with the system;

ii) to control offender behavior in order to make the system more manageable;

iii) to alleviate unusual or undue stress on the system, an example of which is overcrowding.

He then stated that, if these rationales or purposes are confused or if the people who exercise discretionary power are not aware of the reasons they are doing so, it is difficult to be open about discretionary decisions. Moreover, in decisions based on the second and third rationales it is almost imperative to be covert rather than overt simply because they involve decisions based not on invididual needs but on the maintenance of the system.

In his opinion, the second and by far the greatest factor preventing an open system is the ever present state of fear. The very nature of the system works against a positive view of the offender; it breeds a sense of paranoia amongst those who work in, manage or are politically accountable for the correction systems in Canada. He argued that, in such a climate, openness is not likely to flourish. The third contributing factor which he identified is that the purpose of the correctional system has never been clarified. The old punishment versus rehabilitation argument has never been decided. Instead, according to Mr. Pollick, we simply try to make the system all things to all people. In his opinion, the fourth factor that militates against openness is the tradition of secrecy in corrections. The two remaining factors, in his opinion, are the fact that the management and administrative levels are politically vulnerable and that we are currently in a state of transition in which the old staff and inmate roles are no longer valid. He argued that,

given all of these factors, it is not surprising that there is an overall fear which is expressed in a negativeness that discourages the taking of risks. He concluded that the problem is not with discretionary powers per se but with the mood or mentality that prevents the proper exercise of discretion and. in turn, prevents the open, unguarded disclosure of information that should accompany the exercise of discretion.

Two implications of a lack of information for society as a whole were suggested by the next speaker, John Braithwaite, Deputy Commissioner, Communications, Correctional Service of Canada, who stated that the lack or curtailment of information creates a society that is unable to discern critical differences and is incapable of exercising real discretion. The public is left unaware, he said, of the possible choices or alternatives and the ultimate effect is a corrosion of the total democratic process. The question of openness and the exercise of discretionary power were also the focus of discussion in the session "Simply Sensationalism? The Press as a Watchdog". The argument that a climate of fear and secrecy and an inability to clearly state the purpose and objectives of correctional systems stand in the way of openness was endorsed by the two journalists on the panel: Karl Polzer of the Whig Standard in Kingston, Ontario and Gerry McNeil from the Ottawa Bureau of the Canadian Press. Karl Polzer stated that, as the journalist responsible for covering penitentiaries, he has found that he has a three-sided organism to deal with. It consists of staff, administration and inmates. The inmates, he has found, tend to exaggerate, the administration in his assessment, is quite open but lies when it has to and the staff are extremely secretive, partly, he believes, because they have been mistreated by the media. The problem that arises when information is not revealed, according to Polzer, is that balanced coverage becomes increasingly difficult to provide.

During the same session, Gerry McNeil stated that from his perspective as a journalist and from his experience with the Parliamentary Sub-Committee on Prisons and Penitentiaries he has concluded that those who come into contact with the criminal justice system are dealing with a very powerful government force against which they have virtually no legal protection, and no financial resources with which to protect themselves. His own view of the system is that we all have to be on guard against powerful governmental organizations and that it is the responsibility of all citizens to guard against the misuse of government power. Unfortunately, he stated, few individuals have the financial resources or knowledge required to resist abuses by the system.

During the session, "Testing Controls: Are Review Mechanisms Effective?", Lisa Hobbs, a Member of the National Parole Board, identified four specific problems associated with discretion that are brought to the Internal

Review Committee of the National Parole Board. The type of complaints received suggest that the problems inmates have with the discretion exercised by the Board are:

1. Inadequate preparation and/or presentation of their cases;

2. Unsettling attitudes on the part of Board Members;

3. Board Members are unable or unwilling to perceive the changes inmates feel they have undergone.

4. Decision was based on an error in fact.

In the session "Accountability Measures for Corrections", Brad Willis,[12] a practising lawyer, identified unfairness, inefficiency and lack of public accountability as the three major problems associated with discretion in corrections. He contended that these problems stem not simply from the lack of rules and regulations or from the lack of a clear statement of purpose but also from the degree of separation that exists in Canada between the sentencing, or adjudicative, function on the one hand and imprisonment, or administrative, function on the other. In his opinion, as a result of the disjunction between the two, judges have little knowledge of the institutions to which they sentence offenders and correctional authorities have the full discretion to make a number of decisions that ultimately determine the nature and severity of the punishment. He argued that the sentence pronounced in court has limited relevance to the conditions of imprisonment or the length of sentence for any given individual. Thus, in his opinion, the deterrent effect of criminal sanctions is highly arbitrary. Because the court cannot control either the "announcement effect" of a punishment nor the punishment that will actually be inflicted, the public has no idea what any sentence really means to a convicted offender. He stated, moreover, that the practice of sentencing people to institutions rather than specifying punishments leads to a number of incongrous results: for example, incarceration deprives heterosexuals of their normal sexual activity but not homosexuals.

According to Mr. Willis, a further problem that results from the disjunction is that judges do not have adequate information before them in passing sentence. He contended that, in sentencing an offender who has a previous record, neither the offender nor the judge in a Canadian court normally has access to an adequate report of the facts surrounding previous offences, the nature and effect of previous punishments, or the offender's

12 For the full text of his address, see Part II.

conduct in the intervening period. In his opinion, judges would not likely tolerate such a state of affairs if their involvement continued past the sentencing announcement. He stated that, if there is a body of expert knowledge uniquely applicable to the punishment process and which all judges should possess, we do not yet have the faintest idea as to what it might be. Nor, he went on to say, are we likely to develop any reliable body of knowledge as long as we continue our present practices: namely, sentencing offenders to institutions in which they will not necessarily be kept, for periods of time which they may or may not serve, to suffer punishments which we cannot specify in advance, verify while being inflicted or ascertain in retrospect.

The problem of discriminatory practices in the exercise of discretion was raised by Christie Jefferson,[13] Executive Director, Elizabeth Fry Society of Canada, during the session "The Exception to the Norm: Women in Justice". The fact that the majority of those who end up in prison are the powerless in society - the poor and minority groups - is, she suggested, evidence of the need to examine the role of discretion in the process of selecting who to charge and prosecute, who to send to prison and who to conditionally release. There is also evidence to suggest that women are subjected to the discriminatory use of discretion in our criminal justice system, some favourably, others unfavourably. In her opinion, the disproportionately high number of poor and native women in our prisons suggests the possibility that a discriminatory bias against these women is exercised in the system. Ms. Jefferson stated that the conditions to which poor and native women are subjected within the prison lends further support to the suspicion that they are discriminated against. She suggested that several factors might account for the discriminatory use of discretion in the case of some female offenders including a general lack of knowledge amongst criminal justice officials about the social services available to natives. A second possible factor is the absence of women and native administrators in the system and a general lack of sensitivity to the needs of female offenders.

The foregoing summarizes the discussions that pertained to the specific problems associated with discretion and the factors that give rise to them. Stated briefly, the problems associated with discretion that were identified during the conference were inconsistencies in decision-making between various components of the criminal justice system, the lack of openness in decision-making, the substitution of policy for law and discriminatory practices in the use of discretion. Another and quite different problem identified by some

13 For the full text of this address, see Part II.

speakers was the lack of discretion at key points in the criminal justice system. The most frequently cited explanation for the problems associated with discretion was not the existence of discretionary power per se nor the absence of rules and regulations but the lack of a clear purpose or mission within the criminal justice system. According to many individuals, the lack of a commonly understood purpose results in the exercise of discretionary power on the basis of personal values, public opinion and system goals rather than legitimate and clearly established principles.

The following section summarizes the discussions during which the types of mechanisms currently being implemented to curb or improve the use of discretion were identified and described.

MEASURES THAT ARE BEING IMPLEMENTED TO CURB OR IMPROVE THE USE OF DISCRETION IN CORRECTIONS

A wide variety of measures have been developed in response to complaints about the use of discretion in corrections not only in Canada but in most Western countries. Some of the measures that have been adopted pertain to the procedural element of decision-making, others to the substantive. The following section presents the descriptions that were given during the Conference of various mechanisms currently being implemented. The first part of this section reports on discussions about measures that are being implemented in countries other than Canada. The next part reviews the discussions that took place concerning such mechanisms as standards and accreditation, parole guidelines, parliamentary accountability and internally promulgated rules and regulations. In the final part of this section, descriptions of recent developments in case law and the duty to act fairly are recounted.

Steps That Have Been Taken in Other Countries

In the session entitled "Structuring Discretion Through Rules, Guidelines and Openness", Stewart Asquith, a lecturer at the School of Social Administration of the University of Edinburgh, provided an account of the measures that have been implemented to control the use of discretion by Scotland's Children's Hearing System and the Scottish Parole Board. He informed us that the Children's Hearing Committee was established in 1971 on several premises including the following:

- children who commit offences are in need and are no different than other needy children;

- the judiciary is not competent in assessing needs;

- the court is an inappropriate setting for handling children;

- decisions about the needs of young offenders should be made by a specialized body operating as a tribunal whose only function is decisions about the needs of children who have committed offences.

He stated that the Children's Hearing Tribunal is not a court of law; questions of fact must be referred only to a court of law. Punitive measures are not available to the Hearing Tribunal. Furthermore, children and parents are not entitled to legal representation. He informed the audience that the Tribunal decides, on the basis of school, police and psychiatric reports, whether the child should be given compulsory measures of care, such as supervision or residency in a community centre. The ultimate decision, we were told, rests not with the professional social worker or the psychologist but with lay members of the community.

He went on to describe the way in which discretion is exercised in the Children's Hearing System. An effort is made to ensure high visibility in the decision-making process by holding open, informal discussions in the presence of the client. He noted that discretion is exercised with care but that there are problems. For example, he said, due to the informality of the hearing, the few legal requirements that have been applied tend to be ignored. One of these requirements is to make the child aware of the case against him or her to ensure that, if the case is refuted by the accused, it will be referred to the court. A second problem is the conflict over what criteria there are for a review. Some argue that procedural violations alone constitute grounds for appeal. Others claim that the sheriff can intervene in substantive decisions and that the sheriff's court has the right to determine if appropriate intervention has been ordered and the child's rights respected. The situation, in his opinion, ultimately leaves little protection for children and their families.

In the session, "The Climate of the Times and Its Influence on Discretion", Olé Ingstrup, President of the Standing Committee on Prison Regimes of the Council of Europe, described the Danish correctional system as one which has a high degree of power delegation and a high degree of discretion at the front lines. He stated that an active information policy was developed in order to create a general understanding of the system's policies. Since then, in his opinion, the administration has been less

vulnerable to public criticism. In his assessment, changes in the distribution of discretionary power in European correctional systems have been influenced by the recent unionization of the civil services of many European countries. The unions have pressured their governments for greater involvement of union members in correctional decisions. He informed the audience that one consequence has been the delegation of more discretionary power down through correctional systems. Some administrators, he stated, regard this as a threat to the maintenance of efficient management, others welcome it.

According to Mr. Ingstrup, another development pertaining to discretion in corrections in Europe has been the emergence of inmates' rights groups and demands for more precise clarification of the legal rights of inmates, faster treatment of their applications, and more inmate participation in the structuring and planning of daily living schedules. Another change in the use of discretion in Denmark has been the development of more on-the-job training programs to improve the staff's ability to make decisions. He stated that a greater reliance on front-line staff has become necessary in view of the economic constraints under which European correctional systems must now operate and this situation has in turn forced prison administrators to find means of improving the use of discretion by staff members.

Steps Being Taken to Improve or Control the Use of Discretion in Canadian Correctional Systems

In the session on standards and accreditation in corrections, Glenn Angus, Project Director of the Standards and Accreditation Project of the Canadian Association for the Prevention of Crime, pointed out that standards have been around as long as there has been a field of corrections. He commented that the existence of the visiting magistrate in 18th century Britian clearly implies that there were standards to enforce. One hundred and eleven years ago, the American Prison Society prepared a declaration of principles and sixty years later these same principles were reiterated. That set of principles, he stated, is the forerunner of today's standards and accreditation process. He stated that the American Corrections Association has produced manuals on standards for the last thirty years but that their proper application has come about only recently with the development of accreditation. The Correctional Service of Canada is now committed to the American accreditation process. He argued that correctional standards allow us to measure and compare the quality of service provided by correctional agencies.

Mr. Angus went on to describe the process by which the Canadian Association for the Prevention of Crime has developed a set of standards for

Canadian correctional systems. He informed us that sixteen working groups had been established, five of which worked on standards for institutions, four on organization and administration of government and non-government correctional agencies, three on community residential centres and community correctional centres and two on releasing authorities, including parole boards and temporary absence granting authorities. The standards will undergo a process of revision after having been appraised by the correctional groups and agencies that will be affected by them.

A second important mechanism that is used to limit discretion is parliamentary legislation. In the session, "The Discretion of Policy Makers", Ted Harrison, the Vancouver Regional Director of Corrections of the Attorney General of British Columbia, pointed out that there are various forms of legislation that govern us depending on our particular role in the system. These statutes include the Penitentiaries Act, the Prison Reform Act, the Corrections Act of British Columbia and the Parole Act, to name but a few. He noted that there are also pieces of legislation such as the Judicial Review Act that place some limitations on the use of discretion.

Another measure that has been implemented in some parts of Canada to oversee the use of discretion is the office of the ombudsman. In the session, "Testing Controls: Are Review Mechanisms Effective?", Linda Bonin, an official of the Ombudsman's Office of Ontario, described the authority and function of this office. She pointed out that the Ontario Ombudsman is one of nine legislated ombudsmen in Canada. The ombudsman is independent from the Government of the day and has the authority to investigate the acts, omissions and decisions of all government agencies and departments. She further informed us that the ombudsman's duty is to reconsider decisions after making an impartial investigation into them but the office carries no authority to enforce recommendations. She stated that the office has access to internal files, can summon and cross-examine witnesses and has the right to enter the province's institutions.

Ms. Bonin also informed us that, in 1980-81, almost two thousand of the complaints received by the Ontario Ombudsman pertained to the correctional system. While the ombudsman is responsible for areas other than corrections, the largest number of complaints involve the correctional system. According to the speaker, these complaints range from the trivial, such as objections to cold toast, to the serious, including charges of assault. She stated that with respect to the correctional system, there are two significant factors that affect the ombudsman's role. The first is that correctional institutions are governed by a short statute and a set of regulations, both of which are broadly worded and give the warden wide discretionary powers. The second factor is that the correctional system has developed internal review

mechanisms which inmates are instructed by the Ombudsman's office to use before turning to it.

Another review mechanism that is used to control discretion in the correctional system is the federal Correctional Investigator's Office which was established in June, 1973 under Part II of the Enquiries Act. The role of the Correctional Investigator was described by Ed McIsaac, an official of that office. He pointed out that there are four officers in the correctional investigator's office each of whom is responsible for ten to twelve institutions which they visit every four to six weeks. Some visits are announced, others are not. The officers review the information on which decisions are based and assess the final decision. He stated that the Correctional Investigator has powers similar to those of the ombudsman including the right of access to files, the right to visit institutions and the right to private correspondence with inmates. The Correctional Investigator has the power to make recommendations but has no power to enforce a remedy. Mr. McIsaac pointed out that the Correctional Investigator is not a replacement for internal review. Inmates are advised by the Correctional Investigator to go through the internal review process before appealing to the Investigator's Office. Recommendations for policy change are put forward by the Correctional Investigator in the Annual Report of the Solicitor General which is tabled in the House of Commons but the Investigator's Office is not a policy-making body.

During the same session, a third type of review mechanism, the Internal Review Committee of the National Parole Board, was described by Lisa Hobbs, a National Parole Board Member. Section 22 of the Parole Regulations, which came into effect in October, 1978, prescribes the circumstances in which the National Parole Board must re-examine decisions to deny fall parole and to revoke fall parole and mandatory supervision. Currently, the Committee consists, in each case, of three Members who have not previously voted on the case. The grounds for review include:

i) the reasons given do not support the decision;

ii) new evidence is available;

iii) some relevant information was not considered;

iv) an error in fact or law.

The Committee can affirm a decision; set a new review date; order another hearing; cancel a revocation; grant full or day parole or put aside an unreasonable case.

The decisions of the Internal Review Committee, we were told, normally require three votes and the majority rules. Upon receipt of a request for review from an inmate, his or her file is examined by an internal review case analyst. An analysis of the case is prepared for the Committee. The case is reviewed and voted on; the inmate is then notified of the decision and the reasons for the decision.

Measures to increase accountability to the public and to Parliament were often recommended as a means of ensuring that the discretionary power of not only correctional agencies but all government bodies is not abused. Descriptions of some of the measures that pertain to corrections were given during the session, "Accountability Measures for Correctional Systems". Simma Holt, a National Parole Board Member, discussed the system of accountability that has been established between correctional systems and Parliament. In theory, she stated, the administration of correctional systems is accountable to the public through Parliament. The specific accountability mechanisms that are supposed to subject departmental administration to Parliamentary scrutiny are Question Period in the House of Commons, Parliamentary Committees and the Auditor General.

The role of the latter was elaborated by Joe Hudson, an official of the Auditor General's office. He remarked that the requirement that Government be accountable to the elected representatives is the price that we exact in our democratic process for the gift of power. Auditing, he stated, is the process that is super-imposed on the accountability process. An audit is usually performed by a third party, primarily serving the interests of the party that delegated the responsibility. At the federal level in Canada, the Auditor General is that third party and is responsible for comprehensive auditing which involves reviewing and testing financial systems and internal controls and assessing whether management has established procedures to ensure that expenditures are meeting the stated objectives. The Auditor General's task is to call attention to any lack of procedures for measuring the effectiveness of programs in cases where such procedures could be implemented. The Auditor General is not directed to report on the extent to which government programs are effective. He noted that an underlying assumption of the mandate is that government departments are responsible for formulating their objectives and instituting procedures to measure and report the extent to which they are being achieved.

Accountability to the public through other than parliamentary mechanisms was also frequently recommended as a means of controlling the use of discretion in corrections. In general terms, this form of accountability was

described as openness. The steps that have been taken by the Correctional Service of Canada in this regard were described by John Braithwaite, Deputy Commissioner of Communications for the Correctional Service of Canada. During the session, "How Much Openness Can the System Tolerate?", Mr. Braithwaite reported that in October, 1981, the Privy Council office issued a Statement of Basic Principles for a Communications Policy. The basic principle enunciated in this particular document was that Canadians have the right to full, accurate and timely information about their government and programs so that they can exercise their rights of citizenship and take part in the democratic process in a responsible and informed manner.

Mr. Braithwaite stated that the Correctional Service of Canada has been operating for the past four or five years under the general admonition contained in the Parliamentary Subcommittee Report on Penitentiaries that it must be open and accountable to the public. He stated that, before the report was written, the Canadian Penitentiary Service, if not silent, was extremely cloistered. This situation, he said, has been changed. Consultation, though far from a perfected art, is much more common now than ever before. Advisory councils ranging from the National Advisory Committee to individual Citizen Advisory Councils are attached to virtually every institution within the system and are ensured access not only to policy but also to operational procedures. In conclusion, he stated that he knew of no other service in Canada or the United States that is as open and accessible as our federal correctional service.

Several other mechanisms employed by the Correctional Service of Canada to control the use of discretion were identified by Don Yeomans,[14] the Commissioner of the Correctional Service of Canada. He stated that rules, regulations and standards are being implemented to ensure that uniform service of an acceptably high level is provided across the country. One example are the standards for classifying inmates that have recently been developed. The standards make it possible to classify inmates in a uniform manner on the basis of clearly stated criteria and provide a means of assessing experimental changes in classification.

The implications of various methods of conflict resolution for the use of discretion in corrections were discussed by Michael Mandel, an associate professor of law, Osgoode Hall Law School. The three methods he reviewed were mediation, the adversarial process and the inquisitorial process. Mediation, he said, implies a relationship of equality between the disputing parties.

---

[14] For the full text of his address, see Part II.

The parties involved are bound by the mediated settlement. One example of this type of conflict resolution in corrections is the office of the Correctional Investigator. He stated that the adversarial process allows the parties to the dispute to control the presentation of issues and evidence but the adjudicator imposes his decision. This method of conflict resolution requires that a specific charge be laid and it becomes the focus of the process. The third method of conflict resolution is the inquisitorial process. In this case, all power rests with the inquisitor and there is no requirement for a specific charge: thus, the inquisitorial process involves absolute discretion. He stated that examples of the use of this process in corrections are parole board decisions, temporary absence decisions and the granting and withdrawal of earned remission. This method of resolution, he said, is fitted to determining the inmate's attitude, including his or her deferrence to authority.

In Professor Mandel's opinion, the National Parole Board still operates on an inquisitorial basis even though it now reveals the information under consideration to the inmate. He went on to say that he bases this conclusion on the fact that, in his assessment, release decisions are still determined by nebulous criteria. He argued that there is considerable emphasis on factors such as employment plans and previous offences and it is still a process designed to reveal the inmate's attitude.

In the opinion of Frank Steel, Chief of Inmate Affairs for the Correctional Service of Canada, the most just form of conflict resolution in institutions is internal resolution through discussions with staff and inmates. One formal mechanism of conflict resolution that has been implemented by the Correctional Service is the inmate grievance procedure, which, he stated, works well. Thirty-five per cent of grievances are resolved by immediate action; only five per cent move on to staff/inmate committees.

The third speaker during the session on conflict resolution was Chris Lorenc, the Independent Chairperson for Stony Mountain Institution. He informed the audience that the Independent Chairperson occupies a relatively new position in federal institutions. The hearings over which the Chairperson presides are not a court of law and rules of evidence do not apply. The Independent Chairperson must balance the tenets of natural justice to ensure that the procedures provide protection both to staff and inmates. He added that the Independent Chairperson must remain neutral. The swiftness required in decision-making means that involving legal counsel for inmates and, in turn, for staff would be detrimental to the process. He pointed out that natural justice requires that there be clear charges. In the future, he said, there may be recommendations for a reduction in the number of possible

charges, for greater precision in the wording of charges and perhaps also for more sentencing options.

The independence of releasing authorities as a means of controlling discretion was addressed by Maurice Gauthier, Chairman of the Quebec Parole Board, and William Outerbridge, Chairman of the National Parole Board. According to Mr. Gauthier, the Quebec Parole Board was given an independent status similar to that of a civil court to ensure objectivity in parole decision-making. The Board is not responsible for granting temporary absences or day parole; these programs are seen as part of imprisonment and therefore belong within the jurisdiction of prison administrators. Other measures that are taken to ensure that decisions are fair and appropriate include:

i) careful selection of Board Members;

ii) respect for the rights of inmates;

iii) criteria that are well elaborated yet which respect the need for discretion;

iv) a procedure for hearings that encourages the participation of all persons directly affected;

v) good liaison between the Board and the judiciary.

Mr. Outerbridge began his remarks by stating that checks and balances are needed in any system that exerts power over other individuals. He noted that efforts to distribute power in a democratic society include the distribution of authority between the judiciary, the legislature and the administration. Similarly, he stated, there is a need for checks and balances in corrections to ensure: one, that power is not unduly concentrated in one place, and two, to check its misuse. An independent paroling authority is one way, he stated, to achieve a dispersal of power and to create a system of checks and balances. In his opinion, to be both the releaser and the keeper is to be caught in a double role and to operate without the type of check that results from the separation of function and, therefore, of power.

During the same session, Gordon Smith, Executive Secretary of the Ministry of State for Social Development, Canada, expressed his agreement with the need for checks and balances within any system. He stated that since independent decision-making bodies are ultimately accountable to Parliament through a Cabinet Minister, the Minister must have some way of ensuring that acceptable decisions are made. The measures being implemented to achieve this include precisely worded statutes and regulations to govern the independent

body and explicit policy for decision-making. He also noted that accountability with respect to the performance of the head of an independent organization such as the Parole Board is a matter that the Government is examining.

The discretionary power of parole boards and measures that are being implemented to curb and improve its use was the subject of discussion in several other sessions. During the session "Currents in Correctional Theory: The Effect on the Allocation of Discretion", John Vandoremalen, the Assistant Chief of Publications of the Correctional Service of Canada, stated that criteria are being established that will lead to a recommendation for parole. One objective of the criteria, he said, is to counter biases towards participation in institutional programs. The rationale behind this measure, we were told, is that too often case managers base at least part of their judgement on involvement in programs which is not necessarily fair since many good offenders do not get involved in programs.

During the session "Structuring Discretion Through Rules, Guidelines, Openness", Don Gottfredson, Dean of the School of Criminal Justice of Rutgers University, described the development and implementation of parole guidelines by the United States Parole Commission. He stated that the guidelines were the result of a concern over the lack of clear information about the criteria used in parole decisions. The request for steps to remedy this problem was generated internally which, in his opinion, is a significant factor in the overall success of the use of guidelines. In the particular States where their implementation has been imposed, he said, they do not seem to have been used as successfully or as well. When the study of criteria began, the U.S. Parole Board argued that no general policy existed and that any such policy would run counter to the concept of decisions based on the individual merits of each case. On the assumption that an implicit policy did exist, the working group examined decisions pertaining to a group of young offenders with indeterminate sentences. He stated that the two most significant factors in release decisions seemed to be: first, the seriousness of the offence; second, the judgment of risk. On this basis, he said, a scale was then developed to classify offenders according to the seriousness of the offence and risk. Each of these was plotted on a graph to form a matrix.

Professor Gottfredson informed us that in using the matrix, the point at which a person's two scores intersect indicates when parole should be granted. Hearing examiners interview the parole applicant, classify the offender and consult the table. If the hearing examiner is satisfied with the calculated parole date no further explanation is required. If a deviation from the chart is considered appropriate, reasons must be given. He reported that about 20 per cent of the time hearing examiners step out of the guidelines. As a result of changes and developments in social policy, certain

factors - such as employment and living arrangements - have been removed from the risk prediction scale but, he stated, these changes do not seem to have affected the prediction value.

In the session "Parole Guidelines: Are They a Worthwhile Control on Discretion?", Joan Nuffield[15], a policy analyst in the Ministry Secretariat of the Solicitor General, Canada, elaborated on the development and use of parole guidelines. She described them as an accountability measure which forces organizations to make parole policy more explicit and which compels individuals within the organization to explain why a particular case does or does not fit the policy as stated in the guidelines. In her assessment, the criteria for parole decisions given in the Parole Act of Canada leave much unsaid. Precisely what constitutes an undue risk to society, for example, is not specified in the Act. She argued that guidelines offer a clear and rational basis for parole decisions. Furthermore, she stated, they offer the inmate a better opportunity for arguing his or her case in an effective manner because the basis on which it is to be decided is clear. Guidelines can, she pointed out, be geared to regional differences and need not, in her assessment, eliminate important and justifiable variations in release policy. She noted that one other objection to guidelines is the inclusion of a risk prediction score based on statistical estimates of an offender's risk of recidivating. She stated that the predicting of risk is indeed an inexact science, and such predictions need not be part of the guidelines, but, she argued, it must also be acknowledged that statistical guesses of risk are more reliable than are clinical or human judgements. Moreover, she pointed out, the offender does not then run the risk of having his chances judged by someone who has a "theory", untested and perhaps untestable, about recidivism. In her opinion, a statistical score has the advantage of allowing you to see precisely what factors went into it and which did not. She argued further that clinical assessments of risk can never be dissected in a way that will reveal what factors went into it and how they were used. In her concluding remarks she stated that "...guidelines allow for decisions to be geared to the particularities of individual cases but the decision-maker must say why the particularities of the case cause it to be an exception to the general rule".

Legal Developments that Affect the Use of Discretion in Corrections

During the Conference, three legal developments which have important implications for the use of discretion in corrections were the focus of

15 For the full text of his address, see Part II.

considerable discussion. The developments discussed were:

i) the growing emphasis on inmates' rights;

ii) the emergence of the duty to act fairly and the institution of judicial review of administrative action;

iii) the enactment of Part IV of the Canadian Human Rights Act, often referred to as the Privacy Act.

Several speakers described how these developments took place and explained their implications for the exercise of discretion in corrections. During the session "Inmates' Rights: The Case Law and Its Implications for Prisons and Penitentiaries", Michael Jackson, a professor of law at the University of British Columbia, outlined the evolution of inmates' rights and judicial review of administrative action. Since the full text of his address appears in Part II, only a brief synopsis of his remarks will be given here. He argued that the idea of a charter of rights for inmates is not new; it dates back to the origins of the penitentiary system, which was developed largely as a reaction against the discretionary abuses of gaolers and prisoners alike. But, he stated, only recently have the courts been willing to review the administrative decisions of prison authorities. Until a few years ago, the test that the courts used to determine whether to exercise supervisory powers over inferior tribunals was to determine if the decisions were of a judicial or quasi-judicial nature or of an administrative nature. The latter were not subject to the intervention of the court, the former were. He stated that this basis for review was gradually overturned by a series of cases, the most significant of which were the Martineau cases which established that the reviewability of prison decisions depends not on whether the decision is judicial or quasi-judicial but on the fact that underlying the exercise of every administrative power conferred upon a board of authority there is a general duty to act fairly.

Professor Jackson pointed out that fairness is not a static concept; what is considered to be fair in one context may not be considered to be so in another. He then examined a series of cases that have come down since the Martineau decisions and which give us some idea of what the courts may require in the way of fairness. The first case he cited was that of Bruce in British Columbia. In this instance, the Court declared that there was a duty to act fairly in transfer decisions even though such decisions are not judicial in nature. That duty, however, did not require the authorities to give Bruce the reason for his transfer, nor an opportunity to respond. He stated that a similar decision was reached in Ontario in 1980 in the Rollie case. While the Court concluded that the suspicion of a planned hostage taking constituted

adequate grounds for transferring an inmate in a summary fashion, without providing reasons or an opportunity to respond, a council of perfection would make such provisions after the transfer.

Professor Jackson went on to inform us that, with respect to disciplinary decisions, the courts have ruled that legal representation does not have to be allowed in all cases but that the decision as to whether counsel is appropriate rests with the Independent Chairperson. In addition, the courts have suggested that fairness may require representation in a case that involves significant issues of law beyond the ability of a layman to deal with. The next case referred to by Professor Jackson was that of Oswald and Cardinal which provides a further indication of what the duty to act fairly might require in relation to the administrative segregation process. In this case, it was declared that the Warden of Kent Institution had not fulfilled the duty to act fairly when he refused to give his reasons for not complying with the recommendation of the segregation review board.

Professor Jackson noted that while the Martineau cases all dealt with procedural issues there have been some cases in which the courts have indicated a possible willingness to examine substantive issues, under certain circumstances. He stated that the most important case in this regard is the McCann case of 1975 in which the conditions of solitary confinement in British Columbia Penitentiary were brought into question. In rendering his decision, Mr. Justice Heald of the British Columbia Supreme Court ruled that conditions in solitary confinement in the Penitentiary constituted cruel and unusual punishment. Although he concluded that a decision to place an inmate in solitary confinement was not reviewable by the courts, he declared as reviewable the conditions of solitary confinement in which inmates were kept. Professor Jackson next cited the Solosky case in which the Supreme Court of Canada ruled that the lawyer-client privilege was not violated by the scrutiny of correspondence. But, he pointed out, the Court also endorsed the principle that a prisoner remains entitled to all of his civil rights except those that are expressly taken away by statute or regulation. The Court established that one of the rights not taken away by incarceration is the fundamental right to communicate with a lawyer and that prison administrators must exercise the minimum restriction, consistent with security, upon that right.

The emergence of the duty to act fairly and the institution of judicial review were briefly outlined by two other speakers: Judge René Marin, a County Court Judge in Ottawa and Inger Hansen, the Privacy Commissioner of the Canadian Human Rights Commission. During the session entitled "The Exercise of Administrative Discretion", Judge Marin endorsed the opinion that the

courts in Canada are no longer reluctant to review administrative decisions. He stated that the first instance in which the courts reviewed a decision of an administrative nature involved the discharge of a policeman from the Haldimand-Norfolk Regional Police Commission. In rendering the decision, the Chief Justice stated that fairness is a required element of such a discharge. In the Court's opinion, the appellant should have been told why his services were no longer required and he should have been given an opportunity to respond either orally or in writing.

Judge Marin then drew attention to the fact that court review of administrative action and the requirement to act fairly is not confined to decisions within the correctional field. To support this statement, he cited the case of Cooper and Librams v. the Minister of National Revenue in which Mr. Justice Dixon stated that it is possible to formulate several criteria for deciding whether a decision or orders required by law are made on a judicial or a quasi-judicial basis but, significantly, Justice Dixon did not suggest that only the decisions arrived at through the adversary process should be subject to review. Judge Marin cited two other cases to support the statement that judicial intervention is no longer restricted to judicial or quasi-judicial actions: the case of Martineau v. le Comité de discipline de Matsqui and the case of Inuit Tapirisat v. the Traité populaire du Canada.

During the discussion period that followed, Judge Hugessen, Associate Chief Justice of the Superior Court of Quebec, and Alan Leadbeater, Assistant to the Vice-Chairman of the Canadian Radio, Television and Telecommunications Commission, noted that the legislature has never developed a way of stating that particular matters are beyond the purview of the courts. In Mr. Leadbeater's opinion, efforts to suggest that a sphere of responsibility is beyond the jurisdiction of the court have never met with great success; the courts have reserved for themselves the power and authority to determine what kinds of matters should be susceptible to judicial review.

During the session, "Confining Discretion: Are We Headed Towards a More Just System?", Inger Hansen, the Privacy Commissioner of the Canadian Human Rights Commission, supported the opinion that administrative decisions are no longer beyond judicial review and stated that the old distinction between administrative and judicial decisions is no longer clear cut. According to Ms. Hansen, an early indication that the courts might be prepared to review administrative decisions came in 1972 in the Ontario case of Green v. Fagee. In this case, she informed us, the absolute discretion of the Commissioner of Corrections to receive inmates and the authority to delegate that discretion with respect to transfers were challenged. She noted that while the presiding judge declined jurisdiction, he did state that a decision which affects the

locale and manner of confinement, made without a hearing and based on an allegation, should be reviewable by the court.

Two other cases pertaining to transfers were cited by Ms. Hansen, that of Paul Rose in 1971 and Klein in 1981. In the first case, she said, the court declared that a transfer decision was not reviewable. In the second, it was decided that there is no right for a prisoner to be in one prison rather than another. In view of these cases, she stated, for the time being at least, the settled law is that the courts will not interfere with the exercise of discretion to transfer inmates. She went on to argue that there are, however, other controls that as yet remain untested. For example, she said, Section 5 of the Human Rights Act, which prohibits discrimination in the provision of goods, services and accomodation, customarily available to the general public, might be available.

While the courts have been instrumental in the emergence of inmates' rights, they have not been the sole or perhaps even the major factor in this development. This point was argued by Jim Phelps,[16] the Regional Director General of the Prairie Region for the Correctional Service of Canada. During the session, "Inmates' Rights: The Case Law and Its Implications for Prisons and Penitentiaries", he stated that Government rather than judicial initiative has been the main factor in the establishing of inmates' rights. He cited the Privacy Section of the Human Rights Act, which gives inmates the right to have access to their files, as one example of legislative initiative in this area. He also pointed out that Canada is a signatory to a series of international agreements, of which the most widely known and acted upon is the International Covenant of Civil and Political Rights. The basic thrust of the Covenant, he stated, is that an offender retains all of the rights of an ordinary citizen except those that are expressly taken away by statute or lost as a necessary consequence of incarceration. In addition, he informed us, the Covenant lists about 100 basic rights that offenders should maintain and that the Canadian system has taken substantial steps to ensure are met.

Further information about the right of inmates to have access to their files was provided by Inger Hansen during the session entitled "Living with the Privacy Act: The Dilemma of the Professional". Ms. Hansen informed us that under Part IV of the Canadian Human Rights Act, Canadian citizens and those who have been lawfully admitted to Canada have the right to know what is contained in records held by the federal government that pertain to them. They have the right to know what use has been made of their records, to

16 For the full text of this address, see Part II.

request but not order changes and corrections, and to receive assurance that information provided for one purpose will not be used for another without their consent. She informed us that the general principle of the Act is that access is granted unless it can be lawfully withheld as stated in the Act. The authority to withhold information rests with the Minister of a department who can delegate it to the Deputy Minister. She stated that, as the Privacy Commissioner, her role is to review cases in which it is alleged that the rights of access to information or privacy have been violated. The Privacy Commissioner has resources similar to those of a Superior Court Judge. He or she can subpoena files and enter government departments to talk to people. The Commissioner can make findings of fact but cannot reverse decisions; the power of the office is limited to the making of recommendations to the Minister of the department involved in a complaint.

The discussions outlined above demonstrate that a wide variety of measures have been implemented to curb or control the use of discretion in corrections. As we have seen, these measures range from standards and guidelines to inmates' rights and judicial review of administrative action. Some of these mechanisms pertain to the procedural element of decision-making, others to the substantive element. To what extent they are effective in corrections was a major point of debate during the Conference. The discussions that dealt with this question are reviewed in the following section.

THE EFFECT OF MEASURES TO LIMIT OR IMPROVE THE USE OF DISCRETION IN CORRECTIONS

The current or potential effect of the various measures that are being implemented in response to the problems associated with discretion were a major subject of discussion during the Conference. While opinions varied about the relative merits of the mechanisms that have been implemented to date, the discussions revealed a general concern that the ultimate effect of these measures might be an unduly rigid system that is unresponsive to the needs of inmates. The discussions that pertained to the real or possible outcome of the different mechanisms which are being used to curb or improve the use of discretion are summarized below.

The Impact of the Duty to Act Fairly and Inmates' Rights

While the need to ensure fair and equitable decisions in corrections was unanimously endorsed, many of the speakers and delegates who addressed this topic expressed serious reservations about the use of procedural safeguards as a means of improving the use of discretion. In addition, a number of potentially adverse effects of due process mechanisms were presented for our consideration. During the opening session, Stewart Asquith, a lecturer at the School of Social Administration, University of Edinburgh, Scotland, argued that while rules are not totally irrelevant, if we assume that the only problem with direction is a lack of rules and rely solely on legal safeguards, the result might well be an improvement only in the procedural rights of individuals without in any way promoting or enhancing substantive rights.

Similar arguments were presented by John Hogarth, a professor of law at the University of British Columbia, and Alan Leadbeater, the Assistant to the Vice-Chairman of the Canadian Radio-Television and Telecommunications Commission. Professor Hogarth began his comments by posing the question: "Who benefits from the increasing emphasis on due process?" The answer, he stated, is that top bureaucrats and lawyers are the people who benefit from the new emphasis on rules and procedural safeguards. The first group is now able to second-guess the judgements of line staff from a procedural point of view, but not on substantive grounds. The second group has a new sector of clients. The losers, in his opinion, are line staff and inmates.

The argument presented by Professor Hogarth was that whatever abuse of executive power exists in the present system, any attempt at the provision of formal, legal methods of control is likely to lead to four results:

i) more centralization of power, a more hierarchical system;

ii) obfuscation and mystification of the nature of the correctional enterprise;

iii) more alienation on the part of line staff and inmates;

iv) decisions less likely to meet the needs of offenders or of society;

He stated that providing due process guarantees does not correct power imbalances: it institutionalizes them. People can, he argued, be due-processed to their ultimate fate, the same decisions being made that would have been made in the absence of due process but this time no guilt is experienced on the part of the decision-makers. In his opinion, the difficulty with procedural methods of determining issues is that procedure tends to impact, overtake and replace substance. It strips the actors of any moral responsibility for the quality of the decisions they make.

During the session entitled, "The Controversy Over Delegated Authority", Alan Leadbeater stated that the institution of judicial review of administrative action has been a major impediment to the improvement of the quality and acceptability of decision-making in federal agencies. He argued that it has led administrators to concentrate on the procedures by which decisions are taken rather than seeking to ensure the making of good decisions. A second major problem that stems from judicial review, he stated, is that it has led administrators to use the adversary procedures traditional to judicial adjudication as a guide in designing their decision-making procedures. These procedures, in his opinion, are often ill-suited to high quality decision-making. "The adversary method", he argued, "is to public decision-making what logic is

to individual decision-making: a procedural method supporting good and bad decisions with equal vigour".

He pointed out that critical evaluations of the adversary, adjudicative method seem to suggest that in practice they serve as follows: it matters not whether justice is done, as long as it is seen to be done. He argued that court-like decision procedures are especially vulnerable to this form of criticism because they create a distance between the decider and the affected party which makes it extremely difficult for the decider to experience that form of relatedness or empathy essential to a full understanding of the problem at hand. According to Mr. Leadbeater, another element of quality decision-making that is at risk when the adjudicative method is adopted is efficiency, including the element of timeliness.

Mr. Leadbeater argued that judicial intervention results in the allocation of an enormous amount of time and resources by agencies to the task of avoiding court review. Time, attention and resources are shifted away from efforts to produce decent, fair decisions, he said. He went on to argue that efforts to avoid court review result in a heavy reliance on legal advisors and the development of decision-making procedures within the narrow parameters of judicial, court-like procedures. In his opinion, the effect is to limit the approach to the problems of administrative decision-making and to ignore creative alternatives to legal methods.

The arguments presented by Alan Leadbeater were supported by the comments of a delegate during the session "Inmates' Rights: The Case Law and Its Implications for Prisons and Penitentiaries". The delegate stated that the time taken up with procedures, such as the report writing of grievances, takes time away from other matters such as working with inmates in the planning of recreation expenses. He argued that the result is that last minute, arbitrary decisions have to be made in the areas that time has been deflected away from. The delegate also stated that the measures that are being adopted indicate an element of distrust and noted that grievance procedures are primarily used by inmates who entered the institution with a sense of distrust.

During the same session, Michael Jackson, a law professor at the University of British Columbia, stated that while judicial intervention has had some very positive effects, it has a negative side as well. On the positive side, he said, it has legitimized the concept that prisoners retain rights not expressly taken away by legislation. It has legitimated the notion that the concept of least restraint is important and it has legitimated the role, inherent in the nature of the penitentiary, of inspection from outside. The negative aspects, he stated, stem from the adversarial nature of litigation.

Litigation maximizes the polarity between staff and inmates and, therefore, it may not be the best long-term solution. Unfortunately, he stated, given the recalcitrance of the prison administration, there seems to be no available alternative.

During the session "Les Droits des Détenus", the ultimate value of inmates' rights was questioned by Phil Young, a Member of the National Parole Board. In his assessment, inmates' rights have been turned into procedural safeguards and consequently the progress in this area may be more apparent than real. He stated that the distribution of discretionary power has become so diffuse that it is now impossible to locate the source of discretionary abuses. The result, he argued, is that the rights of inmates have, in effect, become the rights of the bureaucracy.

The argument that procedural safeguards for inmates' rights will, of and by themselves, do little to improve the lot of inmates was given further support by Michael Mandel, a law professor at Osgoode Hall Law School. During the session on conflict resolution, he argued that the inquisitorial process currently used by parole boards, which seeks to uncover the inmate's attitude, is premised on the illusion that inmates can become upwardly mobile and develop a middle class outlook. This expectation, he stated, ignores the factors that make inmates downwardly mobile. Consequently, in his opinion, despite changes in the appearance of the parole process, it is still an inquisitorial process in which the exercise of power by the parole board constitutes the exercise of absolute discretion. He concluded by stating that it will remain so as long as we maintain the existing class stucture which calls for a subserviant attitude on the part of the lower class from which most inmates come.

The effect of inmates' rights and procedural safeguards on security within the institution was another area of concern that received considerable attention during the Conference. During one session on inmates' rights, Ken Payne,[17] the Warden of Joyceville Institution, described some of the difficulties that have arisen in this regard. He stated that, as a result of the emergence of inmates' rights, inmates and staff have become increasingly polarized. He informed the audience that security staff are perplexed by the introduction of a responsibility to respect the rights of inmates while ensuring security in the institution. The difficulty stems from the fact, he argued, that during their training, security staff were instructed to use their skill and power to keep the institution secure but were not instructed to respect the rights of inmates in the process. He contended that the new

17 For the full text of this address, see Part II.

onus to respect inmates' rights restricts security staff and management in a way that might prejudice the security of the institution. In his opinion, inmates also lose as a result of this development. He explained that it is no longer possible to intervene when one inmate is harassing another unless there is concrete evidence, and not merely hearsay, to demonstrate that punishment or intervention is warranted. The staff's sense of frustration, he told the audience, is heightened every time they find it impossible to carry out their responsibilities. The attitude the situation breeds amongst staff, he said, is that the inmates might as well be given the keys and allowed to run the institution.

A similar perspective was given by M.A. Sial, Deputy Director of the Ottawa Carleton Detention Centre of Ontario. During one of the sessions on the implications of inmates' rights for prisons and penitentiaries, he argued that if the discretion of the warden is removed and the guidelines made too harsh, the system will suffer. A balance is needed, he stated, between inmates' rights and the warden's authority. He also stated that attempts to establish public accountability through mechanisms such as the Citizen's Advisory Committee have been a failure.

During one session, the discussion centred on what effect the new Charter of Rights and Freedoms might have on correctional workers. The first speaker to address this question was Walter Tarnopolsky,[18] a law professor at the University of Ottawa and the President of the Canadian Civil Liberties Association. Professor Tarnopolsky argued that the Charter of and by itself will not make any difference in correctional decision-making: any effect it does have will be determined by those who sit on the Supreme Court. On the whole, he argued, the Charter will not likely make a great difference. He pointed out that among the fundamental rules laid down by the Supreme Court of Canada in the cases of Mitchell, Howarth and Matsqui is the principle that the parole process is not judicial or quasi-judicial and, therefore, a person cannot proceed under section 28 of the Federal Court Act to seek a remedy for a parole decision. The rules of fundamental justice set out in section 2 (e) of the Charter do not apply to a privilege, he informed us, which is what parole was held to be in the majority opinion rendered in the cases of Mitchell and Howarth.

He stated that Section 7 of the new Charter might have some effect on correctional decisons. The question still to be answered, he said, is whether the fact that a person has already been deprived of liberty and confined to an

18 For the full text of this address, see Part II.

institution will mean that Section 7 is exhausted or whether the opportunity will exist to argue that, since Section 7 talks about the right not to be deprived of liberty, the principles of fundamental justice apply.

With reference to Section 2 of the Charter which pertains to fundamental freedoms of conscience and religion, expression, peaceful assembly and association, Professor Tarnopolsky stated that, given the ruling in the Solosky case, it seems unlikely that Section 2 will make much difference to subsequent "Soloskys". In that case, the Court ruled that the lawyer-client privilege of confidential correspondence did not extend to prisons. He also expressed doubt that section 10(a) of the new Charter, which speaks about everyone on arrest or detention having the right to be informed promptly of the reasons therefore, will have much effect on the parole process. His reasoning was that in the Mitchell and Howarth cases, the majority on the Supreme Court ruled that the statement that parole was revoked was sufficient to meet the right to be informed. Unless the courts come to a different conclusion about what constitutes due information, it is unlikely, he argued, that Section 10(a) will help subsequent "Howarths".

The second speaker to address this subject was Howard Epstein,[19] a Barrister and Solicitor who practices law in Halifax. He argued that the similarities in language between the new Charter and the American Bill of Rights suggests that the Canadian Courts may look to American jurisprudence for direction. He suggested that it is at least worthwhile to examine the American experience and provided an overview of some of the American case law to demonstrate what could happen in Canada under the new Charter. He stated that the fact that there is a remedies clause could mean that the courts will intervene in social issues in a manner similar to the way that the American Courts have done. He pointed out that, in some cases in the United States, the courts have taken over the general superintendence of entire state prisons. This could, at least in theory, happen in Canada, he stated.

He made the observation that in the United States, four sections of the American Bill of Rights have had the most significant effect on correctional systems. He commented that the Eighth Amendment, which is a prohibition against cruel and unusual punishment, has been used for everything from the death penalty to disproportionate sentences. According to Mr. Epstein, disproportionality of sentences is one example of an area that might come before the Canadian courts under the section of the Charter that guarantees protection against cruel or unusual punishment. Someone convicted of first degree

---

19 For the full text of this address, see Part II.

murder might contend that the denial of parole eligibility for the first twenty-five years of his or her sentence constitutes cruel or unusual punishment.

He pointed out that the First Amendment of the American Bill of Rights guarantees protection of freedom of speech, religion and assembly. In the case of Pell v. Procunier, he stated, the court decreed that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system. He argued that the situation in Canada is no different. A wide range of rights exist that must be balanced against legitimate institutional considerations. Unless specifically taken away, or modified in light of penological considerations, these rights must be respected. He then drew attention to the fact that while the Canadian courts have not intervened in correctional matters to the extent that the American courts have, it is still fair to say that the "hands-off" doctrine has been abandoned and that due process applies to a certain range of rights.

The question we are left with, he informed the audience, is what constitutes due process in the correctional context. That question is being addressed by the American and Canadian courts and will continue to be addressed under the new Charter of Rights. A second issue that is being addressed is that of the least restrictive means of interfering with constitutional rights. The Courts will, in his opinion, increasingly demand that justifications be given by correctional administrators for interfering with, or limiting, an inmate's constitutional rights, particularly those which are deemed preferred rights. He concluded by stating that the American legal experience suggests that, if the system does not make rules for itself, the courts will.

The Impact of Standards and Accreditation on Correctional Systems

During the Conference, two schools of thought were expressed on the subject of standards. According to a number of individuals, standards are an effective means of improving the use of discretion in corrections. These individuals argued that standards upgrade the system and reinforce the principles on which it operates. According to the other school of thought, standards become not the minimum level of service but the maximum and act, in effect, like a ceiling on the improvement of conditions in correctional systems.

One of the speakers during the session on standards and accreditation was Maurice Klein, Correctional Accreditation Co-ordinator of the Correctional Service of Canada. He stated that standards are not incompatible with discretion and that an accreditation approach can provide control and accountability in the use of discretion. He argued that standards can promote due reflection

by administrators as to the efficiency of their operations, reinforce basic principles and provide a means of evaluating the system. He stated that they also help to clarify the goals and objectives of the system and thereby contribute to uniformity in decision-making. Since the concepts of fairness and uniformity are imbedded in standards, the accreditation process will assess the success or failure of attempts to meet these objectives. He concluded his remarks with the statement that the potential exists for an adverse effect on decision-making in the standards and accreditation process but it is incumbent on those who operate with standards to inform the architects of the standards about any negative effects.

During the discussion period that followed, Tom Gordon, the Director of the Seventh Step Residence in Vancouver, argued that few independent half-way houses have the resources to meet the standards required for accreditation. André Thiffault, Vice Chairman of the Quebec Parole Board, argued that common sense and good judgement are still the key to the system and that these qualities can not be substituted for by standards. He expressed concern that minimums will become maximums and that people will consider their job to be done once the standards have been met. He stated, "Norms and standards mean that we are suspicious of people. By imposing standards we are rendering accountable mediocrity and staleness". "Why", he asked, "do we not simply establish a system in which the bad administrators will be kicked out and not be protected by minimum standards". His concerns were strikingly similar to those expressed by John Hogarth during the opening session. As we noted in the first section of the Summary, Professor Hogarth argued that the minimum standards established in contract relationships tend to become maximums and that the human qualities of creativity, empathy and a striving for improvement tend to be lost.

The arguments presented by André Thiffault were responded to by Glenn Angus, the Project Director of the Standards and Accreditation Project of the Canadian Association for the Prevention of Crime. He emphasized that standards are not procedures and should not be confused as such. How to arrive at certain identified standards, he stated, is left to the individual agency. The opinion that standards will improve and not limit the quality of correctional services was expressed by John Braithwaite, Deputy Commissioner, Communications, Correctional Service of Canada. During the session "How Much Openness Can the System Tolerate", he stated that, in his view, "the most promising development is the potential for public understanding and professional contribution that the concept of standards and accreditation holds for the field." He went on to say that "if standards for all correctional operations can be enunciated by professionals and accepted by the public and private correctional workers and citizens in general, we will have some understandable objective criteria by which to assess programs and to assess ourselves." That would, he argued, enable those of use who work in corrections to put our house in order and keep it in order without constant recourse to the courts as has been the experience of our American colleagues.

The Possible Effect of Guidelines on Parole Decision-Making

Among the arguments presented in favour of guidelines was the fact that guidelines clarify the criteria that are used in parole decision-making while at the same time allowing the discretionary latitude to take unique circumstances into account. Two criticisms of guidelines that emerged during the Conference were that they simply codify what was done in the past, which may not necessarily be right, and that they create an element of rigidity that did not exist. During the session, "Structuring Discretion Through Rules, Guidelines and Openness", Don Gottfredson, Dean of the School of Criminal Justice at Rutgers University, argued that guidelines at least enable us to know what is being done and thereby create the opportunity to change on the basis of knowledge rather than ignorance.

The pros and cons of guidelines were debated by Joan Nuffield, a policy analyst with the Ministry Secretariat of the Solicitor General's Department and Mary Casey, a Member of the National Parole Board.[20] The need for guidelines, according to Joan Nuffield, stems from the lack of a clear and explicit parole policy, from the unexplained differences in the parole rate from region to region and from the marked annual fluctuations in the full parole grant rate which suggests disparity over time. She argued that the effect of parole guidelines is to make policy explicit without eliminating the discretion needed to handle cases that are in any way unique. She stated that "nothing in the idea of guidelines implies that discretion is eliminated. Guidelines merely require the decision-making body to say what its policies are, usually in very specific terms, but if the policy does not fit the case...then the decision-maker may follow the dictates of the case, explaining all the way why he has found this case to be different."

She argued further that under a guidelines system, the inmate has a better opportunity for arguing his case in an effective manner because he can clearly see the basis for the decision and how it has been applied. She also stated that guidelines will not eliminate important and justifiable regional variations; the agency setting the guidelines is free to incorporate regional variations as it sees fit. She went on to note that a commonly-heard argument

---

20 For the full text of this address, see Part II.

against guidelines is that they are unreliable because so many of them are based on statistical estimates of an offender's risk of recidivating. To this argument, she replied that if risk is to be part of the guideline - and it need not be - it must also be acknowledged that statistical guesses of risk are more reliable than clinical or human judgement. With respect to the argument that guidelines violate the notion of individualized justice, she stated that guidelines allow for decisions to be geared to the particularities of individual cases but compel the decision-maker to explain why the case is an exception to the general rule. The over-all effect of guidelines, according to this line of argument, is to promote equity and fairness in parole decision-making without eliminating the discretion needed to handle unique cases.

The second speaker during this session was Mary Casey who stated that the National Parole Board's objection to the type of guidelines that have been adopted in the United States stems from the fact that inherent in guidelines is the concept of punishment or "just deserts". She went on to say that the National Parole Board does not see its task as making decisions about punishment. She argued that the question at issue is not whether enough time has been served since that is established by the parole eligibility dates, but whether the inmate presents an undue risk to society. She argued that in the area of risk assessment, clinical judgement is neither better nor worse than objective criteria as a method of determination. She then stated that in the United States it seems to be part of the mandate of many of the parole boards to reduce disparity in sentencing. Since this is not part of the mandate for Canadian boards, the use of guidelines to reduce disparities would not, she argued, be appropriate in the Canadian criminal justice system.

A further objection to guidelines that was presented by Ms. Casey was that "...current guideline models base the release decision chiefly on factors the inmate cannot change, such as his previous record and his current offence". She stated that since we still believe in the idea of change and even of rehabilitation, guidelines based on previous record and current offence could do an injustice to the inmate in at least two ways. One type of injustice, she argued, could occur in the case of inmates with long records who have, in fact, become tired of committing crimes. Guidelines, she contended, might obstruct the release of this type of inmate and, in so doing, create an injustice. According to Ms. Casey, the second type of injustice that could occur would be the blocking of the release of an inmate who has committed a very serious crime but who is highly unlikely to commit another offence. The final concern raised by Ms. Casey is that the concept of gradual release, which is used by the National Parole Board, might not fit into the guideline model.

The Effect of Measures to Increase "Openness" in Correctional Systems

As we have seen in an earlier section, a number of measures that have been implemented to increase openness were discussed during the Conference. While the need for increased openness was a recurrent theme of the discussions, a number of individuals expressed concern over the methods that have been established to meet this objective. Of particular concern to many delegates was Part IV of the Human Rights Act. The difficulties in making correctional systems more open was another major point of discussion.

During the session entitled "The Discretion of Policy Makers", Ted Harrison, the Vancouver Regional Director of Corrections in British Columbia, stated that open plans and visibility can help to improve the exercise of discretion at the macro level but there are practical difficulties in achieving openness. The problems, according to Mr. Harrison, are: one, that it is difficult to consult everyone that should be consulted; two, that system needs, such as economy and speed conflict with efforts to consult and three, that it is not always easy to lay bare the reasons for choosing a particular course of action.

During the session entitled "How Much Openness Can the System Tolerate?", Brian Pollick, then Executive Director of the John Howard Society of Alberta, expressed the opinion that the measures that have been implemented to achieve openness have had little, if any, positive effect on the outcome of decisions. He stated, "efforts to create the illusion of openness through elaborate systems of due process and through the formulation of goals and objectives that are dichotomous and mutually incompatible are paralyzing the system without producing any appreciable change". He went on to argue that parole is denied as frequently as before on the vague grounds that the inmate has not yet benefited from the programs of the institution and stated that "the system is paralyzing itself by demanding more and more information before a decision can be made." Mr. Pollick contended that this does not mean a more critical appraisal of the information that is drawn upon: "In fact," he said, "all too frequently negative testimony from an unknown source is uncritically accepted". His summary conclusion was that "efforts are being made to gradually eliminate discretionary powers at the local level through complex systems of procedure and control with the end result that line staff are boxed into decisions made for them by a policy manual."

During the discussion period that followed the panel's presentation, a member of the audience stated that efforts to increase openness and the disclosure of information to inmates ignore certain basic realities of prison environment. The reality is, he said, that staff and inmates view each other as enemies and the major ammunition in their war is information. According to

the delegate, disclosure runs counter to the interests of the staff.

The effect that Part IV of the Human Rights Act might be having on the quality of reporting by correctionl personnel and, in turn, on decision-making was discussed during a number of sessions. During the session "Living with the Privacy Act: The Dilemma of the Professional", Ted Jamieson, the Privacy Co-ordinator of the Correctional Service of Canada, stated that there is a general consensus among parole officers that there have been both positive and negative effects on report writing as a result of the Human Rights legislation. He informed the audience that, on the positive side, the potential for reports based solely on opinion or bias has been reduced. In his assessment, reports are, therefore, somewhat more objective. The negative side, he claimed, is that the Act has created a reluctance to include information, that, if released, might be harmful either to the offender or the informant.

During the same session, Chris Conway, a Community Case Management Officer with the Vancouver District Office of the Correctional Service of Canada, expressed the opinion that the front-line correctional worker is not well-protected by the privacy legislation. He argued that the provisions for exemptions do not, in practice, protect the correctional worker and stated that "all too often bureaucratic bungling leads to the provision of the complete inmate file even when the attached letter states that there were deletions made in accordance with Part IV of the Human Rights Act." He informed the delegates that, when this type of incident occurs, inmates not only become upset and angry over what they have read but also lose respect for correctional administrators. He expressed the opinion that when the emphasis in the system was on counselling and assistance, correctional workers and inmates had open communication and the information that went into reports was first discussed with the inmate; the reports, he said, contained few, if any, surprises. In his assessment, trust and openness are now rarely part of the inmate-staff relationship and the information contained in reports is not known by inmates. With respect to the disclosure of information to inmates in psychiatric centres, he expressed his puzzlement over the expectation that inmates who have been diagnosed either as violent or irrational will receive negative information calmly.

Wayne Crawford, the Head of the Union of Guards, made the observation that discretion requires making value judgements, sometimes on the basis of circumstantial evidence. He pointed out that the terms of Section IV of the Human Rights Act limit the line staff's willingness to exercise discretion because their judgements, once disclosed to the inmate, might result in court action. He also argued that the staff were not given proper training to contend with the privacy legislation and that there are no guarantees that certain types of information will be kept confidential. The problems identified by Mr. Conway that arise when confidential information is mistakenly released were also referred to by Mr. Crawford.

The alleged shortcomings and drawbacks of the privacy legislation were addressed by Inger Hansen, the Privacy Commissioner of the Canadian Human Rights Commission, who stated that if changes are to come about in the legislation, the problems that have been encountered will have to be documented. She said that she was unaware of any case in which an inmate or an informant has been awarded compensation for information contained in a report and gave the opinion that such compensation could be awarded only in the rarest of circumstances. She went on to state that if the legislation has made line staff reluctant or unwilling to hazard diagnoses of inmates, such as schizophrenia or alcoholism, that is all to the good. "Staff", she said, "should not exceed their professional expertise when writing reports nor should they give opinions that cannot be substantiated". She argued that the danger inherent in unsupported statements is that they eventually become accepted as fact. This danger will increase, she pointed out, with the use of computers since anything that emerges from a computer carries a note of authority that exceeds that of written reports.

That the fear of disclosure has had a major impact on the preparation of reports was a point that was stressed by several delegates. Their contention was that less and less information is going into reports as a result of this fear. In response to such statements, one delegate argued that inmates rarely learn new information when they see their files; the inmate information network is such, he said, that they know beforehand what has been reported. The argument was also presented that if information cannot be revealed directly to an inmate, it should not be included in a report.

Accountability to Parliament and its Effect on Discretion in Corrections

During the session on accountability measures for correctional systems, Simma Holt, a Member of the National Parole Board, argued that accountability of government departments and agencies to Parliament simply does not exist. She stated that ministers are unable to control the bureaucracy for which they are responsible, they are unable to bring the concerns of the electorate to bear in policy development and, as a result, the concept of accountability has been brought into disrepute among the public. She went on to state that the crisis of legitimacy that we are experiencing may in part stem from the fact that those who develop policy and run the system are not accountable.

During the session, "The Cost of Accountability to the Private Sector", Jim MacLatchie, Executive Director of the John Howard Society of Canada, argued that the accountability requirements placed on private sector agencies

that receive federal money is a concern not so much because of the accounting process but because of the direct government influence in the management of private sector agencies that results from the accountability requirements. Josh Zambrowski, then Executive Director of the John Howard Society of Montreal, stated that accountability requirements are imposed for the sake of achieving uniformity. He also stated that, through the accountability process, the private sector is being pushed into becoming a support system for the government. Brian Yelland, the Ontario Regional Manager of Offender Programs for the Correctional Service of Canada, agreed with the statement that the private sector agencies have an enormous line-up of accountability requirements but, he said, this is a predictable consequence of depending entirely on the public sector rather than seeking private funding. He argued that federally administered programmes have to have some uniformity and consistency and, therefore, codification and regulation must be imposed.

Whether the type of performance evaluations implemented in response to the demands for accountability are useful was also questioned during the discussions. Irvin Waller, a professor of criminology at the University of Ottawa, argued that simply instituting measures to assess, for example, whether the Parole Board is meeting its objectives overlooks many factors that contribute to failures on parole, such as the fact that approximately $35,000 per inmate, the bulk of available resources, is directed towards security.

The Effect of Extra-Judicial Review Mechanisms on the Use of Discretion

In addition to judicial review of administrative action, the implementation and effect of what might be termed "extra-judicial" review mechanisms, including the Correctional Investigator, the office of the ombudsman and internal review committees, were the focus of discussion during the Conference.

The office of the ombudsman and the Correctional Investigator were credited with having a reasonably positive effect on the use of discretion in corrections. In both cases, we were told, their credibility as impartial investigators is high and they are, therefore, listened to not only by the parties directly involved in a complaint but also by the Minister or Deputy Minister responsible for Corrections. In this way, it was argued, they are able to effect some of the changes that seem to be required in the system, in addition to remedying the misuse of discretion in specific instances. The limitations of the ombudsman's office as presented by Linda Bonin, an officer of the Ontario Ombudsman's office, were:

i) the ombudsman has no power to enforce recommendations;

ii) since decisions are of necessity made quickly in correctional institutions, it is often impossible to intervene before a decision's adverse effects have been felt;

iii) the sheer volume of complaints is difficult for the office to contend with;

iv) the geographical distribution of institutions in Ontario contributes to delays in the processing of complaints;

v) the ombudsman's office cannot go public with its findings;

vi) the ombudsman's office has to contend with several areas, not just corrections and, therefore, those who work in the office are, of necessity, generalists.

Ed McIsaac, an officer of the federal Correctional Investigator's Office, stated that, in his opinion, the Correctional Investigator is effective within the limits of its jurisdiction. In his opinion, the presence of the office has contributed to improvements in the correctional system. He stated that a number of decisions that adversely affected inmates have been repealed as a result of the efforts of the Correctional Investigator. He concluded by stating that review is a shared responsibility and that no one mechanism alone can provide a satisfactory review process. It requires, he said a combination of internal review mechanisms, suitably worded legislation and the Correctional Investigator.

The second review mechanism that was discussed during the Conference was the type of internal review process used by the National Parole Board. During the session on review mechanisms, Ron Price, a professor of law at Queen's University, expressed the opinion that internal policing mechanisms in any area, not just corrections, can hardly achieve the impartiality required for a proper review. Moreover, he argued, in the case of bureaucracy, there is an inescapable amount of delay and confusion that does not serve the ends of justice. Josh Zambrowski argued that internal review for the federal parole system has not been adequately put into effect and should not even be used. He expressed his objection to what he described as interminable delays which are made on the grounds that more information is needed.

In summary, the arguments presented in support of mechanisms such as standards, guidelines and procedural safeguards were that they clarify the basis on which decisions are made and, in turn, promote fairness and equity in the correctional system. A further argument in support of such mechanisms was that they make it possible to evaluate what is being done and, therefore, to

make improvements where necessary. It was also argued that enough discretionary latitude remains to ensure that the unique circumstances of a given situation can be taken into account.

In general, the arguments presented against such mechanisms centered on the criticism that they affect only the procedural and not the substantive element of decisions. Accordingly, it was argued that correctional authorities have become accountable for how decisions are rendered but not for what decisions are made. Another related argument was that the responsibility for decision-making is being transferred from individuals to mechanical processes. This development, it was argued, will not only dehumanize the correctional system but will also erode the incentive to improve the quality of decisions.

The observations and opinions summarized in the preceeding sections formed the basis for a number of recommendations about what should be done to improve or limit the use of discretion in corrections. The recommendations that were presented during the Conference and the rationale given for each are the subject of the next section.

WHAT IS TO BE DONE?

During the Conference, a number of recommendations were made for changes in the exercise of discretion in corrections. Some of the recommendations called for a transfer of power away from correctional authorities to one or more of the following areas: Parliament, the judicial system, the public and the offender. Other recommendations, while not necessarily excluding a reduction in power, emphasized the need to structure discretionary power in corrections through rules, guidelines, procedural mechanisms and standards. Still other recommendations called for measures to improve the ability of correctional workers to make acceptable decisions of high quality. The discussions summarized below illustrate the different types of recommendations that were put forward for consideration during the Conference and the rationales that were provided for them.

The arguments presented by Stewart Asquith, a lecturer at the School of Social Administration, University of Edinburgh, suggested that there is a need not only to limit discretionary powers through the application of legal safeguards but also to re-examine the values and premises that inform the use of discretion. During his address, he stated that, "the exercise of discretion has to be analysed not simply in terms of professional judgement and its lack of accountability but also within a more broadly based critique of the legitimacy afforded to important social institutions such as social work or criminal justice as a whole". He suggested that if the current problems associated with discretion stem from a crisis in the legitimacy accorded to the perspectives of welfare professionals, it might be necessary to address questions concerning the social distribution of power.

During the opening session, John Hogarth, a professor of law at the University of British Columbia, presented a number of recommendations that were premised on the need for a change in the status of inmates and, by implication, in the balance of power between correctional authorities and inmates. He stated that an alternative to controlling, confining and structuring discretion is to provide the offender who is serving a sentence of imprisonment all the status, obligations and duties existing in society generally and distributed, by reason of one's citizenship, to every member of society and to take away only those privileges, immunities and rights that are absolutely necessary for the purpose of safe custody. In other words, he said, the offender ought not, by reason of a due process model, to escape his moral and ethical responsibility as a citizen. He argued that there are choices other than due process. He stated that "there are social engineering choices that are open to us as a society" and gave, by way of example, the use of smaller institutions that would allow a humane relationship to develop between staff and inmates. Another recommendation made by Professor Hogarth was to improve the professional training and conditions of work within institutions. Moreover, he argued, we could require inmates to maintain their obligations to the victim, to their family, to society and to pay for their room and board and thereby create conditions like those in the wider society from which they come in terms of obligations to be productive. He also argued that we could allow persons to be released at the moment that they have satisfied an appropriate tribunal that they have accounted adequately for their behaviour and maintained the relationships described above, which embody status-determined, not contract-determined obligations. He stressed the fact that the proposal to grant the status of a citizen to inmates is based on a model of man as essentially trust-worthy and not on a negative model that calls for controlling mechanisms established in contract.

The third speaker to address the opening session was André Normandeau, a professor of criminology at the University of Montreal. In his opinion, "a middle position must be sought between indifference to the potential and real abuses caused by the exercise of unjust and arbitrary discretionary powers and the impossible, useless and inhumane effort to invent a system in which everything would be settled by law, with no place being left for discretionary power". He argued that we can achieve the middle solution by presenting discretionary powers for examination by an enlightened public and by pressure groups which specialize in the correctional system. In his opinion, the public, and not more legal controls, should be used to ensure that the reasons underlying decisions made in the correctional system, which relate to the offender's rights and freedoms, are known and justified.

During the discussion period that followed the panel's presentation, several members of the audience expressed their agreement with the opinion that we must redress the imbalance of power between the inmate and the correctional system but disagreed with the opinion that legal safeguards would not achieve this objective. Michael Jackson, a professor of law at the University of British Columbia and Howard Epstein, a practising lawyer, both argued that the rule of law restricts the power of officials thereby helping to redress the imbalance of power. Professor Hogarth expressed the opinion that legal measures create an adversarial system and do not redress the imbalance of power; instead they lead to formality, polarization, and alienation between inmates and staff. He went on to argue that the elimination of abuse is contingent on the relationship between staff and inmates. He stated that, if the relationship is based on a we/they attitude, which legal mechanisms promote, abuse will not be eliminated. The elimination of abuse, he argued, requires a community spirit, a sense of common purpose which will be engendered only by creating small institutions and the presence of normal duties and obligations.

The opinion expressed by Professor Hogarth was supported by a statement made in the keynote address by Hans Mohr[21], a sociology professor at York University. He stated, "I take no solace from examples within the formal justice system to believe that inmates will really have their rights asserted through time within a system of justice that parallels the criminal courts on the outside."

The argument, presented by Stewart Asquith, that the problem of discretion in corrections must be examined in the context of much broader social and political considerations, was supported by Charles Reasons, a professor of criminology at Simon Fraser University, who argued that the problem we are facing stems from the imbalance of power between the providers and recipients of services. He stated that we cannot adequately address the problems of discretion or power within institutions, or within corrections, until we adequately address it outside of institutions.

Alan Leadbeater, the Assistant to the Vice-Chairman of the Canadian Radio-Television and Telecommunications Commission, argued that goal substitution is a major factor in the current crisis of legitimacy. He argued that when decisions are made that are not the formal stated goals of an institution, their legitimacy or acceptability suffers. Given these considerations, he argued, we must identify the forces of strains and rewards affecting a

---

21 For the full text of this address, see Part II.

particular organization and examine responses to them in order to know whether goal substitution is occurring and what the goals have become. He argued that to do so requires some form of independent review of the legitimacy of individual decisions. He stated that this should neither be a judicial review nor a public review of the merits of individual decisions but a broad policy review designed to ensure that the operational goals are open to critical scrutiny. He suggested that one mechanism to accomplish public scrutiny is a Council on Administration and that increased Parliamentary involvement, requiring significant reform to the committee system, would also be desirable.

According to Mr. Leadbeater, it will be necessary to improve the quality as well as the acceptability, of decision-making. To do so, he argued three prerequisites must be met: i) proper search, selection and attention; ii) proper weighting; iii) proper contextualization. With respect to the first prerequisite, the decider must have the ability to postpone judgement on a decision pending authorial exploration of evidence, opinion, argument and values. With respect to the second, the decider must have the ability through experience or special aids to assign appropriate weights to the factors under consideration. With respect to the third prerequisite, he said, the decider must have a thorough understanding of the larger decisional context that circumscribes and shapes decision possibilities, coupled with a capacity to be imaginative in developing decision choices. He concluded by stating that, if the goals being pursued by the decision-maker are acceptable to those affected by the decision and if the three conditions listed above are met, the resulting decisions will be of high quality and will be acceptable.

During the session entitled, "The Climate of the Times and Its Influence on Discretion", Olé Ingstrup, a Danish prison warden and President of the Standing Committee on Prison Regimes of the Council of Europe, argued that we must maximize the human resources available in corrections by delegating responsibility and decision-making authority. He informed the audience that the Danish prison system has found it useful to bear in mind the following points:

i) the mere fact that headquarters is functioning well does not mean that the system as a whole is doing so;

ii) staff and inmates will perform according to what is expected of them; if they are expected to behave responsibly, they must have something to be responsible for;

iii) delegation of power, including discretionary power, does not mean loss of influence or leadership; delegation of such power does change the position of management from decision-maker to that of a real leader;

iv) when a manager loses confidence in human beings he no longer understands what responsibility means to them and cannot accomplish what is recommended above.

During the session entitled, "How Much Openness Can the System Tolerate", David Cole, a practising lawyer, stated that what is urgently needed is a clarification of where parole officers stand vis-à-vis the complex issue of disclosure. In his opinion, all of the policy manuals, all of the continuing training of parole officers, all of the legislation, should be directed towards a bias in favour of disclosure of all information upon request. He went on to say that, in his assessment, if real reasons for decisions are not disclosed, the courts will strike down decisions to refuse, revoke or modify the conditions of parole.

During the same session, Brian Pollick, then Executive Director of the John Howard Society of Alberta, stated that to overcome the fear mentality that is preventing not only openness about the exercise of discretion but also the exercise of discretion itself, we must first change our view of offenders from a negative to a positive one. This can come about he said, only through a basic restructuring of institutions so that inmates and offenders are given real responsibility and the opportunity for success or failure. He also argued that the goals and objectives of the system have to be further clarified so that they are not philosophically incompatible. In addition, the staff must be trained and educated so that they believe in and accept those goals. Mr. Pollick recommended next that there be a long-term program of public education. With respect to the use of information in correctional decision-making, he argued that the various components of the system must be prepared to test out all information, not simply positive information. He concluded by stating that if the exercise of discretion in corrections is to be improved, the quality of judicial decisions must also improve.

The need to develop a clear statement of the principles and objectives of the correctional system was reiterated numerous times during the Conference. Recommendations about what the purpose should be were given by two speakers during the session entitled "Currents in Correctional Theory: The Effect on the Allocation of Discretion". John Klein, then a professor of criminology at Simon Fraser University, argued that the rehabilitation ideal should not be discarded on the grounds that it involves some degree of coercion. He stated

that the fact is that coercion is a fundamental part of society. What is important is whether or not the individual has the freedom, and the discretionary power to resist coercion. In his opinion, the rehabilitative ideal can and should be retained since there is evidence that something is working and, on the basis of studies done to date, it would be premature to dismiss rehabilitation as a goal. He argued that what should be done is to permit inmates the right to refuse treatment.

The next speaker, Frank Miller, Secretary of National Associations Active in Criminal Justice, expressed the opinion that no single model, be it rehabilitation or just desserts, should be employed at any one time. Instead, he argued, aspects of punishment, deterrence and rehabilitation are all needed in corrections. The rehabilitation model does call for the exercise of discretion, he stated, and discretion is needed for humanitarian reasons as well. He argued that the tendency toward cyclical trends in corrections should not continue and that we should seek a blend of rehabilitation and justice.

Many of the individuals who emphasized the need to adhere to the duty to act fairly and to implement procedural safeguards strongly recommended that such safeguards be developed by correctional authorities working in conjunction with lawyers and offenders in a non-adversarial climate. If such steps are not taken, it was argued, the courts will impose due process mechanisms in an ad hoc fashion on the basis of the specific instances that come before them, rather than on the basis of an overall view of the correctional situation.

That the expertise necessary to provide not only procedural but also substantive fairness rests with the judiciary and not with correctional authorities was the contention of Bradley Willis, a practising lawyer from Alberta. In his opinion, the appropriate remedy for the problems associated with discretion in corrections is to make the courts responsible for the administration of sentences. The advantages that would result, he argued, would include a net saving in information and in financial cost and also an increase in fairness and justice.

The need to make the system more accountable by making it more open to public scrutiny was stressed by many delegates. In general, the recommendations put forward were to develop the ability to communicate information to the public and to listen to the concerns of the community. One of the speakers who advocated this approach was Don McComb, a recreation director in British Columbia, who emphasized the need for trust between the community and

the correctional system. To develop this trust, he argued, government agencies must abandon the fear mentality and begin to communicate freely with the community.

A somewhat different approach to openness was recommended by a number of speakers who argued that the most pressing need is to demonstrate that equitable and fair decisions are being made on the basis of clearly stated criteria. The implementation of parole guidelines was recommended by Joan Nuffield, among others, as a means of achieving the objectives of fairness, equity and openness to the public.

The recommendations summarized above reflect a divergence of opinion about whether the emphasis should be on measures to constrain discretion or on measures to improve its use. Those who advocated the former expressed their concern about the potential, inherent in discretionary power, for capricious and inequitable decisions. The recommendations based on this perspective called for a limiting of the discretionary power of correctional authorities in two ways: first, through rules, guidelines and procedural mechanisms that establish firm boundaries for the use of discretion and, second, by transferring some discretionary power away from the correctional system towards the courts, Parliament and the public. Those who placed a greater emphasis on efforts to improve rather than constrain the use of discretion in corrections generally expressed a belief that we cannot, nor should we escape the need for human judgement at all levels in the correctional system. In view of this, they argued, we must concentrate our efforts on selecting and training correctional workers who can be relied upon to use sound judgement to pursue clearly defined objectives.

CONCLUDING REMARKS

One of the central themes that emerged during the discussions was that the current controversy over discretion and recent demands for the limiting of discretionary power stem not simply from a perceived lack of rules but from a crisis in the legitimacy accorded to our major social and political institutions. According to this analysis, the crisis in confidence may be the result not only of dissatisfaction with the capricious use of discretion but also with the values and premises that inform the use of discretion. If such is the case, we were told, rules and regulations based on these values may not be an adequate response to the problems that have generated the current controversy.

Those who supported this analysis warned that rules and regulations premised on values unacceptable to those whom the system serves might only perpetuate dissatisfaction with the enormous power that the system yields over the lives of individuals. Our task, they stated, is not simply to lessen inequities in decision-making through rules and guidelines but to meet demands for decisions of higher quality and greater acceptability. To do so, we were told, will entail a number of measures including more emphasis on the proper weighting of decision factors, greater availability of statistical data to provide a context for individual decisions, a clearer statement of the mission of correctional agencies, and openness to public scrutiny.

The extent to which due process and legislation can improve the quality and acceptability of decision-making was a matter of considerable debate. One point of view was that procedural safeguards and legislation based on a recognition of inmate's rights are an important part of the effort to improve and limit the use of discretion. But others argued that they could be an impediment to this task on the grounds that due process mechanisms will

introduce an adversarial system of decision-making and, thereby, increase the antipathy between offenders and correctional personnel. A second argument presented was that procedural safeguards will affect only the procedural and not the substantive element of decision-making, which, in the opinion of many, is the aspect of discretionary decisions with which we should be concerned.

Many of the discussions indicated that the crisis in legitimacy which may be fuelling the controversy over discretion exists internally as well as externally. Efforts to promote equity and fairness through rules and regulations that circumscribe the discretionary power of correctional workers have, it was often stated, bred a feeling of frustration and confusion. The limiting of discretionary authority has been interpreted as a vote of non-confidence and has, we were told, had a debilitating effect on morale. Some of the individuals who expressed this point of view suggested that measures to promote equity and fairness are being implemented at the expense of flexibility and humaneness in the criminal justice system. Others contended that equity and fairness are being emphasized at the expense of order, security and protection of the public. In both cases, the message that came through clearly was that many correctional workers, both in the public and private sector, feel that their discretionary power has been restricted to the point that they cannot adequately perform their tasks.

The sense of frustration is compounded for many correctional workers, we were told, by the fact that they do not support or agree with the goals and objectives embodied in the measures that circumscribe their discretion. Stated in another way, the mission of corrections that is conveyed in the rules, regulations and procedures is not perceived as legitimate by a number of correctional workers.

The argument that there is a crisis of legitimacy in our major social and political institutions which stems, in turn, from conflicting perceptions of fundamental values, offers an explanation for the recent increase in demands for more accountability on the part of all public officials. No longer are the public, or the courts, prepared to leave the discretionary authority of government agencies unchecked and unfettered. As we have seen from the discussions, the demands for more public accountability have been expressed by the public through Parliament and the press and have been strongly voiced by special interest groups. The pressure to meet these demands has been felt by the senior levels of government departments, agencies and tribunals. The need to demonstrate what is being done, to be able to account for the decisions that have been taken in the correctional system has, it seems, profoundly affected the entire system.

During the Conference, it was argued that, in theory, demands for more accountability need not, nor should they, lead to a reduction in the discretion that is exercised at all levels of an organization. That they seem to be leading to such a result can perhaps be explained by drawing together several of the arguments that were presented during the Conference. We were told that if decisions for which managers are willing to be held accountable are to be made at all levels of an organization, it is necessary to articulate and communicate the organization's mission down through the ranks. Moreover, we were told, the only standards that should be imposed are those that intellectually reflect the specific objectives of the organization and the only objectives that are legitimate are those that reflect the mission of the organization. In turn, it was argued, the only mission that is legitimate is that which reflects the needs of the population you are trying to serve. Without a clearly stated, legitimate mission, discretion will be exercised according to individual perceptions of what the mission is or should be.

In view of this analysis and the discussions during the Conference, the conclusion we might draw is that the central problem that is facing correctional systems in meeting the demands for more accountability is the lack of a clear consensus over what the legitimate goals of the system should be. Since those who work within the system, as well as those whom it serves, seem to have conflicting perceptions of the purpose of corrections, guidelines and standards that promote a commonly agreed upon mission cannot be formulated. On the basis of the Conference discussions, it seems reasonable to conjecture that, in the absence of a commonly agreed upon mission for corrections, and in the face of demands for accountability, uniformity and equity are taking precedence over other objectives. That this might result in a concentration on procedural reform at the expense of substantive reform and in an increasing reliance on mechanical processes rather than human judgement was the warning that was sounded.

PART II

A SELECTION OF PAPERS

ON DISCREET/DISCRETE DISCRETION

J.W. Mohr
Professor of Law
Osgoode Hall
York University
Toronto, Ontario

If we transform discretion, which is derived from and dependent on human agency, into rule structures, we limit the visibility of discretion and drive the real perceptions and real actions of human agents underground. In any real life situation, the application of rules is dependent on human judgement. Moreover, the rules must be appropriate to the situation. A simple extension of the rules of criminal law to corrections overlooks the distinct differences between courtroom and correctional decisions.

I

The original title for this talk was - Ring Around the Roses. And although it would have been an easier tune to sing to for one's supper, and although it would have provided a perfectly good entry into the subject of this Conference, it may have signified a lack of seriousness. And we are, of course, serious people in a serious system. There may be prison humour, but we have not yet heard of parole humour and cannot possibly imagine correctional system humour. There is, nevertheless, more than an element of irony in our perceptions of discretion.

Having heard this concept discussed for two days, there may not be any pre-conceptions left; indeed there may not be any clear conception left.

Allow me to do what I usually do when I am confused about a concept - go to the dictionary and start all over again. It has been my repeated experience that the family of meanings which surrounds every work, its history and the praxis to which it speaks contain the essence of everything we may possibly say even in a complex conference such as this.

When I first heard the rumour that there was to be a conference on discretion, I took it as a hopeful sign that we may again be given official national, nay, even international permission to think. Then came the first warning signs - the title and the outline of themes. "Discretion in the Correctional System" - now, systems are not able to make any claims on the kind of discretion the dictionary tells us about and which I want to share with you. Sure enough, the theme of the first day was to be "Confining Discretion" - after all, we know a lot about confining in the correctional system. Only the second day was to be devoted to "Reviewing Discretion" - again this makes some sense since, in practice, we usually confine first and review later. And finally we are to structure discretion - so, no possible freedom for discretion, only mandatory supervision. Thus, the cards were stacked, but as the proverbial gambler said to his friend who warned him: It is the only game in town.

Nevertheless, my hope and my concern are that discretion be understood not as a negative property of systems and rules but as a fundamental and distinct aspect of human agency without which systems and rules could not work, or if they work, only by subterfuge, by concealing what are invariably human judgements.

Let me turn to the Shorter Oxford (with a little help from the big one) et je peux assurer mes amis français que le Petit Robert nous raconte la même histoire.

Discretion: I. Separation, disjunction, distinction 1590.

So far we are on familiar ground. Or are we? Is it not that during the bankruptcy proceeding of the legal imagination in this field during the last decades (if not the last century) discretion has become a dirty word, a fall from the grace of certainty? But surely, separation, disjunction, distinction are our stock in trade.

Let us look further:

II. 1. The action of discerning or judging, judgement, discernment, discrimination ME.

Now we are in even more trouble. Is this not what the legal process is purportedly all about? The action of discerning or judging. Rules, surely, are only the bone structure of a body of law. Judging, whether it is judicial, quasi-judicial or just plain human, necessarily involves discerning and discrimination, with all the good and the bad consequences which these two words remind us of. Both, incidentally, come from the same stem - Greek: krinein, which also gave us the word for crime.

Then we read:

2. Faculty of discerning - 1651.

The Shorter Oxford tells us that this faculty apparently died out by 1651 and the big Oxford instructs us further that Thomas Hobbes was the last one to use it in the Leviathan. He, of course, laid the groundwork for The Rule of Law as the absolute authority of the State. We have remembered his message, and even developed it further but have forgotten his irony: The Leviathan is, after all, a monster.

Now we come to the crunch:

3. Liberty or power of deciding, or acting according to one's own judgement; uncontrolled power of disposal ME; in Law; the power to decide, within the limits allowed by positive rules of Law, as to punishments, remedies, or costs, and generally to regulate matters of procedure and administration 1467.

What do we do with a word that means both acting according to one's own judgement and uncontrolled power of disposal? If we are linguistic positivists, we just throw it out. But if we are students of human nature we will recognize that these are two sides of the same coin. Human judgements are only free to the extent to which they involve uncontrolled power of disposal. In law, as the definition tells us, discretion is the power to decide within positive rules of law - not with positive rules of law.

If we want to break through to the last major meaning the dictionary gives us-

III. 1. The quality of being discreet; discernement; prudence, sagacity, circumspection, sound judgement ME.

2. Propriety of behaviour 1782.-

then we have to ask ourselves what "The power to decide within positive rules of law" really means. And it is for this reason (and not only to confound you) that I added the adjectives discreet and discrete.

Discreet - Showing discernment in the guidance of one's own speech and action; judicious, circumspect, cautious;

Discrete - Separate, detached from others, distinct.

The point is that if discretion is to be judicious, circumspect and cautious, it has to be examined separately and detached from others, which in our framework means separately and detached from systemic assumptions and distinct from rules. We can accept, I think, that in the determination of substantive offences, in the control of process and of evidence at trial, strict construction should prevail, rules should rule. If we must have such a violent and coercive form of law, such as criminal law, the gates should be rigidly controlled. But there is a decisive break between conviction and sentence. There is not only a different set of rules determining the process of conviction and determining sentence, but the nature of rules and the place of discretion change completely. And it is, of course, the sentence which provides the raison d'être of the correctional system - if that's what we want to call it. (In a more colourful way one could also say that it is the sentence which provides the raw material for the correctional industry, if not its finished product.)

It is a fundamental mistake to think that we can extend criminal law theory as it is generally espoused, to sentencing and corrections. This theory - and what is mainly taught in law schools as criminal law - is derived from the interplay of offences and defences as defined by substantive law, previous decisions and principles which shape the trial proper. What is in question at trial is a proscribed form of behaviour and a prescribed degree of intent - not a person, at least not in theory. Sentencing and corrections on the other hand, whether we talk in terms of punishment or rehabilitation, or whatever other generality we have up our sleeve, is about people. Judges may still retain the illusion (although few can in the face of the person in front of them) that their sentence pertains only to the act that has been committed. No such illusion is possible for the keeper who receives the prisoner.

It has always amazed me that judges and others with legal training, specifically academics, could vehemently attack what they think is discretion in the correctional process, such as the very existence of parole, and completely ignore that sentencing, at least in the Canadian context, is highly

discretionary. We can attempt, as our American friends have done during the last decade or so, to take discretion out of the system altogether. This is a dangerous illusion, much more dangerous than the idea of rehabilitation against which, at least in part, the rigidification of the system has been directed. Some Americans have now recognized that the cure is worse than the disease that discretion was believed to be. It is in any case curious that the attack on discretion was mainly directed towards post-sentence decisions and not towards pre-trial decisions which suffer even more from an overdose of negotiated justice with even less visibility. But pre-trial bargains are mainly made by lawyers, so they must be legal.

It may well be, as many have claimed, that corrections is a legal jungle. But is it so because of an absence of rules and regulations or an absence of specified procedures for that matter? Can due process in a prison setting be measured by standards of criminal law when this very law has already deprived one group of people of their autonomy and has loaded another group, the keepers, with obligations it would punish under normal civil conditions? What are the standards to be applied to fact-and-law finding in the parole process which by its very nature is discretionary?

The danger is that, if we transform discretion which is derived from and dependent on human agency into rule structures, we limit the visibility of discretion and drive the real perceptions and real actions of human agents underground. In any real life situation the application of rules is dependent on human judgement. If this is not recognized and not made accountable, human agents will play power with rules and cover arse at the same time.

II

The "Rule of Law" concept is only one concept of law; there are others, such as equity and custom which are not so much bounded by rules but by context or conventions, as our highest court recently was constrained to admit. I wish I could now propose that we turn from law to social sciences to understand context or conventions or mores as they used to be called. But I am afraid we shall find the same rule addiction there, even if differently expressed such as in quantitative measures; we will find the same denial of human agency and its impact on research which does not disclose its search. Social scientists who have recognized that scientific procedures lend themselves as much to power games as do rules have recently either made the phenomenal discovery that crime and corrections are political issues or have turned to debunking or both, job conditions and income permitting. That corrections is political is a truism - every state operation is political.

The vicious innocence of the belief in the neutrality of law and science cannot possibly survive in this century. But debunking too betrays an idealist stance. It is based on the expectation that good can come from the process. This is a misunderstanding; the process is clearly meant to do evil. The justification, of course, is that evil is to be applied to evildoers; but it is only in some form of mathematical calculation that two negatives result in a positive. The cognitive dissonances and the confusion of emotions which result from looking for sanctity in sanctions could be hilarious if it were not for the suffering and human disorientation of keepers and kept.

Let us by all means recognize that systems are expressed by structures and rules. Systems qua systems, should have no discretion. We want our machines to run the way we have designed them to run. But even system theorists know that this applies only to closed mechanical systems. If my watch stops running, it has broken down. If time stands still, this is quite another matter. Corrections, by whatever name we may call it, can neither be a closed system - people do get out - nor a mechanical one simply because it involves people and people do make judgements, including judgements about rules, and thus pervert standardization if they are not part of the standard. We will not be able to change this by 1984 or ever.

We pride ourselves in having a government of laws and not of men. If this motto, which does have meaning, is not to become insipid and insidious, we have to recognize that it is men who not only make the laws but administer them. If we leave no room for their prudence, sagacity, circumspection and sound judgement and for assessing the propriety of their behaviour, we shall have a tyranny of rules rather than men.

A number of years ago, Mr. Outerbridge spoke out against the tyranny of treatment. It was not so much treatment he questioned as the misuse of human agency for systemic purposes. In initiating this conference, I take it he is targeting another tyranny which is now more pervasive than rehabilitation talk used to be.

I would thus argue that freedom for the person must mean a maximum of discretion; and freedom for all persons a maximum of accountability for the actions which flow from personal judgements. To play the game of crime and corrections we need rules; but we surely know that rules are not the game.

WHY IS DISCRETION AN ISSUE?

Stewart Asquith
Lecturer
Department of Social Administration
University of Edinburgh
Edinburgh, Scotland

Concern over the discretion exercised by social welfare administrators may stem not from a lack of rules per se but from a crisis in the legitimacy accorded to our major social and political institutions. If so, the implementation of procedural safeguards alone will not ease the problems associated with the discretionary powers of public agencies. Even more significantly, if we attempt to control discretion strictly by legal and organizational means, the conditions are provided for a move towards centralized bureaucracy and a retributive philosophy.

In the course of my remarks, I want to address the issue of just why discretion or the exercise of discretionary powers should be seen to constitute a problem, what kind of problems it poses, and just as importantly, for whom. My remarks are going to be fairly general and, for the purposes of this Conference, what I would like to do first is give you my concerns about discretion, and the concerns that brought me to study it with Michael Adler. With reference to Scottish criminal justice, I would like to make a number of preliminary comments: we have no probation service, we have no parole service, we have no after-care service. In Scottish juvenile justice, we have no Juvenile Court, children cannot be legally represented, children have no right to legal representation. In 1979, 14,000 decisions were made about children by our Children's Hearings Tribunal. Only two decisions were

successfully appealed. All welfare and social work services in criminal justice are provided by our one single Social Work Department. The resulting difficulty is that the Social Work Department is concerned not simply with offenders, but with the whole range of welfare problems.

One concern then about discretion in Scotland, in my opinion, is the great width of discretionary powers available to our social workers. My remarks derive mainly from my experience in Britain but I hope to argue that they have some general relevance. A common theme in recent debates about discretion has been that wide discretion granted to public officials can best be checked or confined by the imposition of strict legal controls in the attempt to promote greater accountability. I want to argue that it is mistaken to assume that the only problem with discretion is a lack of rules, and I would like to make four points to support that argument. First, concern with the lack of rules per se is rather short-sighted since the problems posed by discretion have their roots in much broader social and political considerations. Second, the current concern with discretion is not simply about the abuse of discretionary powers but may also reflect more general scepticism about the ideological basis which informs decision-making. Third, concern with discretion reflects the erosion of legitimation of confidence in some of our more important social and political institutions. Fourth, consequently, an examination of why discretion is seen to constitute a problem in the first place leads us, I would argue, directly to questions about the distribution of political power and the nature of social relationships in society. In summary, the current preoccupation with discretion is premised upon a crisis in legitimation and in confidence in the institutions which are involved in the implementation and the formulation of social and criminal policy.

My remarks for this Conference are addressed mainly to the exercise of discretion by professionals. This is for two reasons. Firstly, the growth of discretion and the growth of discretion as a problem, have gone hand in hand with the growth of powerful professional agencies. Secondly, with particular reference to the criminal justice system, the involvement of professionals such as social workers, psychiatrists and psychologists in the provision of reports, assessment and treatment measures, has led to confusion and ambiguity in the formal processes of social control. The problem with discretion is then not simply with discretionary decision-making per se but with the exercise of discretion within a system where there may well be a lack of consensus about the objectives of crime control and the best means appropriate to realising them. As an example, the number of children that have been dealt with by our children's hearing system in Scotland has actually decreased every year since 1975. On the one hand, the social work profession

has argued that this is an indication that the system is actually working since fewer children are being dealt with by formal processes of control. It has been suggested by the police, on the other hand, that because they view with suspicion a welfare philosophy as a basis for dealing with offenders, their officers are exercising their discretion in such a way that they are not referring children to the hearing system. Both agencies supposedly working within the same system, exercise their professional discretion in very different ways.

I suggested earlier that I want to relate discretion to power. This is for a number of reasons. The attempt to control discretion by rules, although it does not necessarily go far enough in my eyes, is not totally irrelevant since the provision of legal safeguards can in fact provide considerable protection to the client or to the offender against unwanted and unjustified intervention. The provision of legal safeguards can provide very important basic legal and civil rights. But I want to argue that confining discretion by statute and legal prescription might only enhance the procedural rights of individuals without in any way promoting or enhancing substantive rights. That is, greater protection through due process of law, through natural justice, may provide little more than a recognition that certain steps or procedures have to be followed in the decision-making process without in any way challenging the theories and assumptions employed by the professional welfare agent.

The power given to professionals in the criminal justice system has two main implications. Firstly, with the growth of delegated legislation which is often vague and sometimes confusing, particularly in the welfare field, the professional - the social worker, for example - is in a position not simply to implement criminal policy but also to formulate it through the exercise of his discretion. Therefore, it is in the power of the professional welfare agent to thwart official objectives. Secondly, there may be a lack of agreement between different agencies about how to interpret the legislation. The danger is that, since no agency nor individual has total responsibility for the criminal justice system as a whole, discretion may be exercised in different ways, by different agencies, at different points in the system. The potential lack of co-ordination means that different agencies - again, my examples would be police and social work - might then become involved in an organizational power struggle. The last point I would make in this section is simply that discretionary decision-making is notoriously slow and organizationally inefficient. My concern about the promotion of legal safeguards is that they might be instituted more in the interest of organizational efficiency rather than to protect the rights of individuals or to promote justice.

At this point I would like to discuss discretion as a problem of power exercised by professionals over clients such as offenders. A crucial feature of the debate about professional discretion is that the power of professionals derives from their monopoly over particular forms of knowledge and from their membership in professional institutions; two factors which give professionals firmly entrenched social and political status. In Britain, the government is the main employer of professionals and, in this way, has a potent medium for determining the nature of welfare and other social services. The exercise of discretion then has to be analyzed not simply in terms of professional judgement and its lack of accountability but also within a more broadly based critique of the legitimacy afforded to important social institutions such as social work or criminal justice as a whole. My belief is that the contact between the professional and the client, any recipients of a welfare service, is one of a power relationship in which clients find themselves in positions of subordination and dependency. Moreover, as a number of commentaries have suggested recently, what stands for social and political reality is closely connected to the possession of knowledge and power. And that power and knowledge allows professionals and other welfare agents to impose or transmit particular conceptions of social order in the act of exercising discretion. They have a very effective mechanism for subtle forms of social control.

Welfarism, as currently expressed in criminal justice and social welfare systems, while claiming to offer solutions to the immediate needs of individuals, may well direct attention away from social, political and economic injustices. It is for such reasons that I have argued that greater procedural equality could be introduced by a return to principles inherent in legality while leaving unchallenged basic structural inequalities. In short, welfarism is ideologically attractive but is essentially conservative. The current concern then with discretion may be perceived as an attempt to challenge the legitimacy of the perspectives employed by welfare professionals, and ultimately leads to questions about the way in which power is socially distributed.

There is a strong movement in Britain called the "Return to Justice" movement but, in my opinion, the problem with discretion is not simply caused by an absence of rules nor solved by a "return to justice". Discretionary activity has to be analyzed in terms of much broader organizational and social considerations since the kind of problem it is taken to constitute might differ from the point of view of the client, the consumer and the decision-maker. And since most officials exercising discretion are members of powerful professions, the exercise of discretion by professionals may be seen as a micro-sociological concern, in terms of which discretion is actually exercised and a macro-sociological concern, in terms of the social and political basis of professional power.

It has even been suggested by a number of commentators that the problem of discretion reflects a state of crisis in law and legal institutions and is not simply due to the difficulty of reducing a professional's knowledge base to a set of rules. The problem is more fundamental since it can be attributed to the very nature of law itself and the irreconcilability of legal and welfare ideology. In particular, the difficulty of controlling discretion may well reflect the potential for conflict between two very different forms of legal tradition - "gesellschaft law" and "bureaucratic-administrative law".

In "gesellschaft law", where the emphasis is on formal procedure, impartiality and adjudicative justice, all persons stand before the law as a holder of rights and duties, and all are equal before the law. This type of law is most generally associated with a laissez-faire society composed of private individuals. In "bureaucratic-administrative" law the concern is more with public policy and individuals are seen as agents rather than as holders of rights. The purpose of this second form of law is seen as providing for the regulation or administration of an activity and less with the adjudication of disputes between legal persons. Bureaucratic-administrative law, since it is designed to promote the public interest and the common good, is more commonly associated with societies where the state adopts regulatory and interventionist strategies.

The point is that as contemporary states have become interventionist and regulatory so there has been a tremendous growth in bureaucratic administrative law. However, the traditional function of law, according to the gesellschaft model, has been adjudication. The two are not readily reconciled since they are both grounded in very different sets of assumptions about social relationships and operate in terms of conflicting principles.

Discretionary decision-making involves the exercise of judgement in accordance with bodies of knowledge that have hitherto been accorded legitimacy. The problem of discretion now may have to be construed as a crisis in confidence in basic social institutions such as our criminal justice and legal system and not simply a concern about accountability and control.

To conclude, my own concern about efforts to control discretion is twofold. First of all, if we control discretion by legal statutes, legal prescriptions and organizationally, the conditions are provided for a move towards centralized bureaucracy in the interests of control. Secondly, the conditions are created for a move to the right in the control spectrum, and by that I mean that the principles of legality governing discretion fit in very well with a retributive philosophy. The movement in Britain for children's rights is very closely associated with a move towards retributive forms of

sanction. The principles of consistency, proportionality, determinate sentences and fixed points of procedure in decision-making are all seen as providing appropriate checks on the possible abuse and injustice that may arise from the exercise of discretion by law enforcement agents and related personnel. These principles also provide, however, a logical and convenient basis for the promotion of a retributive philosophy. My concern would be that attempting to control discretion by legal prescription and the principle of legality would not only have implications for the form of decision-making but would require a fundamental change in the nature of the criminal justice system as a whole.

DISCRETIONARY POWER: JUST AND HUMANE WHEN PUBLICLY EXERCISED

André Normandeau
Professor
School of Criminology
University of Montreal
Montreal, Quebec

By presenting discretionary decisions for examination by an enlightened public and by pressure groups that specialize in the correctional system, we can achieve a middle position between the exercise of unjust and arbitrary discretionary powers and a system in which no discretion is permitted. The challenge is to achieve a compromise between the protection of individual rights and the principle of legality on the one hand and discretionary power and individual treatment on the other. It is a challenge which, if approached with good will, could be a source of positive stress for everyone working in the correctional sector.

There will always be a very delicate balance between the principles of legality and equity and that of individualization of punishment and the discretionary powers it implies. Only in this way can we keep the law free of Procrustean arbitrariness and keep at bay the equally Procrustean arbitrariness of an overly personalized individualization of punishment.

In Greek mythology, there was a character named Procrustes, a highwayman and brigand who, after robbing his victims, made them lie down on a bed of iron. If their legs were too long for the bed, he cut them down to size. If they were to short, he stretched them. Theseus eventually put Procrustes to the same torture.

It is difficult to imagine a correctional system in which officials have absolutely no decisional latitude. Discretionary power is absolutely necessary in a system which promotes not only a coherent, uniform policy in decision-making but also strict adaptation of those decisions to the particular circumstances of each case. If this were not so, we would be living under the tyrannical rule of the law and the penal system would be an inhumane, Kafkaesque machine. At the same time, however, the tyranny of extensive and excessive discretionary power, without legal or other forms of control, is just as despotic and is particularly unacceptable at a time when individual rights and human liberties have begun to take on a significance far removed from the empty symbolism of the past. In my opinion, we must not seek an absolute value, pure and unattainable - as did the Knights of the Round Table - whether it be the principle of legality or the principle of individualization of punishment. Life has no absolutes; it has only high points, tendencies, and compromises which must be faced over and over again. Thus, instead of trying to establish a clear-cut position in favour of one principle or the other, I believe we must aim for an honourable compromise which is suitable at least for the short time.

Certain official bodies and some highly-placed individuals have taken a firm stand in recent years in favour of the rule of law. Among them are the Law Reform Commission of Canada (1976), the Sub-Committee on the Penitentiary System in Canada (1977) and Chief Justice of the Supreme Court of Canada, Bora Laskin (1978). The Sub-Committee stated that the arbitrary decisions traditionally linked with prisons must be replaced by explicit regulations and equitable disciplinary measures and that valid motives must be provided for all decisions affecting inmates. Chief Justice Laskin stressed the exorbitant and unprecedented tyranny of the National Parole Board which, he claimed, treats inmates like puppets on a string. These are harsh words but they do describe reality. On the basis of these testimonies, some individuals have demanded a complete or nearly complete termination of all decisional latitude. I am personally against a radical, 180-degree turn which would simply replace the imperialism of discretionary power with the imperialism of legal or quasi-legal power. I strongly disapprove of imperialism whether it be of the right or the left, whether it be well-intentioned or not. In medio stat virtus: the old Latin saying tells us that virtue is found on the middle road and, still naïvely believing in proverbs, I have faith in the virtue of moderation and temperance both in ideological theory and in practice.

With this in mind, I suggest we take the rocky road of compromise. While it is less glorious, I admit, than following an absolute principle, it is ultimately much more humane. A middle position must be sought between indifference to the potential and real abuses caused by the exercise of unjust and

arbitrary discretionary powers and the impossible, useless and inhumane effort to invent a system in which everything would be settled by the law, with no place being left for discretionary power. We can achieve the middle solution by presenting discretionary powers for examination by an enlightened public and by pressure groups which specialize in the correctional system. In my opinion, the following principle should be officially recognized by governments and administrators: the reasons underlying decisions made in the correctional system which relate to the offender's rights and freedoms must be known, made public and justified. For some years now, discretionary power has been somewhat limited by a multitude of laws, regulations and directives. For example, a charter of rights for inmates was enacted just a few weeks ago by the Solicitor General of Canada. In view of this situation, I would not impose many more legal controls for fear of paralyzing the penal system. Instead, I recommend a decree that, henceforth, discretionary decisions be open to evaluation and criticism by the public and pressure groups. Justified, written decisions, provided as a legal right and not as a privilege granted by special permission, would automatically be put to the test of public opinion.

In my opinion, there is not now nor will there ever be any magic way to fully eliminate arbitrariness from the law or from the exercise of discretionary power. We must have standards, parameters, guidelines, and rules of play that are both known and accepted. We must have an equitable process. It is my belief that such a process may be created by means of an effective but informal control mechanism in which legitimacy would be more important than legality. I am referring to public discussion, public evaluation and public criticism. We are living in a society of men, not robots - or so we hope.

The theme of the September, 1981 issue of Criminologie - Québec is parole in Quebec. Several critical questions are raised about social control, intervention, the nature of assistance, and bureaucratic control and individual freedom. The issue contains a demand for the acknowledgement of the right of the public, pressure groups and, in particular, the offender to receive all the explanations they need to fully understand the meaning and the implications of Parole Board decisions. The concluding editorial remarks are pertinent to these discussions on discretionary power in the correctional system and, therefore, worth quoting at length.

> "...after reading these pages, the reader will certainly have the opportunity to reflect on the future of reform measures. Once released from the enlightened minds of the innovators, these measures become victims of what the French sociologist, Raymond Boudon, has called "the opposite effect", the unintentional consequences of social policy. These effects often pervert the nature of the objectives sought; they can even make the measures work against the intention and the principle that initially presided over their concern. The history of social reform is full of examples of goals

betrayed. Just look at the discrepancy in reforms in the school system, the health sector, and social security; between the everyday facts and the intention of the law-makers, not to speak of the high ideals of the people who dreamed up the reforms and proposed them in their learned writing. This is of the essence of social life, which is so complex and so unpredictable in its changes and its progress precisely because of the interplay between the necessity which governs the nature of collective structures and the freedom that is deeply rooted in individual consciences. In addition, we are living in an irremediably moral world where the tensions and conflicts between good and evil, legal and illegal, vice and virtue are real even if the differences appear fuzzy in a time of cultural change. Would it not be Promethean audacity to want to uphold the failing willpower of men and women in search of their place in a world full of pitfalls, contradictions and little real justice with simply a series of psychological and social measures? It is probably this very condition of modern man that explains the critical disillusion that appears in these pages, from which our readers will nevertheless prove wise enough to derive more cause for hope than for despair."

In conclusion I would like to remind you that it is not easy, as I well know, to live with such ambiguities, with compromises that must constantly be renewed. As the famous scientist, Han Selye, would say, it is a source of stress for everyone working in the correctional sector. But Selye also says in one of his books that work is an obligation and a duty which, if performed with a good will, is a pleasure; stress does not kill if taken in stride. In fact, he invented the expression "eu-stress" to designate positive stress. I propose that we look for a criminological "eu-stress" in this challenge to find and to experience a compromise between the protection of rights and the principle of legality on the one hand, and discretionary power and individual treatment on the other.

The Vice-president of the University of Québec, Germain Gauthier, recently said that the 1980s must provide new and radical solutions. We must develop our curiosity, our imagination, our creativity, even our insecurity. Gauthier favours a state of permanent protest and perpetual anguish as a source of creativity (Forum, Université de Montréal, March 15, 1981). The well-known Québec ecologist, Pierre Dansereau, adds his own grain of salt which clarifies the meaning of the challenge I am proposing for us all: the art of living consists of balancing contradictions, not eliminating them. The task facing us is to balance the contradictions that have been brought to light as a result of our discussions regarding discretionary powers in the correctional sector.

METACONTROVERSY: CONTENDING IDEAS ABOUT THE CONTROVERSY OVER DELEGATED AUTHORITY

Dr. Michael J. Prince
Assistant Professor
School of Public Administration
Carleton University
Ottawa, Ontario

On the surface, the current controversy over delegated authority and discretionary powers in government appears to be restricted to legal, organizational and procedural issues. But on closer examination, it becomes evident that the controversy over delegated authority and discretion is part of a larger controversy - a metacontroversy - over the fundamental issues of human nature in general and public administrators in particular. Viewpoints about the numbers and types of controls needed are deeply influenced by conceptions of human nature. Therefore, to properly understand various approaches to delegated authority, we must begin with an analysis of the contending conceptions of discretion, human nature and control.

At the root of the debate over delegated public authority is a metacontroversy. The metacontroversy relates to the fundamental conceptual foundations about a controversy. A metacontroversy deals with the philosophy of public issues and has links with the administrative culture in public bureaucracies.

The metacontroversy over delegated authority is the controversy over our approach to and understanding of discretion in the governmental system. There is disagreement and argument over the basic nature and character of the

CONTINUED

1 OF 3

phenomena of delegation and discretion. There is debate over facts and values regarding discretion. There is dispute over the assumptions on which we think about delegation. Hence, the central proposition of this paper is that much of the controversy over delegated authority is largely conceptual in nature and not legal, organizational or procedural. This is not to say that no problems exist in these other areas; rather it is to highlight a more basic and frequently overlooked aspect of the controversy, that is, the conceptual images which underlie ways of understanding discretionary powers. The concepts of delegation and discretion are value-loaded and are subject to different interpretations.

My intent is to raise the question of the political nature of the conceptual principles that inform the usual discussion, and to emphasize the contentious elements in defining the controversy. The term metacontroversy implies there is ample room for dispute over what the controversy is because the issues are, in large part, about values over which people disagree and which cannot be empirically tested. Thus, the metacontroversy seems inevitable. It is also a continuing process because the phenomenon under discussion is not static. As Professor J.A. Corry has remarked, "The social revolution is not over yet".[1] The universe of public administration and discretion is still unfolding.

The starting point for the metacontroversy is that we are not faced with a given problem. There is considerable potential for genuine dispute over a definition of the problem regarding delegated authority. The question is: what is the controversy over discretion? Is it the growth of delegation in general; the loss of effective control by Parliament; the existence of "unfettered" administrative discretion; or is it perhaps the exercise of delegated authority in law enforcement agencies; the lack of public knowledge and openness surrounding the processes of delegation; or the potential for abuse of discretionary powers?

Furthermore, we may ask, what is the basic value concern over delegated authority? Is it a concern about legality, administrative responsibility, policy flexibility, responsiveness, equity, efficiency, effectiveness, parliamentary supremacy, accountability, or individual liberty? Is it a question of procedural fairness (due process) or substantive fairness (due

---

1 J.A. Corry, "The Administrative Process and the Rule of Law" in W.D.K. Kernaghan (ed.), Bureaucracy in Canadian Government, second edition, (Toronto: Methuen, 1973), pp. 124-29, at p. 124.

outcome)? In short, what social and political values are to be promoted and protected?[2]

To understand the difficulties in defining and dealing with the controversy, we must recognize the dilemmas of discretion. Very often delegated authority is intended to promote several values concurrently that are, to some degree, in tension with each other. For instance, the exercise of discretionary power is meant to realize both predictability and flexibility in decision-making and, at the same time, to achieve equality and equity. The effective exercise of delegated authority, therefore, may not so much involve pursuing goals as balancing values.

Can the issue of delegated authority mean so many things? Is there not one basic problem or is there a set of controversies? There is a metacontroversy over delegation because there are contending ways of defining the problem and of discussing discretion, controls and human nature.

Another cause for the metacontroversy is the different orientations of academic disciplines in studying public sector organizations and delegated authority. While there is some common ground among the disciplines of law, political science, economics, public administration and sociology in the study of administrative and regulatory behaviour, there are "important differences of emphasis and levels of analysis".[3] Each intellectual orientation or discipline has certain bases and blinkers which emphasize certain issues and variables while excluding others. Moreover, the structure and implementation of delegated authority has usually been examined from a uni-disciplinary viewpoint rather than a multi-disciplinary perspective. The academic literature has placed considerable emphasis on analysis but paid little attention to the synthesis of issues, concepts and explanations.

---

2 On the issue of competing values in administrative law see John Willis, "The McRuer Report: lawyers' values and civil servants' values", University of Toronto Law Journal, 18, 1968, pp. 351-60.

3 G. Bruce Doern, Ian A. Hunter, Donald Swartz and V. Seymour Wilson, "The Structure and Behaviour of Canadian Regulatory Boards and Commissions: multidisciplinary perspectives", Canadian Public Administration, 18, 1975, pp. 189-215, at p. 210.

How we conceive discretion is another point of entry for debate in defining the controversy over delegated authority. It is likely there are competing opinions about the extent, nature and significance of delegation in the Canadian governmental system. Is there too much delegated authority? This raises the question: authority for what and delegated to whom? Do senior public servants have sufficient authority to exercise management responsibilities? Some commentators think not. Are more discretionary powers desirable? Are they inevitable? Is the number of discretionary rulemaking and rule applying powers evident in public authorities a ground for praise or criticism?

Discretion is seen largely in legal and institutional terms in relation to statutes and the legislative, executive and judicial branches. Much of our thinking about delegated authority pays little attention to behavioural aspects and the implications discretion can have for relations between officials and publics. Discretion can be seen in many ways. For example, it can be understood as despotism or simple interpretation or innovation. In other terms, is discretion inherently bad or good or neutral, or is it a double-edged sword? Discretion is frequently regarded as public power that threatens private rights. It is frequently seen as a necessary evil for modern-day governing. Furthermore, discretion was traditionally viewed by some people as decision-making in a statutory vacuum without reference to legislative rules and standards.

However, discretion can also be treated as a necessary good and as a creative instrument in public policy and administration. Delegation entails the allocation of some form of activity, authority and accountability. Put in another way, delegation involves the decentralization of functions, powers and obligations. In this sense, delegation is consistent with the internal democratization of public administration. But what is the controversy over delegation really about? Is it about the kinds of activity that are granted discretionary powers? Is it over the extent of authority itself being delegated? Is it over the absence of accountability systems in government? Does an increase in delegated authority necessarily mean a decrease in parliamentary accountability? To fully consider the question of whether the delegation of power has gone too far in Canada, one must examine the related dimensions of activity and accountability.

It is generally held that delegation and discretion are inevitable in the administrative state. The real issue, many suggest, is the development of effective controls to ensure that discretionary powers can be called to account and can be exercised in a responsible manner. In this context, the controversy is over which control or combination of controls should be

selected in order to regulate delegated authority. Should judicial controls of delegated powers be increased? Should legislative control be more direct and detailed through parliamentary debates and committees? What about parliamentary ombudsmen?

And, in the executive branch, what hierarchical controls and monitoring structures for audit should be established? Indeed, many of the panel discussions at this Conference are intended to explicitly explore these issues. In thinking and talking about controls, administrative theory and practice have assumed that discretion is controllable. But are there cases of uncontrollable discretion? These issues need to be explored.

The conventional view is that discretion is something that administrators exercise. Yet, discretionary powers can be seen in the hands of politicians, justices, professionals, private organizations and individual citizens. The organizational forums of public discretion include the legislative arena, the executive or cabinet arena, the judiciary, government departments, independent regulatory agencies, crown corporations, public enterprises and self-regulating professions. The organizational forums for private discretion include voluntary and proprietary organizations and families. Thus, it is important to recognize that discretion is not confined to public servants in government departments and regulatory boards.

Moreover, we should consider thoughtfully the notion of private-citizen discretion in the controversy over delegated authority. Private discretion can be a co-decider of government services along with public discretion. It plays at least three roles in the administrative process. The citizen can decide to call the police, visit the hospital emergency, or apply for unemployment insurance benefits. Second, private discretion can maintain contact with the process and require that further public actions occur. The citizen may press charges or obtain control or supervision, review and appeal of an administrative decision. Third, private discretionary behaviour can terminate some administrative or judicial process. The citizen may withdraw a complaint or application, or may accept a decision by an agency or official. In discussing the control of delegated authority, it is essential to examine the range of organizational forms of public discretion and the interrelationships between public and private discretion.

Both theory and practice have emphasized formal procedures and external devices for control. Conventional wisdom holds that controls are needed; controls are good and more controls are required. Such efforts have endeavoured to confine, check and constrain discretion rather than encourage, facilitate and reward delegation. What is the relationship, for instance,

between discretion and job satisfaction, between discretion and efficiency, between discretion and job stress, or between discretion and innovation? The link between discretion and organizational behaviour deserves much more consideration.

Behind this controversy over controls is a metacontroversy over beliefs about human nature in general and of public administrators in particular. Viewpoints about the numbers and types of controls needed are deeply influenced by conceptions of human nature. Are people generally creative or innovative? Are they well motivated or capable of being well motivated? Pessimism is a dominant theme in the delegation debate. There is lack of faith in public officials expressed in much of the administrative literature. For many people, politicians and/or bureaucrats cannot be trusted. They are easily corruptible and/or irresponsible. "Without the checks provided by either the law or the processes of professional socialization, the resultant behaviour of administrators would be both selfish and capricious."[4] Other people are more willing to trust the discretion of public officials. Here the premise about human nature is that public administrators are basically good, worthy of trust and are responsible. Thus some observers argue responsible conduct of administrative or quasi-judicial functions is not so much enforced as it is elicited. Hence, responsible conduct is largely brought about by collegial relationships, the existence of professional integrity and expertise, and self-control.

In conclusion, part of the politics of delegated authority is trying to lay bare and obtain agreement on what exactly is the controversy. This reality of public policy and administrative issues is the metacontroversy. We need to recognize the differing approaches to understanding the problem of delegation. This can be done by an analysis of the contending conceptions of discretion, human nature and control. It is hoped that this paper has contributed to a better appreciation of the philosophical and political aspects of delegated authority.

---

4 Michael M. Harmon, "Normative Theory and Public Administration: Some Suggestions for a Redefinition of Administrative Responsibility", in Frank Marini (ed.), Toward a New Public Administration, (New York: Chandler, 1971), pp. 172-85, at p. 173.

THE CONTROVERSY OVER DELEGATED AUTHORITY

Alan Leadbeater
Assistant to the Vice-Chairman
Canadian Radio-Television and
Telecommunications Commission
Ottawa, Ontario

At the centre of the controversy over delegated authority lies the problem of improving the quality and acceptability of decision-making in federal agencies. The increasing use of judicial review may actually be an impediment to solving this problem. Neither the adversarial approach nor an emphasis on procedure are likely to improve the quality and acceptability of administrative decisions. An independent review of broad policy - perhaps by a Council on Administration - might be a more effective means of achieving better, more acceptable decisions than judicial review of independent decisions.

I think perhaps if we substitute the term "decision-making" for the term "discretion", we can better understand the fundamental nature of the problem that is being addressed. Good decision-making is after all an elusive goal for each of us as individuals, just as it is for public officials. Taking that view, we can also be prepared to raise more questions than there are compelling answers, at least that seems to be the chief characteristic of the learning in this field.

It has been my experience that a major impediment to improving the quality and acceptability of decision-making in federal agencies today is the institution of judicial review of administrative action. It has, I believe, led administrators, at the urging of their legal advisors, to concentrate on the procedures by which decisions are taken, rather than seeking to ensure the nurturing of good decision-makers. Moreover, it has led administrators to pattern those procedures on adversary procedures traditional to judicial adjudication. These procedures are often ill-suited to high quality decision-making, even when one of the accepted elements of quality is conceded to be fairness. I call this phenomenon in today's agency decision-making "lawyer overkill". The adversary method is to public decision-making what logic is to individual decision-making, a procedural method supporting with equal vigour, bad decisions as well as good.

But let me leave that theme for now and take a step back to a consideration of why it is that decision-making authority has been delegated to independent agencies in Canada. Why have we not left government decision-making to Parliament and the appropriate Departments and reserved dispute resolution to the ordinary Courts?

We can perhaps be permitted the generalization that agencies have been delegated decision-making powers in those instances where either it was practically difficult to have Parliament, Departments or the Courts undertake the task because of a large volume of cases or the requirement for special expertise, or because Parliament could only provide the most general standards, goals or policies to govern decisions, preferring them to be "fleshed-out" on an ongoing basis outside the direct control of the government of the day.

When agencies are delegated this quasi-legislative function, they have broad discretion. In that circumstance there is, in our democratic tradition, a special onus placed on agencies not only to make high quality decisions but to make acceptable decisions. These terms "high quality" and "acceptability" call for further definition because the terms "fairness" or "due process" and "accountability" are more traditional to the topic, and indeed are considered to be at the heart of the controversy over delegated authority.

In my view, quality and acceptability are the standards against which existing public decision-making should be assessed and the terms in which the controversy over delegated authority should be recast. For a decision to be one of quality, the decider must have the ability to postpone judgement or decision pending a thorough exploration of evidence, opinion, argument and values (proper search, selection and attention); the ability, through

experience or special aids, to assign appropriate weights to those inputs (proper weighting or evaluation); and a thorough understanding of the larger decisional context that circumscribes and shapes decision possibilities, coupled with a capacity to be imaginative in the generation of decision possibilities, (proper contextualization). That is not to say the decision will be right or that the substance may not be open to dispute. There may still be problems of acceptability with decisions of high quality. Decisions having these three components: proper search, selection and attention; proper weighting; and proper contextualization, will generally be both of high quality and fair. Fairness is not a foil to quality in decision-making but, as an attribute of decision-making, it can come into conflict with "quality" when it is assumed always to be best served by observing the procedural requirements of the adversarial, adjudicative method. These procedural requirements are constructed to give effect to the notion that "justice should not only be done, it should be seen to be done". While that is certainly a laudable sentiment, one can question the popular assumption that the adversarial adjudicative method is the most successful way to structure decision-making so as to respect that principle. There is a growing literature exploring procedural alternatives for administrative decision-making. Critical evaluations of the adversary adjudicative method seem to suggest that in practice they frequently serve a principle more like this: "It matters not whether justice is done, so long as it is seen to be done." Court-like decision procedures are especially vulnerable to this criticism because they create a distance between the decider and the affected party which makes it extremely difficult for the decider to experience that form of relatedness essential to full understanding - empathy.

Another element of quality decision-making that is at risk when the adversary adjudicative method is adopted is efficiency, including the element of timeliness. Curiously, disregard for the effects of procedure on this element is an important cause of the reduction in the actual justice delivered to parties. The growing awareness of the limitations of the traditional procedural fairness protections is reflected in the radical reconsideration of the usefulness of traditional legal decisional processes by the Courts themselves. In this regard I would refer you to a 54-page bibliography put out by the American Bar Association, entitled Alternative Methods of Dispute Settlement: A Selected Bibliography, 1979.

I want to emphasize again the distinction between quality decisions and acceptable decisions or rather the potential distinction. A high quality decision may be disputable, arguably wrong, or unacceptable. This is not so because it might be unfair, that being a defect of quality, but because the substantive principles that define the question for decision and set the

standards for decision are unacceptable either in themselves or as operationalized for application.

One of the major problems of acceptability in public decision-making, explored at length in the literature on organizational behaviour, is the phenomenon of "goal substitution". This refers to the reality that an organization's official goals or even those administrators believe to be their controlling goals, are frequently not the actual ones being served by the organization's actions. Goal substitution results because any activity an organization pursues will produce either strains or rewards. The tendency of organizations to seek the minimization of strains and the maximization of rewards is the dynamic that generates new goals. An important element in the production of strains and rewards is often efficiency. Of course other sources of strains and rewards that bear on any organization may be even more influential than that of efficiency. Some of these, especially in public organizations, are: the career aspirations and socio-political philosophies of the decision-makers in the institutions; the authority of outside individuals or groups to determine budgetary allocations; the power of others to set the remuneration of decision-makers within the institution; the ability of individuals to impede goals by non-cooperation; and the power of outside groups to bring public attention to institutional activities.

It is only through an identification of the sources of strains and rewards affecting a particular organization and an examination of the responses to them, that some understanding of the actual operational goals of an institution is possible. Thus, the task of ensuring effective supervision of agency goals and policy development requires the ongoing study and evaluation of the daily activities of agencies. It is this phenomenon of goal substitution which is the principal justification, in my mind, for some form of independent review of agency activity. However, the review which this problem calls for is not appellate review of the merits of individual decisions, nor judicial review of the legality of individual decisions. It calls for a broader policy review designed to ensure that the ongoing goals actually being served by agency action are open to critical scrutiny.

One mechanism to accomplish this, which I have suggested in a study published by the Law Reform Commission of Canada,[1] is a Council on Administration. Increased Parliamentary involvement, requiring significant reform to the committee system, would also be desirable. I fear, however, that

---

1 Law Reform Commission of Canada, Council on Administration, 1980.

continuing judicial involvement in the review of administrative action may impede the search for ways to improve the quality and acceptability of administrative decisions. I am especially concerned in light of the now inevitable entrenchment in the Constitution of the proposed Charter of Rights. Section 7 of the proposed Charter, for example, states: "Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice". That may lead the judiciary to undertake a more activist role in reviewing administrative action and force agencies to be increasingly subservient to legal procedures.

The U.S. experience is that judicial activism in this field, under similar constitutional provisions, frequently does not serve the public interest. Let me explore briefly, by way of example, the involvement of the U.S. federal judiciary in the activities of the former Department of Health, Education and Welfare (HEW).

As of October 1979, 18,000 cases were before the federal courts arising out of HEW's social security disability program. Those were cases that had already been processed through a sophisticated, administrative adjudicatory system applying HEW rules and regulations. Part of the system was an administrative appeal process involving, first, a reconsideration of denied benefits by departmental officials and, second, a full adversarial hearing before an administrative law judge. In fact, there were more administrative law judges hearing social security disability cases than there were federal judges in the entire hierarchy of American federal courts. Those administrative law judges heard upwards of 30 cases per month in an appeal mechanism where government had no right of appeal. If one is tempted to wonder how good the whole adjudication scheme could be when 18,000 persons filed suit to have the determination reviewed, one should realize that the 18,000 figure represents .014 per cent of some 1,300,000 initial determinations made by HEW. And those figures do not take into account the federal court cases involving education, health care, financing and civil rights, nor those involving the Food and Drug Administration. For example, under the Civil Rights Act of 1964, HEW was charged with investigating and prosecuting complaints of discrimination. A suit was taken in the Washington, D.C. Federal District alleging that HEW was not acting forcefully enough on complaints of discrimination against blacks. The judge agreed and issued a continuing order calling on HEW to handle certain cases in a certain order. Other citizens also protected by the civil rights legislation realized that this order would prejudice the handling of their claims. So Hispanics, women, and the handicapped filed suit and became parties to the case. The judge continues to this day to have effective command of 80 per cent of the person days in HEW's Civil Rights Office which

has some 2,000 employees. In another case, a federal judge has ordered and is overseeing the teacher desegregation of such large school systems as New York, Chicago, Los Angeles, as well as six systems of higher education in the South, including North Carolina.

A former secretary of HEW reports that in 1978 he was ordered personally to request from the Office of Management and Budget an additional 1,800 people to staff the Office of Civil Rights. He says: "The Court demanded to review the memorandum I had sent to the director of the Office of Management and Budget, asking for the additional staff, and during oral arguments on one or another of the various contempt motions proposed to which I was potentially subject, the judge even asked counsel to describe the vigour with which I presented the argument to the Director of the Office of Management and Budget at a meeting".[2]

If Canada takes the U.S. route and if the traditional legal point of view continues to govern our search for higher quality and more acceptable public decision-making, then we can indeed expect an increasing concern over public decision-making and a diminishing ability to fashion responsive solutions to the real problem of how to find, train and nourish good decision-makers.

---

2 Joseph Califano, at the Kennedy School of Government, Harvard University, October 18, 1979.

INMATES' RIGHTS: THE CASE LAW AND ITS IMPLICATIONS FOR PRISONS AND PENITENTIARIES

Michael Jackson
Associate Professor
Faculty of Law
University of British Columbia
Vancouver, British Columbia

The real task facing prison authorities is not to discover ways around the intervention of the courts but to respond to the need to legitimize imprisonment, to recognize that discretion is an eradicable part of the system and that it must be controlled in response to principles that are understandable both to prisoners and to those in the correctional field. To a large extent, the concept of the penitentiary developed in reaction to the abuses of the unfettered discretion exercised by 18th century gaolers. Now, more than two centuries later, we are once again recognizing the need to curb discretion, to prevent abuses and to ensure that inmates do not suffer more severe penalties than the law imposes.

Case law does not evolve in a vacuum. An historical perspective is necessary to fully understand the issue of judicial intervention in correctional decisions. A typical response by prison administrators to judicial intervention is that it is officious, that the courts really have no business in second-guessing administrative actions, that prison administrators know best how to run their prisons and that the courts should look to the multitude of other business they have to occupy their time without worrying about what happens inside the prisons.

Against that background and what, I think, is a fairly general reaction to the intervention of the courts and lawyers, one has to look at the original basis for the introduction of penitentiary discipline. Penitentiaries have fairly recent origins, dating back only 200 years in the Common Law world. Their introduction can be seen as a reaction against the injustices of the system of imprisonment in practice in England in the 18th century. Imprisonment as it was practised then was completely lawless in the sense that wardens were not subject to any legislative or administrative control; jails were run as businesses and it was in the interests of those who ran them to do so as cheaply as possible. There were terrible abuses of prisoners in terms of their physical health, and that was one of the prime concerns of prison reformers, such as John Howard, who investigated the prison system in Europe in the latter part of the 18th century. The concept of the penitentiary developed as a reaction against what reformers perceived to be uncontrolled discretion on the part of prison administrators. It was also a reaction against what reformers saw as the uncontrolled discretion of the prisoners who had tremendous control over their own affairs, subject to the imperialism of the wardens. The charter of authority which prisoners had among themselves was regarded as invidious to reform as was the uncontrolled discretion of the wardens.

The idea of the penitentiary as a principle substitute for the old 18th century gaol was an attempt to demonstrate that the practice of imprisonment was legitimate and that, through its legitimacy, prisoners would be denied any alternative but to become penitent, to reform and to respond to the persuasion of moral and vocational opportunities. Not surprisingly, since the penitentiary was perceived in part as a response to the problems of unbridled discretion, there was a heavy reliance on rules in the early penitentiary. Rules governed every move of the warden and the gaolers. And those rules were as much an attempt to list the deprivations of prisoners, to list the limits of authority which the warden had, as they were a charter of rights for prisoners. Clearly, the idea of a charter of rights for prisoners is not a new idea but one that dates back to the origins of the penitentiary.

A second concept, introduced at the urging of John Howard and his fellow reformers, was that of superintendence of authority. They argued strenuously that, if prisons were to be seen as the ultimate authority of the state, they had to be legitimated in the eyes of the public. Thus, inherent in the architecture of the original penitentiaries, inherent in the whole penitentiary mandate, was the principle that such institutions must be accountable and visible to the public. For this reason, the first architectural models of penitentiaries had inspection walks for the public. As in the case of rules,

the notion of outside superintendence and accountability are part and parcel of the heritage of the penitentiary.

Similarly, the judicial review of decisions that significantly affect the administration of public duties is of ancient vintage. With the rise of administrative tribunals, the courts developed a supervisory jurisdiction in relation to public tribunals which, while not courts, nevertheless exercised important powers affecting the lives, rights, liberty and property of individuals. Through the writ of certiorari, the courts reviewed decisions to ensure not that the right decision was reached but that the procedure used was calculated to inspire confidence in the reliability of those decisions and in the legitimacy of the exercise of administrative authority. Given the ideas underlying the concept of the penitentiary and the willingness of the courts to supervise administrative tribunals, how can we explain the fact that until 1969 there were no prison law cases to speak of? Why did the courts not exercise the kind of supervisory power that they exercised in other areas of public administration?

A number of reasons can be found for the "hands-off approach" the courts have applied to prisons. One is the indifference that the courts, like everyone else, including lawyers, have traditionally demonstrated towards prisoners. The whole concept of rights depends upon members of the bar being prepared to enforce them and on the courts' willingness to develop remedies for grievances. To some extent, lawyers did not view it as part of their traditional role to represent prisoners. The mandate of the criminal lawyer was to represent his client at trial and on appeal; once the client had been sentenced and committed to the custody of his keepers, the lawyers wanted nothing more to do with the person. That attitude was, in part, based upon a perception that the courts also wanted nothing to do with incarcerated offenders. The idea that the convicted criminal was an outcast who had no civil and proprietary rights died technically in the 19th century but survived in practice in the 20th century.

In addition to the long-held notion that prisoners had no rights to enforce, a second factor explains the "hands-off approach" that the courts continued to take towards prison administration in the first half of this century. The concept of rehabilitation and the emergence of professionals in the field of corrections generated the notion that decison-making in prisons should be left to qualified individuals, to those who ran the penitentiaries. The rehabilitative model, moreover, carried with it the notion that decisions should be made on a case-by-case basis to accommodate the specific needs and circumstances of each inmate. Individual considerations, not generally applicable rules, were to govern decision-making.

The first case to challenge the courts' indifference to the state of prisons arose in 1969 and was argued by a prisoner. Lawyers viewed the Beaver Creek case, which originated from an Ontario prison, as one with no chance of success. The argument presented was that the disciplinary decisions of the Warden's Court were reviewable by the courts. In order to understand that case and the ruling of the Ontario Court of Appeal, as well as the cases which followed it, we need to examine the legal precedents that had already been established.

The courts had by then developed a test for deciding whether to exercise supervisory powers over inferior tribunals. A distinction had been drawn between decisions which are judicial or quasi-judicial in nature and decisions which are administrative. Decisions characterized as administrative would not be subject to the intervention of the Court. The Court would, however, intervene in decisions characterized as judicial or quasi-judicial for the purpose of ensuring that the rules of fundamental justice were served. This distinction has been the subject of literally hundreds of cases and it was in that context that the Ontario Court of Appeal had to decide whether a decision of a warden exercising disciplinary powers was judicial or quasi-judicial, thereby justifying the intervention of the courts.

The Ontario Court of Appeal declared that in the case of correctional decisions, the distinction depends upon whether or not a decision affects the civil rights of a prisoner in that they affect his status as a person as distinguished from his status as a prisoner. This strange distinction had not hitherto appeared in the law, but that was the test which the Court used. They said that decisions which affect the civil rights of a prisoner as a person are decisions which have to be exercised in a judicial manner and are, therefore, reviewable by the courts, while decisions affecting the status of a prisoner as a prisoner are purely administrative and, therefore, not reviewable.

To make the distinction more concrete, the Court classified a number of decisions as judicial or administrative. Decisions which affected the status of a prisoner, including decisions about the locale and nature of imprisonment, were administrative. In addition, decisions which affect or restrict privilege - visiting privileges, earned remission - were classified as administrative and, therefore, not reviewable. However, decisions which affected liberty, such as a decision to take away statutory remission, affected the inmate's civil rights as a person, and could, therefore, be characterized as judicial or quasi-judicial. Similarly, the Court said that physical punishment such as the strap affected a prisoner's right to personal security and was, therefore, a decision which affected his rights as a person. In the end

only two types of decision were categorized as judicial and, consequently, reviewable: those pertaining to earned remission and strapping. By the time of the Beaver Creek case, strapping had pretty much disappeared from the litany of correctional measures. Thus, in effect, statutory remission was the only area which the courts suggested they would review and in which they would require the prison administrator to observe the principles of natural justice.

That was a fairly narrow window for judicial review. However, the Court did also state that it would review decisions which violated the rights of prisoners guaranteed by the Penitentiary Act or Regulations. However, since the Commissioner's Directives or Divisional Instructions were not law but simply administrative measures, their violation was not cause for judicial relief. Only if the prisoner could point to a violation of the Act or Regulations could judicial review be sought.

Beaver Creek remained the landmark prisoners' rights case until 1977. Throughout the seventies, litigation ensued over what kinds of decisions affected a prisoner's civil rights as a person as opposed to his civil rights as a prisoner. It was a rather sterile search. In the Anaskan decision, the Ontario Court of Appeal held that a transfer from one prison to another simply affected the locale of the imprisonment and was not a judicial decision. Therefore, it was not reviewable. Similarly, in the McCann and Kosobook cases, the courts held that a decision to place a prisoner in segregation was the exercise of administrative discretion and was not reviewable by the courts.

The position of the Canadian courts in the early seventies stood in stark contrast to development in the United States. By applying the Fourteenth Amendment, the American courts had come to require that "due process" be provided to a prisoner before a decision that resulted in the infliction of grievous loss was reached. What "due process" meant depended on the individual circumstance; the extent of due process required varied proportionally with the severity of the consequence of a given decision. The flexible standard that had been developed permitted the Court to strike, or attempt to strike, an appropriate balance between the consequence of a decision and procedural protection. It did not entail the difficult dichotomy between judicial and administrative decisions which had developed in Canada.

When confronted with the argument that, given the Canadian Bill of Rights, there is a requirement that decisions affecting rights and obligations be made in accord with the fundamental principles of fairness and of fundamental justice, Canadian courts responded that the Bill of Rights did not apply to administrative decisions but only to decisions which are judicial, and even

then gives no more protection than what the courts required under Beaver Creek.

In my opinion, the decision in the Beaver Creek case ignored prison reality. Decisions to transfer inmates to administrative segregation might mean solitary confinement for years at a time; the conclusion that such decisions were not to be subject to review completely ignored the possible consequences, which are that individuals often slash themselves, string themselves up and suffer irreparable mental harm. To say that only when remission was affected could the right to due process be enforced simply did not do justice to the reality of prison life.

Beginning in 1975, there were attempts to get the courts to review the whole basis for their intervention. One argument made was that the courts had a role in reviewing prison decisions in order to keep the prison in the continuum of the criminal justice system. It was argued that fair treatment of prisoners should be as much a part of the correctional mandate as rehabilitation had been to that point. A series of cases, which culminated in the first two Martineau decisions, have greatly changed the basis upon which the courts will review prison decisions and have precipitated a review of administrative law itself.

Briefly, the Martineau decisions established that the reviewability of prison cases depends not on whether the decision is judicial or quasi-judicial but on the fact that underlining the exercise of every administrative power conferred upon a board of authority is a general duty to act fairly. This is not specific to prisons; it applies to every area of public administration to which powers are conferred to make decisions affecting the status, rights, obligations and privileges of individuals. The Martineau decisions are a significant authority because they held that, irrespective of whether the decision is judicial or administrative, the discretionary power of prison administrators is reviewable by the courts and is subject to the overriding obligation to act fairly.

It is important to understand the limits that the courts have placed on this duty. Following the decision of the English Court of Appeal, Mr. Justice Pigeon found that, while the duty to act fairly applies in the prison context, the power of the courts to intervene and review the discretionary power of prison administrators is itself discretionary. He stated that this power should be exercised with constraint and restraint, bearing in mind the purpose of prison discipline. The Court specifically identified the need to deal speedily with matters and suggested that only in cases of serious injustice

should the Court exercise its powers to intervene. In Mr. Justice Pigeon's opinion, simply pointing to unfairness in a procedural sense should not trigger intervention.

Mr. Justice Dixon, who wrote a much more expansive judgement in this case, one which is relied upon heavily by prisoners' rights' advocates, indicated that the rule of law must run within prison walls, but also made the point that not every technical deviation from rules justifies the Court's intervention. The Court also affirmed the notion that Commissioner's Directives do not have the force of law and deviation from these Directives, therefore, does not automatically trigger the need for intervention. Despite having indicated that fairness was the test, the Court did not give any details as to what fairness meant. The problem with the two Martineau cases was that they dealt with a question of jurisdiction of the Court rather than with any particular decisions.

Fairness is not a static concept; what is fair in one context may not be fair in another. Moreover, the fairness doctrine is not designed to second guess the decisions which prison administrators make but to ensure that the procedures used are fair. Fairness, in this sense, is based on the principle that a decision must not only be fair but also be seen to be fair, if it is to be considered legitimate by those upon whom it is imposed. Procedural fairness confers legitimacy to administrative decisions and, in that sense, is designed to aid the legitimization of state authority.

A series of cases have come down since the Martineau cases which give us some idea of what the courts require in the nature of fairness. Matters have come up before the courts in relation to transfer, segregation and visiting privileges. The argument presented to the Court since then has been that whether a decision is judicial or administrative is no longer the test: there is a general duty to act fairly in relation to all administrative decisions and the Court, having regard to the importance of introducing the rule of law into the prisons, should look at a particular decision, consider its impact upon a prisoner and then decide for itself what the principle of fairness requires.

One of the first cases in this series involved Andy Bruce from British Columbia. It was heard after the Supreme Court Decision in the Nicholson case which was the precursor to Martineau No. 2. The Court declared that there was a duty to act fairly in relation to transfers, even though it was not a ju icial decision; however, that duty did not require the authorities to give Bruce the reason for his transfer nor did it require that he be given the opportunity to respond. The argument presented on Bruce's behalf was that

fairness requires knowledge of the case against you and an opportunity to respond. The Court, in the Bruce & Yeomans decision, held that fairness in this case did not entail those requirements.

A similar decision was reached by the Ontario High Court last year in the Rollie case. Rollie argued that the decision to transfer him from a minimum to a medium security provincial institution affected the quality of his institutional life, his liberty, visiting privileges, his eligibility for and likelihood of getting parole, and his work opportunities. The decision, he argued, was important enough to require that he be given a hearing, a reason for the decision and an opportunity to contest the reason for his transfer. The Ontario High Court, in full cognizance of the Martineau case, said that this was not a case justifying the exercise of judicial discretion to intervene. Since suspicion of a planned hostage-taking was the reason for his transfer, it was appropriate and possible, without violation to the duty to act fairly, to transfer a person in a summary way. The Court, however, said that to ensure fairness a council of perfection would require that after transfer the prisoner be given the reasons for this transfer and an opportunity to make a formal presentation in reply. Thus, in relation to transfers, the courts, under the new stand on fairness, have not moved much beyond what they required in relation to the pre-Martineau law and the judicial-administrative dichotomy.

In relation to disciplinary decisions, the primary argument made before the courts has been that the importance of a disciplinary decision is such that fairness requires the right to representation. The duty to act fairly in terms of notice of charges, right to call witnesses, the opportunity to cross-examine and the right to a reasonable decision is already laid out in a Commissioner's Directive. But the Directive seeks to avoid legal representation by providing that when a prisoner asks for representation, he shall be told that it is not available. A number of courts have ruled against this latter provision and have held that fairness may require representation by counsel in appropriate cases. The Correctional Service cannot arbitrarily prohibit representation. However, while the courts have struck down the practice of blanket refusal of representation, they have suggested that it is up to the independent chairperson to make a decision whether, in light of the particular case at hand, representation is required in order to deal with the prisoner fairly. The suggestion has been made that, when points of law are raised, legal representation may be appropriate, although one judge suggested that such matters could be dealt with by providing an opportunity for the prisoner to consult with a lawyer before the hearing rather than having legal counsel at the hearing. Nonetheless, the courts have suggested that fairness may require representation in a case which involves significant issues of law

beyond the ability of a layman to deal with. That decision is fraught with problems because legal representation is not limited simply to arguing law. Legal representation is designed to effectively cross-examine and to ensure the reliability of fact-finding - all matters which are important in terms of a duty to act fairly.

A recent decision of the British Columbia Supreme Court probably goes further than any other decision in terms of what the duty to act fairly requires in relation to the administrative segregation process. The Oswald and Cardinal case concerned individuals who had been involved in a hostage-taking at Kent prison and had been placed in segregation. Their cases had been reviewed by the segregation review board established at Kent which recommended that they be released; however, the Warden decided not to release them. That decision was challenged before the courts. The Court held that the decision had initially been made in accordance with the duty to act fairly but that, when the Warden refused to follow the recommendations of his review board without giving any reasons and without giving the prisoner any opportunity to hear or respond to what he had to say, the decision ceased to comply with the duty to act fairly. The Oswald-Cardinal decision probably goes further than any other in requiring an institutional decision-maker to articulate reasons for a decision, to communicate those reasons to prisoners and to give them an opportunity to respond.

The impact of Martineau No. 2 and the duty to act fairly, so far, has not exactly sent shock waves through the system in terms of court intervention in substantive decisions, in part, because the Martineau line of cases is concerned only with the procedures by which decisions have been reached. However, there have been other cases which have suggested that the courts, under certain circumstances, may be prepared to look at the substantive decisions which are reached. The most important case in this regard is the McCann case of 1975 in which the conditions of solitary confinement in the British Columbia Penitentiary were brought into question. In rendering his decision, Mr. Justice Heald ruled that conditions in solitary confinement in the British Columbia Penitentiary constituted cruel and unusual punishment and were unlawful. Although he concluded that a decision to place an inmate in solitary confinement was not reviewable by the Court, he declared as reviewable the conditions of solitary confinement in which inmates were kept. Applying the jurisprudence which had developed in relation to the cruel and unusual punishment clause of the Bill of Rights, he held that when the punishment failed to achieve any legitimate penal purpose, and in situations where it inflicted pain and suffering, it could be viewed as cruel and unusual punishment and was prohibited by the Canadian Bill of Rights. That was a review of a substantive issue as opposed to the procedure by which decisions are reached.

The Solosky case is another extremely important one; its full implications are only now beginning to be realized. In this case, the Commissioner's Directive authorizing the scrutiny of all mail going in and coming out of a prison was challenged on the grounds that it interfered with the lawyer-client privilege. The Supreme Court held that it did not, that the lawyer-client privilege was a technical rule attached only to information that had an evidentiary basis and was not, therefore, applicable to the general flow of correspondence in and out of prisons. Nevertheless, the Supreme Court endorsed some very important principles in this case.

They endorsed the principle that a prisoner remains entitled to all his civil rights except those that are expressly taken away by statute or regulation. They further established that one of the rights not taken away by incarceration is the fundamental right to communicate with a lawyer, and that the prison administration must exercise the minimum restriction consistent with security upon that right. What the Court endorsed in the Solosky case is the doctrine of least restraint, which is that, in the case of rights not taken away by legislation, the discretion of prison policy makers cannot be imposed without regard to the principle of least restraint. The Supreme Court said that the courts must perform a balancing role to ensure that the rights of prisoners not taken away by imprisonment are safeguarded and balanced against the interests of the security of the institution. While the security of the institution would be the paramount concern, the doctrine of least restraint was not to be ignored.

I should, at this point, comment that while judicial intervention has had some very positive effects, it has a negative side as well. On the positive side, it has legitimized the concept that prisoners retain rights not specifically taken away by legislation. It has legitimated the notion that the concept of least restraint is important and it has legitimated the role, inherent in the nature of the penitentiary, of inspection from outside. The negative aspects stem from the adversarial nature of litigation. Having been involved in some correctional litigation, I know that rarely is a court victory interpreted as an improvement in conditions in the prison. Both prisoners and administrators regard the outcome of litigation as a victory or loss, what constitutes a win for one side being a loss for the other. The outcome is rarely viewed as an improvement in their collective enterprise. Litigation maximizes polarity and, therefore, in terms of long-term solutions, it is not necessarily the best way to go. Unfortunately, given the recalcitrance of the prison administration, there seems to be no available alternative. Unquestionably, much more could be done to legitimize imprisonment by correctional administrators accepting the rule of law and accepting the legitimacy of prisoners' rights.

We now have to work out a system which builds in those rights and which builds in the need for informed discretion in a way which minimizes the interference with those rights. The courts are not the first resort. They have been used, both here and in the United States, as a last resort, and that is what they are. It is much better for correctional administrators, in consultation with lawyers and prisoners, to work out rules which take into account the need for discretion while ensuring that inmates' rights are protected. Discretion can be confined in a way that does justice to both sides. In my opinion, the real task facing prison authorities is not to discover ways around court intervention but to recognize that discretion is there and that it must be controlled in response to principles that are understandable both to prisoners and to those in the correctional field.

THE ANTICIPATED EFFECT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS ON DISCRETION IN CORRECTIONS

Walter Tarnopolsky
President
Canadian Civil Liberties Association
Ottawa, Ontario

The effect of the new Charter of Rights on the exercise of administrative discretion and on inmates' rights will depend, to a large extent, on the composition of the Supreme Court of Canada. The constitutional status of the Charter and several of its provisions, including the remedies clause, could in theory lead to greater protection of individual rights, including those of inmates. However, the force of this guarantee remains to be tested.

There has been much discussion recently about the Charter of Rights and what effect, if any, its entrenchment or non-entrenchment and opting out clauses might have. I thought, therefore, that I would begin with a basic, if somewhat subjective, review of these issues. In the course of doing so, I will go back to some of the leading cases that are directly relevant to the topic of this Conference.

I have defined entrenchment, very simply, as a method of amendment that is more complicated than the usual means of legislative enactment. Whether that process will involve a weighted majority or mean that any act by one legislature has to be approved by a certain number of other legislatures is irrelevant. Similarly, it is unimportant whether, in some cases, a statute will have to be repassed, or whether a unicameral act of legislation, with the

two Houses sitting together, will be required. For our purposes, what is significant about entrenchment is that enactment is necessarily more complicated than in the case of ordinary legislation.

I think the complexity of enactment has given rise to considerable misunderstanding about the significance of entrenchment. I will argue that not entrenchment but four other factors will determine the effect of the Charter of Rights. The first of these is constitutional status. On repeated occasions, majorities of the Supreme Court have referred to the Canadian Bill of Rights as being merely statutory. At the very most, there have been concessions that it might be quasi-constitutional, but at no time has the Bill of Rights been recognized as part of the Constitution. I would argue that it is a constitutional statute, but that need not detain us now. If constitutional status is a necessary and sufficient factor to convince our Supreme Court judges that the Bill of Rights is overriding, then the new Constitution Act, once it has been passed, will be an advance since the first part is the Charter of Rights. I think it would be impossible for the Supreme Court to deny its constitutional status any longer.

More important than its constitutionality is the fact that the Act can only be amended by a specific process. Except in the Drybones case, the Supreme Court of Canada has failed to give the Bill of Rights the overriding effect that one might have expected. One has to admit that the Supreme Court has at no time detracted from its statement in the Drybones case that the clear meaning to be given to Section 2 is that, if a law cannot be so construed and applied as to be consistent with the Bill of Rights, it is inoperative to the extent of the inconsistency. That proposition has never been detracted from, but the Supreme Court has not been anxious since then to find laws to be inconsistent with the Bill of Rights.

The question now facing us is whether the Charter of Rights will be treated differently. The statement in the Bill of Rights that, "Every law of Canada shall", unless it contains a clause saying, "notwithstanding the Bill of Rights", "be so construed and applied so as not to abrogate, infringe or abridge fundamental freedoms", did not give the Supreme Court a clear directive that inconsistent legislation was to be held inoperative. That presumably will now be changed by Section 51 of the new Constitution Act which provides that the Constitution of Canada, of which Part One is the Charter of Rights, is the supreme law of Canada and any law that is inconsistent is of no force or effect. Presumably then, we have a clearer direction to the courts that inconsistent legislation has to be held of no force or effect.

The third thing to consider in trying to decide whether the new Charter of Rights can be effective is the actual wording of the different rights and provisions. Section 1 of the existing Bill of Rights says that, "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination, ... the following human rights and fundamental freedoms." The Supreme Court has interpreted that clause to mean that there were no new rights created by the Bill. In its opinion, what the Bill of Rights protects are the rights as they existed when it was enacted, August 10, 1960, and no new rights were created thereby. In my opinion, that was not a necessary decision. In fact I have suggested that this interpretation creates a "legislative lie" because many of the rights proclaimed in Sections 1 and 2 did not exist in 1960, and have been declared at various times since. Nevertheless, we have that interpretation, what I call the frozen-concepts interpretation. We can only hope that the new Charter of Rights, without using the words "have existed and shall continue to exist", might get around that interpretation. All the rights are set out as "Everyone has the right to..., Every witness has the right to..., etc.," all expressed in the present. Obviously, legislation speaks forever. To that extent, there might be an improvement.

The fourth and final factor which, I think, will determine the efficacy of the Charter of Rights is the remedies clause. One would expect that when the courts hold that there is a right, they will also hold that there is a remedy. Certainly, our common law courts have always done so. However, the famous Hogan case demonstrates that this is not always so. Hogan was stopped on suspicion of drinking and asked to go to the police station to take a breathalyzer test. Before Hogan had taken the breathalyzer, he asked for permission to speak to his lawyer, who had been summoned at his request. The policeman told him he had no right to do so and that if he did not take the breathalyzer he would be charged under Section 238 (of the Criminal Code of Canada) for failing or refusing without reasonable excuse to take the breathalyzer. At that point, Hogan made the mistake which everyone, including lawyers, might have made and took the breathalyzer. The question then was whether the test results could be excluded as evidence.

When the case came to the Supreme Court of Canada, there was no doubt on the part of any of the judges, at least not expressed in writing, that there had been a contravention of the right to counsel. Nevertheless, the majority went on to say that it did not mean that there was a remedy. They further stated: "We do not necessarily have to apply the American exclusionary rule, and therefore, we follow the Common Law judge-created rule that evidence, even if illegally obtained, is admissible if relevant." Therefore, the breathalyzer evidence was not excluded.

To date then, it has been possible to have a right and not necessarily a remedy. Section 24 of the new Charter of Rights provides, in the first subsection, that anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to approve such remedy as the court considers appropriate and just in the circumstances. Further, subsection 2 specifically provides for an exclusionary rule. However, there is a great deal of misconception about its possible effect. It is not an absolute rule. It provides for exclusion of evidence if the Charter of Rights has been infringed or if it has been established that, having regard to all the circumstances, the admission of certain evidence in the proceedings has brought the administration of justice into disrepute. I would argue that those who create fear by suggesting that perhaps mere police technicalities will exclude evidence really have not read subsection 2. The rule is not absolute, but leaves the Court to consider whether, in all the circumstances, the admission of certain evidence would bring the administration of justice into disrepute. Nevertheless, Section 24 does clearly indicate that a remedy must be given and that one of the possible remedies is exclusion of evidence. To that extent, the Charter of Rights should have more effect with respect to inconsistent legislative or administrative acts than the Bill of Rights.

I will now briefly deal with the non-obstante clause which has raised so much controversy. Such a clause now exists in the Canadian Bill of Rights, in Section 2, and also in the Quebec Charter, the Bill of Rights of Alberta, the Saskatchewan Human Rights Code and in the Human Rights Code of Prince Edward Island. Thus, we do have five existing clauses which provide for overriding effects for the Code or Act concerned, and which also provide for a non-obstante clause.

The first point to be made is that inclusion of a non-obstante clause in any legislation will present difficulties for the legislature. Signalling to the opposition, the media and to the electorate that the legislature intends to detract from the Charter of Rights in its legislation is politically risky, as evidenced by the fact that in the past 21 years the Bill of Rights' provision for a non-obstante clause has been used on only one occasion. After the invocation of the War Measures Act in October 1970, the Act was replaced, on December 2 of that year, by a Public Order (Temporary Measures) Act which did contain a notwithstanding clause. That is the only occasion on which it was used at the federal level. When the first Quebec Language Charter -- Bill One -- was submitted, there was a notwithstanding clause to exclude the application of the Quebec Charter of Rights and Freedoms which is the most complete Bill of Rights in Canada and includes a non-discrimination provision. In reaction to criticisms by civil libertarians, including the president of the Quebec Commission, René Hurtubise, who is now a judge, the

government dropped the non-obstante clause which, in my opinion, further demonstrates the high political risk in including it.

The lessons learned by experiences like the one in Quebec no doubt contributed to the decision to adopt a written and constitutionally entrenched Charter of Rights. The biggest objection to the Charter, frequently voiced by the ex-premier of Manitoba, Sterling Lyon, is that it will transfer the ultimate decision-making, on fundamental issues of economic and social policy, from the legislatures to the courts. My answer to that, which never did convince him, was that, in fact, if you look at the American experience, the overwhelming majority of the cases do not deal with legislative acts; they deal with administrative and police acts. During the twentieth century, it was not until 1965 that an act of Congress was first held invalid on the ground that it was contrary to the American Bill of Rights. Evidently, it is not legislation that comes so much to be challenged, but the whole field of administrative and police actions, with respect to which the notwithstanding clause is not terribly important.

My final point on this subject is that the legislature cannot hope to get away with a provision latently inconsistent with the Bill of Rights unless the notwithstanding clause is included. Otherwise, if the provision is subsequently revealed to be contrary to the Charter of Rights, it could be held inoperative or of no force or effect. But if the legislature puts in a notwithstanding clause, it signals to everybody what the derogation is. We would then return to our traditional means of civil liberties enforcement, which is through the legislative process.

I will turn now to the matter that is of concern to this Conference, which is whether the Charter of Rights will make any difference in corrections. On the whole, I would say that it will not make a great difference. Among the fundamental rules that the Supreme Court laid down, in the famous cases of Mitchell, Howarth and Matsqui, is the principle that the parole process is not judicial or quasi-judicial. Therefore, you cannot proceed under Section 28 of the Federal Court Act which restricts the remedies that one can get in the Federal Court to those which are judicial or quasi-judicial. It would appear also, from the Mitchell case, that one cannot bring a habeas corpus with certiorari in aid and use the certiorari as a basis for going behind the warrant of committal in order to see if it was justified. The provision under consideration in the Howarth and Mitchell cases, Section 2(e) of the existing Bill of Rights, provides for a fair hearing in the following terms: "No law shall deprive a person of the right to a fair hearing, in accordance with the principles of fundamental justice for the determination of his rights and obligations." In the Mitchell and

Howarth cases, one of the arguments given by the majority, which held that there was no right to a hearing, was that parole is a privilege, not a right. And when you are not talking about a right, the rules of fundamental justice set out in Section 2(e) do not apply.

Will Section 7 of the Charter of Rights, which reads, "Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice", make a difference? There is no reference to rights and obligations; merely one to deprivation of the right to life, liberty and security. The question still to be answered is whether the fact that a person has already been deprived of liberty and confined to an institution, will mean that Section 7 is exhausted or whether an opportunity will exist to argue that, since Section 7 no longer talks about rights and obligations but about deprivation of liberty, the principles of fundamental justice apply.

Another section that might be expected to have some effect is Section 12 of the new Charter. It is not a major change from the provision we already have in Section 2 of the Bill of Rights, which is the right not to be subjected to any cruel or unusual treatment or punishment. Mr. Justice Darrell Heald, of the Federal Court, held in the McCann case, that long periods of solitary confinement under the conditions that prevailed could constitute cruel and unusual punishment. I know of no other similar decision, but certainly there is no authority which detracts from what Mr. Justice Heald said. It must be remembered, however, that in the case of Bruce and Reinate the Federal Court held, and I have not been able to find any overruling of this decision, that Bruce, who had already been in dissociation for some four years, was not to be permitted to marry.

Section 2 of the new Charter of Rights refers to the fundamental freedoms of conscience and religion, expression, peaceful assembly and association. Freedom of expression was the central issue in the well-known Soloski case. The question at issue was whether the inmate concerned could correspond with his lawyer without censorship. The Court balanced the needs of the individual against the needs of the institution and decided that the security of the institution overrode whatever right one might have to correspond with one's lawyer; in addition, they also held that the privilege did not extend in these circumstances. Given this decision, I am not sure that Section 2 is going to make much difference to subsequent Soloskies.

Another issue which has arisen in some of the cases is the present requirement in Section 2 of the Bill of Rights to be informed, upon arrest or

detention, of the reasons therefore. This issue was raised in both the Mitchell and Howarth cases but was discussed more particularly in the latter case with reference to the right to be informed. The majority of the Supreme Court held that, in the case of parole, the statement that parole was revoked was sufficient to meet the right to be informed. No explanation of the reason was required. Section 10(a) of the new Charter of Rights speaks about everyone on arrest or detention having the right to be informed promptly of the reasons therefore. Unless the courts come to a different conclusion about what constitutes due information, Section 10(a) will not likely help subsequent Howarths.

The final section I would like to discuss is Section 15 of the Charter which reads: "Everyone has the right to equality before and under the law, to the equal protection and benefit of the law without discrimination...." The peculiar wording of this section is largely a response to developments surrounding the Lavelle case, in which the Supreme Court, in a very split decision, held that equality before the law did not really mean equal protection of the law, but simply that everyone was to be tried before the same courts and tribunals.

As a result of this decision, among others, women's groups pushed for equality before and under the law. The Department of Justice was faced, on the one hand, with demands from women's groups for equality for women before and under the law and, on the other hand, with the Supreme Court's interpretation that the clause "equality before the law and the protection of the law" did not incorporate the egalitarian notions of the American Fourteenth Amendment, that is "equal protection of the law". The solution arrived at was to incorporate the words "equal protection of the law" in the Charter of Rights.

How would that apply, again, in the area we are concerned with at this Conference? In the Bruce and Reinate case, one of the issues that was raised on behalf of Bruce was that not permitting him to marry contravened the equality clause. The prosecution accepted the fact that all kinds of conditions would have to be placed upon the ceremony, and the subsequent effects; nevertheless, the issue was, was he being treated unequally? The Supreme Court had already restricted its definition of equality before the law, which it had given in the Drybones case, to say that it only applies where people are treated more harshly. Well, if you take that test, which has been repeated on a number of occasions, surely one would have to say that the denial of a right to marriage constitutes being treated more harshly than other people, unless you can provide an overriding reason.

In my opinion, the non-obstante clause is much less disturbing than another feature of the new Charter of Rights: the limitations clause. The absence of such a clause does not mean the courts will not place reasonable limitations on a right. The American Constitution has no limitations clause. And yet, although the first Amendment states that Congress shall make no law abridging freedom of speech, the American Supreme Court has on many occasions upheld limiting laws. The need to guard against limitations being imposed on rights has been acknowledged in the International Covenant on Civil and Political Rights which we have ratified and which applies to Canada, and to the European Convention which applies to all the European countries, including the United Kingdom, and the Inter-American Convention. All of these recognize that in times of emergency, officially proclaimed, there can be derogations from certain rights and freedoms. But, what is important is that even in time of emergency, there are certain rights which are non-derogable. One of the most important is the right not to be subjected to any cruel and unusual treatment or punishment. Even in emergencies, that is a right which cannot be derogated from.

Significantly, however, the second thing that these international Bills of Rights make clear is that while the fundamental freedoms of expression, religion, assembly, association, and the right to movement in the country can be restricted for reasons of national security, public order, public health and public morality and the rights and reputations of others, these restrictions cannot be applied to legal rights in peace-time. This is a very important principle of international instruments and those of us in the Canadian Civil Liberties Association strenuously argued for its inclusion in the new Charter of Rights. The legal rights set out in Sections 7-14 of the new Charter, in our opinion, should not be subject to a limitations clause except in times of emergency. Despite our efforts, the limitations clause in the Charter makes no distinction between times of emergency and peace-time. Therefore, presumably even in normal times, limitations which are demonstrably justifiable in a free and democratic society can be imposed even on legal rights and that, in my opinion, is a greater cause for concern than the non-obstante clause.

I would like to say, in conclusion, that the Charter of Rights of and by itself will not make a difference: the difference it might make will be determined by those who sit on the Supreme Court. Since the Mitchell and Howarth cases, there have been several changes in the membership of the Supreme Court of Canada. Whether the new justices will make a difference in the interpretation of human rights cases one does not know. But certainly the composition of the Court will be as significant a factor as the improvements in the new Charter which I have outlined.

One further concluding remark I might make is that, in my opinion, the Federal Court Act has to be changed. Although intended to simplify the procedure of judicial review, the wording of Section 28 of the Federal Court Act has created significant problems. In the Parliamentary debate, there were suggestions that the Act would produce a reform similar to that which took place in Ontario under the Judicial Review Procedures Act and in Alberta under the Administrative Procedures Act, which is to have one application for judicial review. That did not prove to be the case. Section 28 is confined only to decisions of a judicial or quasi-judicial nature. Perhaps the judges know what the restriction means, but I can say that I do not. I hope practicing lawyers do.

Other useful changes could perhaps be made in the relevant statutes themselves. In the Matsqui case, for example, the majority ruled that the directives with respect to the right to a hearing in cases of severe offences, and discipline of inmates, although issued pursuant to statutes, and pursuant to regulations, did not have the status of law. If that is the case, it may be necessary for the legislation to be changed. In summary, the Charter of Rights does give us some hope that some of the most obscure decisions of majorities in the past might be overcome but, in my opinion, the composition of the Supreme Court and other actions with specific statutes will be almost as important.

THE ANTICIPATED EFFECT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS ON DISCRETION IN CORRECTIONS

Howard Epstein
Barrister and Solicitor
Halifax, Nova Scotia

Since the language of our Charter of Rights is strikingly similar to that of the American Bill of Rights, it is reasonable to expect that, when confronted with issues pertaining to the new Charter, our courts will look to the American experience for parallels. At most, American jurisprudence will be suggestive for Canadian courts but for that reason alone it should be studied by all who have an interest in the possible effects of the Charter. In general, what the American law suggests about discretion in our correctional system is that, if the system does not make rules for itself, the courts will make rules for it.

As a prefatory comment I would like to state that, although I served as legal advisor to the Department of the Solicitor General of Canada between 1974 and 1976, I am here not as an apologist for the Department but as someone who has a knowledge of Canadian correctional law and American constitutional law, much of which has been gained in private practice and through teaching law. I am not an American lawyer but that is only, I hope, a minor limitation since I have taken some time to familiarize myself with American constitutional law.

For the purposes of this address, let us assume that the Charter of Rights will actually be taken seriously by the judges who will have to deal with it in the coming years, perhaps because of the magic of the word entrenchment, perhaps because of its constitutional status, or the remedies clauses. Given that assumption, I suggest that it is sensible to examine what the United States' courts have done with their Bill of Rights. It seems to me that our courts will be looking to the American experience for parallels since the language of our Charter of Rights and the American Bill of Rights is extremely similar. I will draw on a selection of cases not only from the United States' Supreme Court but also from various courts around the country to illustrate what situations are likely to arise in relation to our Charter. Since decisions of the Supreme Court vary according to its composition,[1] the decisions to which I refer are not necessarily the final word on a given problem.

To begin, I will point out some of the differences between the Charter of Rights and the Canadian Bill of Rights. It is important to note that the Charter of Rights does not repeal the Canadian Bill of Rights; we will be operating, when we have a Charter, under both. The Bill of Rights is a statute that went through Parliament, has not been repealed and is not likely to be repealed in the immediate future. The protections in the Bill of Rights will survive the coming into existence of the Charter. Next, I will compare some sections of the Charter of Rights with relevant sections of the American Bill of Rights and then examine some of the case law that pertains to those sections.

In his address, Professor Tarnopolsky identified most of the distinctions between the new Charter of Rights and the Canadian Bill of Rights; I will simply elaborate on one or two points. First, I wish to emphasize the limitations at the beginning in Section One: the Charter's rights and freedoms are subject "To such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". I regard that as an extremely serious limitation. It should be borne in mind, however, that even without a limitations clause a similar state of affairs has evolved in American jurisprudence. There we find a wide range of rights, some of which take precedence over others. Freedom of religion, for example, has been

---

1 For an exceptionally good analysis of the effect of composition see: Levy, Leonard, Against the Law: The Nixon Court and Criminal Justice, Harper, 1974.

deemed a preferred right which takes precedence over most other rights. There are common law rights, statutory rights, preferred constitutional rights and inalienable constitutional rights. In my opinion, Section One of our Charter invites the courts to take a similar approach to our rights and freedoms.

To take a concrete example: the First Amendment of the American Constitution states that there is a constitutional right in the United States protecting freedom of speech. Everyone knows many examples of limitations, such as the textbook case about not yelling "Fire!" in a crowded theatre. The First Amendment does not protect pornography in certain cases and there are certain limitations, more specifically relevant to our area for discussion, on what happens inside a prison. Those rights are not held to be absolute or so paramount as to override all other considerations. The State in the U.S.A. is regarded as having certain interests that have to be protected, against which inmate rights are balanced off. The first section of the Canadian Charter of Rights places us in essentially the same position that has been arrived at in the United States over time.

A second difference between the Charter and the Canadian Bill of Rights is that the former includes a right to be secure against unreasonable search or seizure, a right which is also in the American Bill of Rights. This may have important implications. For example, the Writs of Assistance to which the Solicitor General has recently referred may subsequently be deemed contrary to the constitution of this country by a court of law.

The last distinction to be made between the Charter of Rights and the Canadian Bill of Rights concerns the remedies sections, Sections 24 and 52. Section 24 gives our Courts a remedial power not explicitly stated in the American Constitution and which the United States Supreme Court took many years before developing through jurisprudence. Section 24 states, "Anyone who feels their freedoms or their guarantees have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances". You could not look for broader wording anywhere. What the United States courts have done, in some very limited cases, is to take over the general superintendence of entire State prison systems. That would never occur in Canada unless we had this kind of invitation to the courts to do that. To that extent, Sterling Lyon was not wrong when he said that the Charter of Rights invites the courts to be involved in social issues. It invites the courts to take a very strong hand in social issues.

Whether the courts actually do so is another question. But they have a broad invitation to do so. It took the United States Court a long time to say, "We will go beyond being bodies that will declare what rights are; we

will go further and require remedies such as monthly reports from the Superintendent of Prisons, or a particular warden, on what has happened, or psychological testing for guards to demonstrate that they are not racially biased". Those things have happened in the United States and, in my view, Section 24(1) of the Charter of Rights in Canada invites that kind of continuing supervision of the prisons, the federal penitentiaries, or the parole system in this country. Whether it happens will depend on a multitude of factors, but the language is there.

Let us look at what actually has happened in the United States. There are four significant sections of the American Bill of Rights that have had the most effect on the corrections system: the Eighth, the First, the Fourteenth and the Fourth Amendments. The Eighth Amendment is the prohibition against cruel and unusual treatment or punishment. The First Amendment is freedom of religion, freedom of speech, freedom of assembly. The Fourteenth Amendment is due process and equal protection of the law, and makes it mandatory that these things be applied to the State systems as well. The Fourth Amendment is the one that states there shall be no unreasonable search or seizure. These are the four most significant sections for corrections and the related jurisprudence will be the most significant for corrections in Canada.

Let us examine the cruel and unusual treatment or punishment Section. This is a broadly-used power in the United States. It has been used for everything from the death penalty to attacks on the disproportionality of sentences. Related cases have dealt with the laws pertaining to habitual prisoners; whipping inside prisons, sterilization of inmates, status offences and, most importantly, conditions of incarceration. Disproportionality of sentences is one example of an area that might come before the courts under the Section guaranteeing protection against cruel or unusual treatment or punishment. Someone convicted of first degree murder might contend that the denial of parole eligibility for the first twenty-five years of his or her sentence constitutes cruel or unusual treatment. In the United States life imprisonment has been ruled unconstitutional for a juvenile.

As well, in the United States, a series of status cases have come out since 1962. In the case of Robinson versus California,[2] it was decided that the State law which made it an offence to be addicted to narcotics was unconstitutional. It was deemed a violation of the cruel and unusual treatment or punishment clause to create a status offence, one consequence of

2 Robinson v. California (1962) 370 U.S. 660

which is of particular significance to the prison system. It has since been held that addiction to narcotics can be a defence to a charge of escape from prison. The 1968 decision of People versus Malloy[3] states: "We know addicts long for escape. Drugs fulfil this need". It goes on to say that "To punish these defendants' escape is to impose vengeance upon sickness, to transform a hospital into a prison cell, and this must, therefore, of necessity be cruel and inhumane punishment". Whether the Court is right or not, the decision sets a precedent. If someone is charged under Section 132 of the Criminal Code with escape and that person is a narcotics addict, he or she may well come up with that defence and they will have case law to back them up.

What about conditions of incarceration? The one case we have so far is the case of McCann[4] et al. in British Colombia Penitentiary. As I mentioned earlier, entire prison systems have been found constitutionally lacking in the United States. The kind of supervision Section 24 of the Charter of Rights could allow, if used as an effective tool by a judge in Canada, has, in fact, been an active tool in the U.S.A. And lack of funds has been specifically struck down as a defence. Every time the prison administrators claim that the Legislature does not provide a sufficient budget to do anything more than is being done, the courts reply that, "For a constitutionally protected right of this sort, that is irrelevant". However, in contrast to the Malloy case, conditions do not justify an attempted escape. That seems generally to be well accepted in the United States cases. You have to look and measure in your own mind certain things if you are a prison administrator. And the Court has to look and balance the same things if they have a case that challenges the prison administrators. The measures to maintain health and hygiene; to curb possession of narcotics and weapons; to prevent escape, destruction of property and assaults of one sort or another, must be examined when the Court assesses the overall system or the system as it applies to a particular individual.

Transfers are generally not reviewable under this section. However, it must be borne in mind that I am talking exclusively about the cruel and unusual treatment or punishment section. Court cases have been launched which use more than one section of the American Bill of Rights and under the due process section there has been some success when it comes to reviewing

3 People v. Malloy (1968) 296 N.Y.S. (2d) 259

4 McCann et al v. The Queen (1975) 68 DLR (3d) 661 (F.C.T.D.)

transfers. Solitary confinement has been held not to be unconstitutional per se in this context. However, severely oppressive conditions may well be a violation and cases are legion.[5] In Canada, we have one case, the McCann case.

Let us now briefly examine some cases pertaining to the First and Fourteenth Amendments of the American Bill of Rights - the First Amendment being protection of freedom of speech, etc. and the Fourteenth Amendment being the guarantee of due process and equal protection. In the case of Pell versus Procunier[6] in 1974 the Court stated that: "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system. Thus, challenges to prison restrictions that are inserted to inhibit First Amendment interests must be analyzed in terms of legitimate policies and goals within the correction system to whose custody and care the prisoner has been committed in accordance with due process of law." The situation in Canada is no different.[7] A range of rights exist which must be balanced against legitimate institutional considerations. Unless specifically taken away or modified in light of penological considerations, these rights must be respected.

In earlier years, the Court simply chose not to intervene in certain aspects of public management such as prisons. In such areas they operated according to what is called the "hands-off doctrine". During the 1960s, American courts abandoned the "hands-off doctrine" and began actively to intervene in areas such as prison management. The high water mark in this trend seems to have been reached some years ago and since then the courts have

---

5 For a good analysis of American constitutional law as it applies to prison and parole systems see: Kerper & Kerper, Legal Rights of the Convicted, 1974, West; I.J. Sensenich, Compendium of the Law on Prisoners' Rights, Federal Judicial Centre, U.S. Government Printing Office, 1979; J.W. Palmer, Constitutional Rights of Prisoners, Anderson Co., 1973, plus 1974 Supplement.

6 Pell v. Procunier (1974) 417 U.S. 817

7 See for example R v. Institutional Head of Beaver Creek Correctional Camp, Ex p MacCaud 1969, O.R. 373; 5 C.R.N.S. 317; 2 D.L.R. (3d) 545 (Ont. C.A.)

been less willing to intervene in prison management. This, no doubt, is a reflection of changes in the composition of the courts, particularly in that of the United States Supreme Court. The Canadian courts have not intervened in correctional management to the extent that the American courts have but, nonetheless, it is fair to say that the "hands-off doctrine" is now dead. The courts have established that due process applies to a certain range of decisions.

The question we are left with is what is due process in the Corrections context. That question is being addressed by the American and Canadian courts and will continue to be addressed under the new Charter of Rights. A second issue that is being addressed both in Canada and the United States is that of the least restrictive means of interfering with constitutional rights. The courts will, in my opinion, increasingly demand that justifications be given by correctional administrators for interfering with or limiting an inmate's constitutional rights, particularly those which are deemed preferred rights.

Let us consider some specific questions that have arisen in relation to these issues. The right to be able to communicate freely versus the need to inspect incoming mail in prisons for security reasons is one issue that has come before the courts. Prison administrators have a recognized power to inspect mail for good cause but some courts have said that such inspections must be justified. Correspondence between the lawyer and client has been given additional protection in the United States and I would suggest that the Solosky case[8], in which the Canadian Supreme Court held that the lawyer-client privilege was not applicable to the general flow of correspondence in and out of prisons, might have been decided differently under the new Charter. In other decisions in the United States, imposing a limit on an inmate's correspondence has been disapproved of and the duty to give notice if mail is censored has been declared.

At one point there was a series of cases that related to the question of receiving published materials. Certain prisons had established rules that prohibited inmates from receiving published material from any source other than the publisher. Such rules have been struck down as unreasonable. The racial orientation and sexual explicitness of published material in prison libraries have also been the subject of litigation in the United States. It has been established that reasons must be given for banning material on the

---

8 Solosky (1979) 16 C.R. (3d) 294 (S.C.C.)

grounds of its racial orientation or sexual explicitness. Once again, at issue is the balance between protecting individual rights and freedoms and maintaining prison security.

Visitors and the press constitute another area that has raised questions for the courts. In the United States, the law has been fairly clear about the duty of prison administrators to allow reasonable visitation. But the courts have also said that the press has no lesser or greater privilege to visit than the general public and "contact" visits are not a generally protected right. Moreover, in the United States, conversations can usually be monitored. In Canada we have Section 178 of the Criminal Code which pertains to invasion of privacy in general and the interception of communication in particular. I will not offer an opinion on whether that Section means that the legal requirements for monitoring conversations are satisfied if prison officials simply post a notice in a visitation room to the effect that all conversations in the room are subject to monitoring but I am of the opinion that all conversations between inmates and their visitors are not legally monitored at present.

I would like to cite an American case that is indicative of the direction in which our courts could move under the Charter of Rights. In the 1976 Alabama case, James versus Wallace[9], the Court ruled that:

> Each institution shall provide a comfortable, sheltered area for visitation. The visiting area must not, except for security purposes that have been documented, physically separate visitors from inmates. Visitation policies must officially permit an inmate to receive visitors on at least a weekly basis, and the rules governing visitation must allow reasonable times and space for each visit. Visitors shall not be subject to any unreasonable searches. Inmates undergoing initial classification shall not be denied visitation privileges.

It is unlikely that a Canadian court would make such a broad statement except under the Charter of Rights. But, should the Charter come into effect, there are American precedents for broad statements on issues, such as inmate visiting privileges, to which our courts could refer.

---

9 James v. Wallace 406 F. Supp. 318

During the 1960s in the United States, a series of cases pertaining to incarceration and religious freedom was sparked off by activist Black Muslims, a large number of whom were imprisoned at that time. Several principles emerged from those cases, one of which is that minority religions do not necessarily have to have facilities identical to those provided for majority religions but some facilities must be provided. In one American case, it was decided that segregated prisoners do not have a right to attend Mass but, in that instance, a Catholic priest was available for sacraments. I would suggest that such a case would be significant not only in Quebec but throughout the country, since fifty percent of the population is Catholic. A number of other cases pertaining to religion have determined that an Orthodox diet must be available for Jewish inmates.

With respect to search and seizure, there is an interesting line of American cases in which the legal concept "burden of proof" has been used. The cases have determined that prison officials must be able legally to establish the reasonableness of searches. What the courts have looked at, particularly with respect to body cavity searches, are the circumstances surrounding the search. For example, the courts have questioned whether the search was made prior to a transfer or a court appearance; whether there was reliable information beforehand to suggest the need for such a search; whether trained paramedics conducted the search under sanitary conditions and whether the inmate was protected from or subjected to humiliation during the process.

In conclusion three points should be stressed. The first is that while American legal precedents are not binding on our courts, they may influence the direction in which our law evolves under the Charter of Rights. At most, American jurisprudence will be suggestive for Canadian courts but for that reason alone it is worthwhile to become familiar with the details of American law. The second point is that law is evolutionary; American law has and will fluctuate. In most instances, including many of the examples I have cited, cases can be found to support both of the opposing sides. The third point relates to the question: what does the American law suggest about discretion in the prison and parole system? What it suggests to me is that if the system does not make rules for itself, the courts are going to make the rules for it. One thread that does run through some of the cases is that the courts have been inclined to take more of a hands-off approach when they are dealing with a system that has taken a responsible attitude and has set up for itself limitations on the absolute, unfettered discretion of the individuals who are in authority.

PUNISHMENT AND THE RULE OF LAW

Bradley Willis
Barrister and Solicitor
Ogilvie and Company
Barristers, Solicitors and Notaries
Edmonton, Alberta

This paper* investigates both the theory and practice of punishment and advances three main propositions: first, that legal punishment consists of two distinct activities: sentencing (the adjudicative function) and imprisonment (the administrative function); second, that over time, these two functions have become almost completely separated; and third, that the degree of separation which now exists in Canada leads to unfairness, inefficiency and lack of public accountability. These three propositions, buttressed by certain moral and practical considerations, suggest two main conclusions: one, that courts should impose specific punishments rather than merely terms of incarceration; and two, that the carrying out of those punishments should be subject to judicial supervision.

> By the rule of law we mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[1]
>
> A.V. Dicey

---

1 Dicey, A.V., The Law of the Constitution, p.188.

* This paper is an abridged version of an unpublished text entitled Punishment and the Rule of Law by Bradley Willis.

Punishment Defined

To provide a general definition of punishment, it might be said that we punish an individual if and only if two specific conditions are fulfilled. The first condition is that some act or acts be performed that restrict the choices open to an individual. The second is that it be announced those acts are being performed solely because of some act or actions done in the past by the individual in question. Of course, a civil matter in one era may be a criminal matter in another, as the survival of punitive damages in tort actions testifies. Even what we now call crimes of violence were once compensable under Anglo-Saxon law according to a standard tariff called the wergild. This need not detain us. The essential point is the stipulation that punishment is inflicted only for past conduct and not for present intransigence.

Our proposed definition leaves open the question of who is doing the punishing. The punisher could be a vigilante. He could be a parent disciplining a child. He could be a Correctional Officer or Living Unit Officer ensuring an offender's continued incarceration in strict accordance with a sentence imposed by a judge in the name of the legal system, or alternatively, inflicting rough justice upon an offender under the customary "Law of the Slammer". It is critical to make these distinctions to determine in any real-life case whether a certain punishment ought to be inflicted upon a certain person.

We can now expand our definition to one of legal punishment by incorporating three additional conditions. The first is that some person (the judge) has antecedently announced that the actions for which an individual is to be punished constituted an infringement of the rules of the legal system which has jurisdiction over him or her (nullum crimen, sine lege). The second is that the judge is an official of that legal system and has specific authority under that system to make such an announcement. The third is that the legal system contains other rules such that the punishment inflicted on an individual is within a given range associated with the impugned acts and the sentence announced by the judge (nulla poena, sine lege).

In the 18th century, in England, punishment was inflicted directly on the body of the offender. It was not then misleading to think of punishment as imposed and administered by a single authority. But the leading characteristic of the prison system since its emergence in the late 18th century has been and remains the almost complete separation of the adjudicative function (performed by a judge) from the administrative function (performed by prison staff and police officers). Thus, it is misleading to

speak of an offender being punished for his offence. An offender is sentenced for his offence; the punishment he suffers depends on the diffuse considerations of classification officers, parole boards, prison guards and even fellow prisoners.

Given this separation of functions, it is perhaps not surprising that, in Canada, few provincial court judges have any but the most cursory familiarity with the institutions to which they daily sentence people. As His Honour Robert Reilly, an Ontario Provincial Court judge, reportedly said in 1980:

> "...most judges, lawyers and police officers know little or nothing about the prisons where they send convicts."[2]

This is the case not because these people are negligent in the performance of their duties but because what they do is largely irrelevant to what happens in prison.[3]

In summary, legal punishment typically consists of two parts, judicial sentencing and imprisonment. The first stage of sentencing is carried out by a judge. It consists of a public announcement that some person is the author of the offending act and that a particular punishment will be imposed. That penalty will be a monetary fine, a period of probation, imprisonment or some combination of the three. Since the ultimate sanction for non-payment of fines or failure to comply with probation orders is imprisonment, it makes sense to think of them as contingent forms of imprisonment.

---

2 Kingston Whig-Standard, Nov. 30th, 1979: "Judges Should See Prison Life Firsthand".

3 cf. Morris, N., The Future of Imprisonment: "The prison should, were the world not full of paradox, be the very paradigm of the rule of law. Until recent years it was instead a hidden land of uncontrolled discretion, the preserve of individual power immune from legal process." (p. 106)

It is perhaps worth noting that the separation of the adjudicative and administrative functions in legal punishment provides an interesting parallel to the separation of ownership and control in large corporations and the bureaucratization of governments generally. This parallel is both conceptual and chronological (i.e. it dates from the mid 18th century).

The Components of Punishment

Imprisonment consists of a systematic restriction of a prisoner's choices, including some or all of the following:[4]

(a) rationing of food, clothing and consumer goods and amenities in general;

(b) sexual deprivation (especially of heterosexual prisoners);

(c) assaults by guards and inmates;

(d) solitary confinement or segregation;

(e) restriction of movement with respect to both space and time;

(f) uncertainty as to which choices may be further restricted and when;

(g) mandatory or coerced subjection to medical treatment or participation in "treatment programs"; and

(h) post-judicial sentencing (see below).

There are three types of post-judicial sentencing. In Canada and most other civilized countries the first is classification. The initial determination of the conditions of imprisonment is, as a rule, entirely within the discretion of the prison authorities. Sexual offenders or police informants, for example, are normally placed in segregation to prevent other prisoners from physically harming them. Similarly, prisoners viewed as potentially dangerous may be segregated, isolated or physically bound. Again, these matters are within the sole discretion of prison authorities.

The second type of post-judicial sentencing is prison discipline. Most Canadian prisons have established a disciplinary tribunal (Warden's Court), the composition of which is set out in regulations or management directives. Until recently, all such tribunals consisted entirely of prison staff. As a

---

4 The list is intended to be illustrative rather than exhaustive.

result of the 1977 report of the Parliamentary Sub-Committee on the Penitentiary System (The MacGuigan Report),[5] some Canadian federal penitentiaries had, by 1980, instituted disciplinary committees chaired by independent persons, but there is strong resistance within the prison system to this proposal.[6]

The third kind of post-judicial sentencing is community release. Parole and community release authorities have a very wide discretion within the ostensible sentencing period as announced by a court. This was confirmed in Mitchell v. The Queen (1975) 61 D.L.R. (3d) 77 (S.C.C.), in which the Supreme Court of Canada held (5:3, Laskin C.J.C., Spence and Dickson dissenting) that the National Parole Board was not required to tell an accused why his parole was revoked, notwithstanding the provisions of the Canadian Bill of Rights. Martland J. summarized the majority's approach at p. 89:

> The appellant had no right to parole. He was granted parole as a matter of discretion by the Parole Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Board.

In Canada eligibility for temporary release may, in some jurisdictions, begin after the expiry of one-sixth of the nominal sentence but normally occurs after one-third of the judicial sentence has been served. For

---

5 Votes and Proceedings of the Canadian House of Commons, Tuesday, June 7th, 1977.

6 In a letter to the Kingston Whig-Standard published November 30th, 1979, D.R. Yeomans, the Federal Commissioner of Corrections, claimed that "we have achieved implementation or virtual implementation of 51 of the 65 recommendations".

However, Mr. Yeoman's progress report to the Solicitor General of Canada submitted on October 26th, 1979, does not bear out this claim. Even if every statement in that report is accepted at face value, an approximate tally would seem to be:

Implemented	17
Not implemented	28
Partly implemented	9
Impossible to tell from report	11
Total.....	65

prisoners serving federal time there is a hearing before the Parole Board at which counsel were not until recently permitted to be present.

It makes sense to think of such a hearing as a sentencing hearing. To call the activities of parole boards "clemency" rather than "punishment" is to make a distinction which, while important for some purposes, is not significant here. It is true that parole reduces the severity of punishment. But it still involves actual and potential restrictions on an offender's otherwise lawful choices.

The Effects of Punishment

As we have seen, punishment consists of an announcement followed by the performance of certain acts restricting an offender's choices. The effects of these two aspects of punishment are interrelated. But for simplicity's sake, we will look at them separately and only in so far as they affect the offender himself.

i) Announcement Effect

The announcement consists of proclaiming that an individual is the perpetrator of a certain act or acts. The effect of this announcement upon the individual will depend upon a number of factors. If nobody hears the announcement, if those who hear do not care or if the prisoner does not care what people, including us, may say or do and does not otherwise foresee any significant change in the choices open to him as a result of what we have said, then there will be zero announcement effect upon him although, it is worth noting, there may be effects on others who learn of the announcement.

ii) Restriction Effect

The second aspect of punishment is the restriction effect. Adult malefactors are sent to "correctioncl institutes". In these places, restrictions have indirect effects of the same kind as announcement effects. There are also direct effects. Their magnitude will depend upon which choices are prevented or to what extent choices are impeded by the restrictions imposed (cf. 2.1(2) - (h)); how strongly those choices are preferred by the prisoner to the choices available under restrictions; and the degree of uncertainty as to further restrictions.

The Practice of Punishment and the Rule of Law

It is my contention that punishment should not only be announced but also supervised by a judicial body. Moreover, the specific content of punishments, and not merely where and when they will take place, should be announced by judges. The consequences that flow from the separation of judicial sentencing from post-judicial sentencing provide the necessary evidence to support the argument for judicial supervision of sentencing. While a full description of all the consequences that result from the existing separation of sentencing functions is beyond the scope of this paper, I will highlight some of the worst effects to demonstrate why a change is needed.

As many writers have pointed out, denunciation is an important part of punishment. The announcement that an individual has been convicted of a criminal offence (or even that he has been charged with the commission of one) is a powerful source of humiliation. Because the sentencing function does not include supervision of publicity, the degree to which individuals suffer public obloquy is largely dependent upon the whim of the media. Admittedly, this will always be the case to some extent because of the danger of interfering with freedom of expression. However, permitting the courts to specify certain kinds of publicity would go far towards influencing the announcement effect and equalizing it, as between different offenders, to the extent possible. Currently in Canada, the only significant judicial powers with respect to publicity are the negative powers granted in Section 467 of the Criminal Code to ban publicity until committal on a preliminary hearing, the protection of anonymity afforded to juveniles, and some discretion (disputed in the case law) to require or permit in camera hearings.

A second problem is that there is no one-to-one correspondence between announcement and punishment. As things stand, the judges have no way of knowing what punishments will be imposed on an accused during the course of his imprisonment. Moreover, except in very rare cases, judges never know precisely what happens to people they sentence for the commission of offences. How has he behaved in prison? Has he re-offended? What efforts has he made to rehabilitate himself? And so forth. For these reasons, among others, a judge facing the disagreeable and onerous task of sentencing an accused has been compared to a golfer hitting a golf ball into a fog.

Attached to the Canadian prison system is a bureaucracy which engages in post-judicial sentencing. This bureaucracy is, as we have seen, not bound to act judicially. Its powers are enormous: in Alberta a sentence of two years less a day may be shortened to as little as four months if the "temporary absence program" administrator feels the case is appropriate. Order is

maintained in prisons chiefly by the device of statutory remission. By "good behaviour" (as defined by the prison authorities) a prisoner "earns" remission of one-third of his sentence. Given this fact and the fact that the classification privileges and transfer (cf. Re Bruce et al and Yeomans et al (1980) 102 D.L.R. 3rd p. 267 (Fed. Ct.)) of prisoners are entirely within the discretion of the prison authorities, the sentence pronounced in court has limited relevance to the conditions of imprisonment for any given individual.

A third consequence of the disjunction between judicial and post-judicial sentencing is that the "general deterrence" effect of a given sentence is highly arbitrary. In the bygone era in which our laws were drafted, proceedings in the courts were well known to the entire community. There was no television or radio. The courts were one of the community's major sources of amusement and edification, and court proceedings were a public ritual involving everyone. In those days it made sense to speak of the deterrent effect of punishment on others tempted to commit like offences. In matters of extreme gravity it still makes sense to speak of such "general deterrence", even though measurement is problematical.

However, for most criminal matters, the Court has no way of exercising any control over the general deterrence effected by a given sentence because it can control neither the announcement effect nor the punishments which will actually be inflicted. Because of this lack of control, the public has no idea what any sentence really means to a convicted person. This renders "general deterrence" even more problematical since members of the public are the ones who are supposed to be deterred.

A further problem is that identical sentences of incarceration affect different prisoners differently. The practice of sentencing people to institutions rather than specifying punishments leads to a number of incongruous results. To take one of the most obvious examples, there is no a priori reason why all heterosexual people who are incarcerated should be deprived of sexual activity whereas bisexuals and homosexuals are not (or not to anything like the same extent). It would seem sensible and fair that decisions in this regard should be made on an individual basis and should be made for explicit reasons. Similar discrepancies occur with respect to the availability of training, therapy and recreational facilities, the application of the "inmate code" and generally the incidence of all the various pains and discomfitures associated with prison life.

The current state of affairs also means that judges do not have adequate information before them in passing sentence. In sentencing an offender who has a previous record, neither the offender nor the judge in a Canadian court

normally has access to anything like an adequate report of the facts surrounding previous offences, the nature and effect (if any) of previous punishment or the offender's conduct in the intervening period. At best, this results in a duplication of effort. Usually, it results in a false, highly inaccurate or incomplete set of facts on the basis of which sentences are imposed. It is a lamentable but readily ascertainable fact that judges today tolerate this state of affairs. It is unlikely that they would continue to put up with it if their involvement continued past the sentencing announcement.

Who Should Do The Judicial Supervision?

If punishment should be judicially supervised, should that judicial supervision be performed by the ordinary courts or by specialized sentencing bodies composed of the sort of people who now testify as expert witnesses? For both practical and moral reasons, I adopt the conclusion reached by U.S. Federal Judge Marvin Frankel in his book, Law Without Order:

> While any change in sentencing practices is likely to be an improvement, I doubt that wholly removing the responsibility and the power from the jurisdiction of the legal profession would be either feasible or desirable.[7]

To support this conclusion, I shall first set out some practical arguments. They are, I think, less controversial than the hybrid moral argument I shall subsequently advance. Judge Frankel himself cites the following arguments in defence of the above-cited proposition: the importance of tradition in effecting compliance; the fact that sentencing includes specifically legal problems; the demonstrated lack of expertise of the "helping professions", at least to date.

Another, much underrated consideration is the information diseconomy involved in having separate triers of fact and sentencers. If (as Professor Sheldon Glueck first suggested in Crime and Justice back in 1936) there were a sentencing panel consisting of a judge, a psychiatrist or a psychologist and a sociologist or educator, that panel would have to hear all evidence led at the trial if it were not to be entirely deprived of information. Alternatively, written findings of fact and reasons for them would have to be prepared before every sentencing to ensure fairness. The result would be intolerable delay in almost every case of any complexity. There is, almost everyone would agree, enough delay as things stand. "Fresh Justice", as Francis Bacon pointed out, "is the sweetest".

7 Frankel, Marvin, Law Without Order, p. 55.

To anticipate an obvious objection, there seems little likelihood that the net cost of judicial supervision would be significant. Indeed, there might well result a net saving. In the first place, judicial supervision of punishment would replace parole boards, which would reduce to a considerable extent the additional man-hours required. In the second place, as discussed above, significant economies of information would be realized because of the judiciary's closer involvement. In the third place, the cost of imprisonment is now so high (a conservative estimate: $25,000.00 per year per man in Canada)[8] that even a marginal improvement in the effectiveness of punishment

8 Many different figures have been cited for the cost of imprisonment. For example, Daniel Baum in Discount Justice gives an estimate of $14,000.00 to $17,000.00 per year (page 36, 65 and 71). But such a cost would amount to a substantial discount! As Baum admits at page 65, the figure of $17,000.00 takes into account only "direct costs". It does not include, apparently, any attribution for overhead (staff, administration and physical plant). The figures in the Moyer Report, recently released by the Government of Alberta, probably exhibit the same shortcomings, although it is impossible to tell because the basis for their calculation is not set out.

Again, the MacGuigan Sub-Committee (at p. 937 of the Votes and Proceedings of the House of Commons, June 7, 1977) claims that, "the cost of maintaining an inmate in prison is estimated at $17,515.00 a year for each male, maximum security prisoner".

The excessive number of significant figures in that estimate should make us suspicious at the outset.

But a simple cross-check shows the degree to which the estimate is understated. At p. 986, the Committee's report points out that as at April 12, 1977, the staff-inmate ratio in Canadian Federal Prisons was 1 staff member to 0.994 inmates. (this includes only Canadian Penitentiary Service staff and does not appear to include staff hired by the Solicitor General's Department, some of whose functions are performed in connection with the CPS, monies paid to the RCMP, some attribution for the cost of parole services and other ancillary services, etc.)

Even under the restrictive assumption set out above, if we assume that the average salary of a penitentiary service employee is $15,000.00 per year, then apart from any overhead cost properly attributable to physical plant, and even assuming substantial overlap, the cost per prisoner must be at least $25,000.00 A more likely figure is, I suggest, in the $35,000.00 to $40,000.00 range.

Note as well that even the uncorrected figures cited are in 1977 dollars and thus would require at least a 35% upward revision to allow for inflation between 1977 and 1980.

(i.e. a marginal reduction in recidivism) would have a substantial cost saving. This cost saving would justify devoting more resources to the punishment process. For example, a yearly saving of 3 man-years in prison would justify, on a break-even basis, the creation of a $75,000.00-a-year position. This does not count the saving associated with crimes not committed. Nor does it count the immensely important benefits not measurable in money - including justice itself.

Judicial Supervison of Punishment and The Right to Punish

Practical considerations are important but fairness and justice are more important. For that reason, many well-meaning people would like to see punishment announced and supervised not by the ordinary courts, but rather by some sort of panel of experts. Criminals, they argue, need to have their unacceptable behaviour modified. It follows that the people who decide what is to be done with them should ideally be experts in human behaviour and not elderly gentlemen learned in the law. In my opinion, this argument overlooks the nature of the decision to impose legal punishment. I contend that the very assumption that we have a right to punish someone implies that the decision as to precisely what punishment to impose is one which should involve both the weighing of evidence (including, of course, expert evidence) and the application of evidentiary presumptions. The need for both of these procedures requires legal expertise as a necessary (although not always sufficient) condition to the making of any sensible decision about punishment.

The Right to Punish and Evidentiary Requirements

Assuming that we have a right to punish an offender, what sort of a right is it? Only a summary of a somewhat complex answer can be offered in the space available.[9] If there are, as we assume, moral rights to punish, they are derivative ones founded in rights of self-defence. They have no independent existence. Where a victim's physical health is not endangered, there may be good reasons to punish an offender. But the existence of good reasons from the point of view of economic self-interest of individuals or groups does not imply the existence of correlative moral rights.

As Baum points out, there are a large number of other indirect costs, such as the expense of maintaining a prisoner's family on welfare and of course a large number of unquantifiable costs.

9 A full treatment of this question is given in the author's original paper, Punishment and the Rule of Law.

The foregoing suggests the following evidentiary presumptions:

(1) Where an offence against the person is committed, the burden of proof should be on the defence to show that any particular punishment should not be inflicted;

(2) However, in the case of an offence against property, the burden of proof should be on the prosecution to show that any particular punishment should be inflicted.

These conclusions are, of course, significant in themselves, if by no means startling. They also imply that the need for characteristically legal skills does not end with an offender's conviction.

Evidentiary Requirements and the Need for Legal Skills

There are two main reasons that legal skills are vital to sentencing. First: experts disagree. Because they do, their evidence has to be heard and weighed. The changes suggested above, far from relegating experts to some academic background, would greatly increase the relevance and frequency of their testimony. Both Defence Counsel and the Crown, in order to discharge the burden of proof of the suitability of any particular plan of punishment, would be required to present evidence (normally expert testimony or reports) to establish or attack a plan's alleged announcement and restrictions effects. Another group of specialists - prison administrators, guards, parole officers, etc. - would also have a far more prominent public role to play. If a given plan of punishment proved impractical or unworkable, they would be obliged to apply to the Court to be relieved from the task of carrying it out. Thus, there is no one kind of expert whose testimony would be decisive as to the workability of some punishment plan. Rather, it is a question of the performance of the characteristically legal task of weighing the relevance of disparate sorts of evidence, evidence which is connected, as the philosopher John Wisdom has well expressed it, not like the links of a chain but like the legs of a chair.[10] Second: expert evidence has to be weighed in the light of evidentiary presumptions. And the initial decision to apply a

---

10 Wisdom, J. "Gods", in Kaufman, ed., Religion From Tolstoy to Camus, p. 391 at 397: "...the process of argument is not a chain of demonstrative reasoning. It is a presenting and representing of those features of the case which severally co-operate in favour of the conclusion...it is a matter of the cumulative effect of several independent premises".

given evidentiary presumption itself presupposes, among other things, the legal characterization of the offence.

For both the above reasons, legal expertise is a prerequisite to the making of most decisions about plans for punishing convicted persons. This is not to say, however, that additional professional expertise in sentencing matters would not be desirable. But if there is a body of expert knowledge uniquely applicable to the punishment process, and which all judges should possess, we do not yet have the faintest idea of what it might be. Nor are we likely to develop any reliable body of knowledge as long as we continue our present practices; namely, sentencing offenders to institutions in which they will not necessarily be kept, for periods of time which they may or may not serve, to suffer punishments which we cannot specify in advance, verify while being inflicted or ascertain in retrospect.

Legal Mechanisms for Judicial Supervision

In the event of maladministration of punishment, the remedy would be in the nature of mandamus (i.e. a direction requiring an official to do his duty). Questions therefore arise. Who should have the right to invoke such a remedy? What screening devices (if any) should be put in place to prevent frivolous applications? How can the process be made reasonably speedy? How can it be designed not to interfere with the need for quick action by the authorities? (On the latter point: sentences could be shortened or monetary compensation could be made if it were found that punishment had not been administered as directed by the Court).

These are matters about which much could be said. The point I want to make here is simply that none of the above matters present insuperable or even serious difficulty.[11] Nor will the drafting of the requisite amendments to The Criminal Code (and associated legislation) be beyond the wit of legislative draftsmen.

---

11 Although Section 664 of the Criminal Code is in practice a dead letter, that Section (which sets out typical probation conditions) is the sort of section that would be required. An evidentiary presumption will have to be added to ensure enforceability and some care would have to be given to the drafting of the legislation.

Conclusion

In advancing the foregoing propositions, the appeal must finally be to moral considerations. But the prescriptive language of the discussion is, I submit, justified by principles which are logically necessary (in the sense that no system of punishment could be internally consistent without them) as well as moral, including:

- Like cases should be treated alike.
- Statements by public authorities (such as sentencing announcements) should not be misleading.
- Reasons should normally be given to people whom other people decide to punish.
- Nullum crimen, nulla peona, sine lege.

These maxims are consistent with the axiom that punishment is not necessarily incompatible with caring about people whom we punish. Perhaps if we paid more attention to precisely what we do when we punish other people, the practice of punishment would more often be seen to be fair and helpful by everyone concerned with it:

> If there is nothing in the world but enemies, and that is how the criminal feels, his hate and destructiveness are, in his view, to a great extent justified - an attitude which relieves some of his unconscious feelings of guilt.[12]

---

12 Klein, "On Criminality" in Klein, op. cit., p. 16.

INMATES' RIGHTS: THE CASE LAW AND ITS IMPLICATIONS FOR PRISONS AND PENITENTIARIES

Jim Phelps
Regional Director General
Prairie Region
The Correctional Service
of Canada
Saskatoon, Saskatchewan

In recent years, the Correctional Service of Canada has recognized and adopted measures to protect the rights of inmates. Case law and efforts to use the courts to reform the correctional system have vastly increased due process in our decision-making but, in terms of the substantial improvement of inmates' rights, the real gains have been made by legislative authorities and by management working to implement basic principles and rights. Similarly, future improvements in inmates' rights and measures to safeguard them will depend less on the courts than on the Government's commitment to the protection of human rights in general.

In his presentation, Michael Jackson has given an excellent overview of the development of case law over the past two or three hundred years as it relates to penitentiaries and prisons. His presentation has indicated the relative lack of impact that case law has had both in Canada and in the United States. Nevertheless, the correctional systems in the United States and in Canada have greatly increased the amount of due process involved when making decisions regarding inmates. Today, inmates are given a hearing by the Independent Chairpersons of the Disciplinary Boards in the institutions. Inmates are allowed to have assistants at parole hearings. In transfer decisions in the Prairie Region, reasons are given to the inmate for the decision rendered.

The tendency is to provide due process and to give the system of decision-making as credible an appearance as one possibly can. My own opinion, and I think this is true of most administrators in the system, is that decisions made, as in transfers, for example, have for the most part been acceptable to the inmates. There have been very few appeals or grievances in that area. But it still leaves a better feeling for the inmate, and for management, if officials explain why they did what they did, and if they hear the inmate out, ideally before the transfer.

Case law and efforts to use the courts to reform the correctional system have vastly increased due process in our decision-making but, in terms of a substantial improvement of inmates' rights, the real gains have been made by legislative authorities, and by management working to implement principles and culturally-accepted rights. The government, through legislation, most effectively grants inmates' rights. The court system can be used to enforce those rights, and in so doing, it will also define and, to some extent, expand the rights. However, the basic substantive right is granted by the government or it does not exist in the first place.

A good example of the relationship between government and the courts in this area pertains to strip searches in British Columbia. The Court ruled that we could not do a strip search but the searches were so important to the fundamental management of an institution and the safety of staff and inmates that Cabinet very quickly changed the law and strip searches were once again legal. This is the likely outcome of any court decision that, on the basis of existing law, denies the administration a technique or procedure absolutely essential for the operation of an institution and the management of inmates. In such cases, the government of the day will change the relevant law.

The question of checking mail in institutions provides another example of this situation. The first time a lawyer sends some form of dangerous equipment in a letter will be the last time we are told not to open letters. The balance between security and respect for the individual's rights always has to be kept in place, always tipped in favour of the government, which is operating the prison in the first place.

An example of a fundamental change in inmates' rights is the section of the Canadian Human Rights Act which gives inmates and all citizens the right to review information that forms the basis of the decisions made about them. This was a complete reversal of about one hundred and fifty years of policy in the Canadian system of confidentiality. Historically, in the system, when a police officer gave prison officials his report on what he thought of an

inmate and the crime connections he thought the inmate had, the inmate had no way of reading it. The police were confident that the inmate would never see the report. Similarly, if an inmate's wife or lawyer gave us information, the inmate would never expect to see it. A lot of our case preparation in case management was based on the assumption that confidentiality would always be observed. The Human Rights Act changed that overnight. As a result, the police reports stopped overnight. Even today, the police reports are a shadow of what they used to be. We again receive them after a lengthy process of trying to convince the police that their reports would not be released to inmates if there was anything in the report of a very sensitive nature or that would threaten the security of the country or the well-being of any individual. This has been an uphill battle, and the fact still is that the Canadian Human Rights Act applies and inmates do have access to their files. We still provide access for the vast majority of requests for information. It is a right that has been established in law, is enforceable by courts, and will probably be enshrined even further in the Constitution. Ultimately, in my opinion, inmates' rights will be established either by the legislation of the day or by the management of the day, not by the courts.

When speaking of inmates' rights, it is also necessary to refer to international agreements which the Government of Canada has signed. The most widely known is the International Covenant of Civil and Political Rights, including optional protocol. The basic thrust of this is that an offender retains all the rights of an ordinary citizen except those that are expressly taken away from him by statute or that he loses as a necessary consequence of incarceration. Also the Covenant lists approximately one hundred basic rights that offenders should maintain. The federal system in Canada has taken substantial steps to ensure that those rights are met, many through legislation, the remainder through the Commissioner's Directives. The difference, as has already been pointed out, is that you cannot enforce the Commissioner's Directives in a court of law. At least, you cannot do it yet.

Other agreements that Canada has signed are the United Nations' Standard Minimum Rules for the Treatment of Inmates, the United Nations' Declaration on the Protection of all Persons from Torture, and All Other Cruel, Inhuman or Degrading Treatment or Punishment. We have made a fairly substantial effort to operate our system in accordance with these rules. The procedures that we have taken to implement the basic rights required by the international agreements have been acceptable to the United Nations. In my opinion, the progress made in rights has been very dramatic in the past six years, and will likely continue with the new Constitution.

That brings us to the second aspect of inmates' rights. It does little good to grant rights if there is no way to enforce these rights. If the inmate has no recourse to make sure that his rights are respected, then he may as well not have the rights at all. It is just a document. Again, the Solicitor General's Department as a whole, and the Correctional Service of Canada, specifically, have taken very active steps to make sure these rights are enforced. The most popular method of enforcing rights is the standard grievance procedure. I would say, judging from the thousands of inmates that have used the process, that they consider it a successful method of having their rights redressed.

The system we have is a unique model in the world. In the federal system, the inmate starts first with an official complaint. The concept is that the person who has made the decision has the first opportunity to meet with the inmate to change his decision, if he feels it should be changed. A huge proportion of grievances die at the complaint stage. Somehow or other, the officer involved and the inmate come to a mutually agreeable decision. If this fails, then a formal grievance is submitted. The first stage is the Grievance Committee. This again has a relatively democratic appearance to it; the Committee reviews the grievance, and a decision is made about it. Most of the grievances that reach the Committee stop at this level. If that is not a satisfactory decison or if the Warden cannot accept it, the Warden will review the grievance and make a decision. If that is not satisfactory, the grievance will be taken to an external body, outside the institution, usually the Citizens' Advisory Committee. They will review the matter being grieved and advise the Warden. The Warden then has another opportunity to reconsider his decision and, if that fails to satisfy the inmate, the inmate can apply to the Regional Director General. If the inmate remains unsatisfied at that level, he may apply to the Commissioner at National Headquarters. Very few grievances, proportionally less than five per cent, ever reach the Commissioner. This is an internal process of remedy that, in my view, is very successful. It is my understanding that, in the United States, the courts do not like to intervene if the grievance procedure has not been exhausted. It is one way of minimizing the court work while still giving the inmate a method of redress.

The other method that is also widely known is appeal to the Correctional Investigator of the Solicitor General's Department. He has the power to investigate, evaluate and recommend, but not to actually change a decision. The role is very similar to that of an ombudsman and, again, the success rate is very high. When he has to investigate, he and/or his staff will normally work with the administration to come to a mutually acceptable decision that either resolves the problem or is highly defensible under the circumstances.

The Correctional Investigator normally will not intervene unless the grievance procedure has been exhausted, although he does not have any law or regulation preventing him from intervening.

Another approach that inmates may use to enforce their rights is a simple letter to the Commissioner, the Solicitor General, a Member of Parliament or a Senator, outlining their concerns. The letter will normally be given to the Director of Inmate Affairs, who will study the situation in much the same way as the Correctional Investigator. He will try to resolve the problem or he may conclude that management should not change its position. In this case, the Member of Parliament has to be advised of the basis for the decision and the investigation that took place. My view is that you have basically three broad remedies available to make sure that rights are respected, before the inmate has to resort to the court system. If all else fails, he has the right to contact a lawyer and go to the Court. There is an increasing tendency to enshrine inmates' rights in law. I look upon the process as an evolutionary one that changes with the basic philosophy of the country and the government in power. Fortunately for the inmates and the citizens of Canada, the government in power today is very strongly committed to human rights. In the past six years, a huge amount of progress has been made and I suspect a lot more is going to be made in the next two or three years.

INMATES'RIGHTS: THE IMPLICATIONS FOR INSTITUTIONAL MANAGERS

Ken Payne
Warden
The Correctional Service of Canada
Joyceville Institution
Kingston, Ontario

While abuses of discretionary power in corrections cannot be tolerated, the concept of inmates' rights does pose some very real and serious problems for prison officials and staff. The fundamental responsibility of penitentiary guards is to protect not only the public but also the inmates. At times the need to respect the rights of one inmate hampers efforts to protect the rights of others. Given the reality of prison life and the difficulty of obtaining evidence of misconduct on the part of inmates, it is necessary to allow prison staff broad enough discretionary power to make decisions that balance the rights of one inmate against the rights of other inmates and society's right to protection.

In my opinion, the duty to act fairly, the need for not only justice but an appearance of justice, is making us do our job a little better than we might have done in the past in the Correctional Service of Canada. Nonetheless, there are some distinct problems created by the concept of inmates' rights and I would like to discuss those now from my perspective, that of a manager of a large institution where 400 individuals co-exist.

We are living in what I have heard aptly-termed a "low trust" society. The correctional system and the institutions in which we operate are further characterized by a low level of trust. When you combine that situation with the expansion of inmates' rights and that of workers' rights, the potential

for tension is very high. The metaphor I might offer to illustrate the situation is that of three triangles or three circles moving around almost amoeba-like in their own world. As the manager and the warden of an institution, my job is to make these little circles move a little closer together, to achieve some kind of congruence and some kind of harmony. It is hard to strive for that kind of harmony when the staff has a concept of their role that conflicts with the demands imposed upon them by the concept of inmates' rights.

If I were a security officer, I would expect that, as part of my role, I would have some power to control inmates who are stepping out of line. I would have been trained at the Staff College in Ontario to respond to crisis situations with the appropriate and requisite amount of force to contain and terminate an incident. I would not have been told that, if I terminate an incident, the inmate might bring a suit against me for not being a nice fellow. Conflicts can and do arise between the training, expectation and need to control inmates and the whole concept of inmates' rights.

One personal observation I have made is that, as a consequence of the expansion of individual rights, a lot of inmates are actually losing certain rights, for example: the right to do their time as they see fit; the right not to have someone muscle them for their canteen - I know of many cases in which an inmate has gone for months without cigarettes, chocolate bars or shampoo, because someone on the range who was bigger, stronger and smarter than he is simply told him to turn it over. The warden cannot prove anything in such cases any more than he can prove, for example, that one inmate is raping another inmate every second night. Now, how do you deal with that kind of problem? You cannot arbitrarily move the inmate who is creating trouble. You cannot do it capriciously, nor do I think that we should be able to. But, at the same time, when we do know that an inmate is harming others in the prison population, I think it is incumbent on us to move that person to another institution. And we do know when and how much harm is being done, not from courtroom-like evidence but from the experience of working in institutions and from a knowledge of the prison population. The type of action that is required has been referred to over the years as "Greyhound therapy". You back the bus up, you throw five or six inmates in the bus, you drive them forty miles down the road to increased security, and the whole tone of Joyceville, the medium institution I work in, mellows. Those inmates who were stealing cookies and chocolate bars are now gone. It might be six months before somebody else starts stealing cookies and chocolate bars.

The example might seem frivolous but I think it illustrates a basic point. An individual inmate has committed a crime and his punishment is

incarceration, and that is it. The manager of an institution has to have enough discretionary power to protect the inmate. The discretionary power cannot be used simply on a whim or a fancy and, as we become increasingly aware of the need to exercise discretion fairly, it is getting harder for lawyers to take us into court. Since it was their intent in the first place to improve the system, the increased difficulty in finding grounds for taking the correctional system to court can hardly be a disappointment to lawyers and prison reformers. As valuable as the improvements are to inmates and as much as we agree that discretion cannot be used impulsively, there may be times when a seemingly arbitrary decision is necessary to protect the inmate population from a particularly troublesome individual. If you take that power away, you leave the manager in the difficult position of trying to run an institution without any authority. For example, when an inmate sets out to get drunk you have a hard time proving that his intention was to get drunk. Unfortunately, my point of view is that when he is drunk, he is drunk. All I can see is the drunkenness; I know all too well that if I let him go running around the range, rather cavalierly, in a drunken state, sooner or later either he or someone else will get hurt. We have to take action against that individual. And what do we do? We put him in administrative segregation. For some people outside, that may seem cruel, that may seem to be unusual punishment but, on the other hand, we have 399 other inmates who need to be protected while that guy is being drunk and disorderly. It is that kind of situation that makes the job of a warden, security officer, and a classification officer frustrating.

The development of inmates' rights on the one hand and employees' rights on the other hand, may only lead us to an environment of ever-increasing conflict. The grievance committee is an interesting alternative to that type of adversarial approach. The committee is made up of an equal number of staff and inmates, and amounts, in effect, to peer group decision-making. The grievance committee does not always rule in favour of the inmate. The inmates judge their fellow-inmates from a point of common understanding. In some cases, an inmate will say: "I have a beef, I have been treated unfairly"; and the other inmate will look at him and say: "Hey Harry, you are blowing smoke". In such cases the inmate cannot complain that his rights have been infringed by the "enemy" and the tension that is all too common between staff and inmates is not exacerbated.

The problem of balancing individual rights and the need for security is not, however, miraculously resolved by the establishment of inmate committees. At different points in the system, different pressures are felt for a tightening up of security, on the one hand, and for the protection of individual rights, on the other. Within the institution, we are subject to the

inmates' demands for protection of their individual rights and to the frustration of correctional officers who feel hampered in their efforts to ensure security. At times we are subject to the criticism of the press. We face the dilemma of balancing individual rights and the need for security measures in dealing with visitors as well as inmates. For example, the matter of skin searching involves discretionary power vis-à-vis outside guests. I do not like to see a woman coming in for a visit, with a nice little baby, being forced to submit to a skin (strip) search, but we have had cases where the baby's diaper has been full of valium. We have had cases where the woman's brassiere, boots and other articles of clothing are covering large quantities of contraband drugs. If two hundred pills of valium are pumped into the institution and split by fifteen inmates, stand back and watch out. Although we may uncover only a small percentage of the smuggled drugs, we cannot stop trying to prevent the smuggling of contraband into institutions. Some sanctions are necessary. Unfortunately, to enforce them we have to violate individual rights such as privacy. None of us would happily submit to an order to remove our clothes before being allowed to visit a relative in an institution but civil rights have to be balanced against the need for security measures.

At the same time, I would not want to see a return to the days when a warden had unlimited discretionary power over staff and inmates. What is needed is instruction and assistance in exercising enough discretionary power to deal with the day-to-day reality of prison life while protecting, as far as possible, the individual rights of inmates and the collective rights of staff workers. And that discretionary power must be broad enough to cope with potential problems and to take action based not necessarily on factual evidence, but on the knowledge we gain through experience.

I think that, unfortunately, given the reality of penitentiary life, we have to be given the opportunity to err on the side of caution. Is it better to move five or six people, four of whom you are certain are doing nasty things in your institution, and a couple of whom you suspect might be, to another institution, than to gamble and leave a couple of inmates behind, and perhaps later pay the price of small riots or another assault? And those are the kinds of decisions, I suppose, that are plaguing the managers of institutions on an ongoing basis, day after day. Without the power to act on experience and "gut" intuition, you might end up knowing who is responsible for a stabbing or beating but be unable to do anything about it. Because you lack solid proof the responsible inmate will be cleared in a hearing and, the next thing you know he is out in the institution, smiling and grinning at the staff. It is frustrating for the staff, because, again, you see yourself almost neutered from the point of view of not having any power and knowing full well that this inmate is going to go back out and hurt somebody else.

Given the existence of inmate committees, grievance procedures, the Correctional Investigator, and the fact that journalists can enter our institution whenever they want, I would say that the inmates have pretty good access to the public. Moreover, the current philosophy of the Service is that people, via the Citizens' Advisory Committee, are free to come into our institutions any time. We are not trying to hide anything. It is not a perfect system but it does acknowledge inmates' rights to a considerable extent as evidenced by the handbook, Inmates' Rights, a publication of federal inmates' rights for our country. Some of the rights, such as the right to practise any religion, may seem like small concessions but even that right can create difficulties for managers of institutions. Let us consider, for example, the case of an inmate whose religion is devil worship. He is into the occult and wants to make a sacrifice. Where do we draw the line? We have to be cautious in such cases because we are not always dealing with the most stable people in the world and permitting such practices might end in serious trouble.

In view of the special problems which exist in penitentiaries and prisons, strictly worded legislation that must be adhered to at all times might lead, in certain cases, to disastrous consequences. Semantics, the language of legislation, might well be part of the source of the problems with individual rights. The tighter the legislation gets, the more difficult it is, in some ways, for us to do our jobs. On the other hand, I think that, as we become more conscientious about protecting inmates' rights, the inmates will benefit, and I, personally, welcome the responsibility to balance the need for discretionary power with a respect for inmates' rights. As a correctional worker, as a warden, as a former school teacher, and a responsible manager, I do not want a job in which I am always arbitrarily "backing up the bus". You do not do it that often and when you do, you do not treat it lightly.

ORGANIZATIONAL STRUCTURE AND DECISION-MAKING

John Ekstedt
Department of Criminology
Simon Fraser University
Burnaby, British Columbia

Organizations have a capacity, like living organisms, to reject or resist attempts to change their fundamental structure or nature. Therefore, to be successful, efforts to reform an organization or a system must accord with their fundamental nature. In the case of correctional organizations, efforts at reform must acknowledge the central role that individual judgement plays in correctional work. The task before us then is not to reduce or eradicate discretion but to make changes that will assist individuals to exercise their discretion prudently and well.

It is my intention to outline some perspectives on the relationship between organizational structure and discretionary decision-making. I will attempt to relate these perspectives to the organizational dynamics of corrections work. In doing so, it may be possible to illuminate some of the problems or issues which are associated with the exercise of post-disposition discretion.

Organizational theory is sometimes useful in helping us analyze and understand the nature of an organization, what it intends to do and how it is structured to do it. One approach in organizational theory addresses these

questions in a way similar to the biological perspective on the function of the human body. This approach views an organization as a living organism with many of the characteristics required for self-preservation, healing, learning and growth which are associated with any living creature.

In a biological sense, it is possible to increase our understanding of the nature and functions of a living organism by studying what happens to it when a foreign or unnatural substance invades its body. The reaction of the organism can tell us much about its defence systems, its strengths and weaknesses, and its purpose and function within its environment. Using this perspective, we can observe what happens to an organization when it experiences an external intervention which seeks to change or influence its life. By studying the response of the organization to such an intervention, we can perhaps learn something about the substantial nature of the organization and, consequently, come to some conclusion about its purpose and viability within its environment.

In recent history, correctional organizations have experienced numerous external interventions, many of which have stimulated a response. Interventions have taken the form of alternative program initiatives, alternative structures for providing services, new therapeutic techniques and various other changes at the operational level. More recently, there have been increasing interventions with respect to the method and style used to manage or administer correctional organizations. It would appear that the response of correctional organizations to this last category of interventions tells us the most about the real nature of correctional systems.

For our purposes, it is therefore important to make a distinction between external interventions which are directed to changes in program and external interventions which are directed to changes in management. On the one hand, the implementation of a new correctional program, or even a new structure for delivering categories of correctional services, rarely means that fundamental change has occurred in the correctional organization. Even a cursory review of correctional history demonstrates the ability of correctional organizations to accommodate a wide spectrum of program initiatives (many of which are based on opposing or contradictory philosophies) and to discard them with little effect on the fundamental nature of the organization.

On the other hand, attempts to introduce changes in the philosophy, method and style by which correctional organizations are managed seem to have resulted in a different type of organizational response. By viewing the system from the perspective of its reaction to this category of initiatives,

we may gain a clearer understanding of the relationship between the structure of the system and its decision-making process.

Most of the external interventions which have attempted to introduce substantial change in the management of correctional organizations have resulted in failure. The recent American experience provides dramatic examples of attempts to implement alternative structural management styles in correctional systems. Persons who have been brought in from the outside to implement these initiatives or persons who have identified with them from inside the system have almost invariably been rejected. Clearly, the system seems to be able to organize itself politically, bureaucratically and operationally, to exclude persons identified with such initiatives. And even where a system has actually undergone structural change, it often reverts quickly back to its former state. Almost anyone who has worked in the correctional field in North America during the last three decades can document this phenomenon.

What we have is an apparent capacity within the system that is similar to a huge antibody effect; that is to say, there is something about the system which makes it very powerful in its ability to reject attempts to change its fundamental structure or to change the way in which it manages its work. While the tendency to resist structural innovation is regarded as common knowledge, it is somewhat more difficult to determine what that tells us about the nature of the relationship between the structure of the system and its decision-making process. However, the point has already been made many times in this Conference that there is something about the requirements of correctional decision-making that contributes directly to the system's resistance to fundamental structural or managerial change while retaining the capacity to absorb new program initiatives almost without any resistance whatsoever.

History has taught us that correctional organizations will buy into almost any program package without critical thought, but will reject categorically any initiative that is intended to change its substantial structure. Organizational theory teaches us that this phenomenon is not necessarily unique to corrections organizations. Any established institution resists substantial structural change. However, correctional systems are normally regarded as being somewhat more extreme in their resistance to structural change, while they also tend to demonstrate great flexibility in program experimentation. If this is true, then it is important to understand what it is about the nature of correctional work that results in these diverse organizational responses.

Basically, there are two categories of work carried out in corrections organizations. First, there is the category of work which is organized to provide services directly available to the client of the system. This work is variously referred to as activities of the field, line or operations. Secondly, there is the work which is designed for purposes of maintaining the system and assuring that resources for the provision of services to the client are available. This work is normally described as administrative or managerial in nature.

It is generally considered to be self-evident that decisions in any category of work performed by an organization require an understanding of the purpose the work is intended to satisfy. If the reason for doing the work is not known, then it appears obvious that there will be confusion about the decisions required to maintain the services as well as the decisions required to provide those services to the client. One of the unique characteristics of corrections is the lack of common agreement with regard to the purpose of the work performed. While most persons who work in corrections have some way of justifying what they do and many can articulate statements of purpose with regard to their particular role, it is extremely difficult to come to any collective agreement about an overriding purpose. Since it has not been possible to come to any clearly defined collective agreement about the purpose of corrections work, the nature of decision-making within corrections organizations is for the most part dependent on the exercise of individual discretion.

In a system where so much individual discretion is required, it is not surprising that there is resistance to any overall structural innovation; particularly structural innovations which attempt to create a movement away from individual discretion toward corporately defined and enforced goals. This is really what this Conference is all about. What we are experiencing now in corrections is a conflict between the view that corporately defined and enforced goals and procedures are necessary and the view that individual discretion is critical in the provision of program and managerial services.

In my opinion, the correctional system, as it presently exists, must function on the basis of individual judgements about specific things that need to be done, whether those things involve breaking up a fight in a recreation room or deciding on a major policy related to an entire category of work. These are both examples of activities within correctional organizations that require exercises in individual discretion. I should add, at this point, that by individual discretion I do not necessarily mean one person making a decision. Individual discretion can be exercised in committees, within small groups, or by agreement between colleagues working on the line.

Regardless of how individual discretion is exercised, it would appear that the fundamental characteristic of the correctional system is its requirement for individual discretion. That factor is responsible both for the rejection of structural reform and for the acceptance of any program that offers the promise of increased individual discretion. It would appear that one of the reasons that the correctional system is willing to accept major new program initiatives without much critical thought, is that almost all new program initiatives offer the promise of increasing the correctional worker's ability to do more things in more ways in the delivery of services to the client. If a system that is based on the exercise of individual discretion is offered more ways of exercising that discretion, then such initiatives will be supported. If the same system is presented with a program or a structure that would reduce the exercise of individual discretion, such a proposal will be rejected.

If this is an accurate description of the characteristics of correctional organizations, then the first question that must be addressed is whether or not the exercise of individual discretion -- and related concepts of individualized justice -- is acceptable, despite any abuses which might result. If the principle of individual discretion is not acceptable in corrections work, then the changes required would probably amount to some form of social revolution. But it seems to me that the principle of individual discretion in corrections work is acceptable -- what is required is reform, not revolution.

To be successful, any reform of the structure of the correctional system must take into account and reinforce the existing reality in the most appropriate way. In other words, models of structural reform must at least acknowledge the nature of correctional work. And the reality of correctional work is that it involves an interaction between individuals, between the keeper and the kept, and this relationship is based on individual judgement.

What kinds of structural reform are in order? It seems to me that given the realities of the system, there are two elements of structural reform that are critical to maintaining the health of the organization. The first is that decentralization is better than centralization. This point has been made over and over again in this Conference: a redistribution of power which brings decision-making closer to the client being served is critical to the health of an organization which depends so much on the exercise of individual discretion. The second element of structural reform is that the energy the system uses to maintain itself needs to be directed to support the intelligent and informed exercise of discretion by the people closest to the client.

The question is not so much whether individual discretion is a valid principle as how it should be exercised. If a correctional system wishes to support the principle of individual discretion, it must direct itself to assuring that the exercise of individual discretion is informed, intelligent and fair. This is currently one of the greatest weaknesses of correctional organizations. Correctional systems are generally not structured to provide support to people in a way that assists them to make individual decisions in informed and intelligent ways. Structuring the system to do this is, in my view, the basic requirement for its reform.

ORGANIZATIONAL STRUCTURE AND DECISION-MAKING

T.P. Ference
Professor
Graduate School of Business
Columbia University
New York, New York

> The nature of professional organizations is such that we do not control the specific decision, we control the decision-maker by establishing standards of performance and by supplying the necessary policy information. Through the use of appropriate techniques to control the decision-maker, such as clear information about the organization's mission and in-service training, we can obtain a system in which decisions are made at the lowest level corresponding to the problem at hand, decisions for which the executive is willing to be accountable.

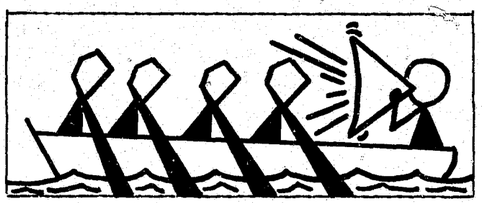
I will begin with a disclaimer and one or two heretical and provocative statements. My presumed area of competence is organization theory, not corrections, and I can safely say that my remarks will be conditioned by neither knowledge of nor opinions about the correctional system in Canada or the United States. As a professor of business management at Columbia University in New York, my main involvement is with not-for-profit organizations and business corporations. Much of what I will say is based on my observations of organizational reality rather than on organization theory. These observations are drawn from my involvement, over a number of years, with voluntary and governmental agencies that are not-for-profit organizations or, in other words, organizations that deliberately set out not to make a profit in contrast to organizations that simply fail to do so.

The first observation I want to draw to your attention is that in most not-for-profit organizations managers and administrators are responsible for professional staff which have an intellectual commitment to their work. Secondly, these managers and administrators typically are also professionals in the field that concerns the organization and have come up through the professional service ranks. For example, social welfare agencies are generally supervised and administered by individuals whose sphere of competence is social work. The assumption I make is that most managers of not-for-profit organizations, those who must make decisions about whether to delegate authority and to permit discretion, are essentially professionals who by force of circumstance and bad luck have become managers. They are generally more comfortable continuing to do what they were trained to do than delegating that work to others. The conclusion I have drawn from my observations is that in the not-for-profit environment the delegation of decision-making authority takes place in a system run by people who are more comfortable "doing" than "delegating" not because they lack management training but because they have a strong intellectual commitment to the work of the organization.

The second observation I want to draw to your attention is that most not-for-profit organizations typically have a poorly-shared understanding of the mission and purpose of the organization. A recent experience that I had with an American organization illustrates this point very well. I was called in to help develop a strategic plan, and, during a meeting with the senior managers, I asked each of them to write a brief description of the mission of their organization. The results were revealing and somewhat embarrassing. There were some similarities among the various descriptions but only enough to indicate that they were written by people in the same general field. Beyond that, it was difficult to discern whether the descriptions related to the same management system. The conclusion that can be drawn from such observations is that not-for-profit organizations characteristically lack a clearly articulated mission and would be well advised to invest time and money in identifying and communicating their mission.

The third observation I want to make is that generally there is a poor understanding of the nature of the managerial role in the not-for-profit environment. The diagram below illustrates one of two management models.

A



In traditional management theory, the model is patterned after a rowing team in which the oarsmen simultaneously carry out the instructions of the helmsman. To reflect reality, the diagramatic illustration of this model would look more like B than A (see below).

B

The reality, as illustrated in Diagram B, is that everyone, at every point in the system, makes decisions. One individual does not call out orders and make decisions which are simultaneously and uniformly carried out throughout the system. The central issue pertaining to decision-making and organizational theory is not centralization versus decentralization but how to achieve system control over the quality of decisions. The first task, therefore, in designing an effective management system is to develop a way to maintain control over the quality of decisions that will inevitably be made at every point in the system regardless of what the formal policy manual states.

The next problem in achieving an effective management system involves the psychological or emotional component of leadership. The individuals at the top of an organization, such as the chief executive officer, are accountable for a system over which they do not have complete control. The inescapable fact is that, in a complex organization, daily decisions are made for which the top management must accept responsibility but over which it can exercise little or no direct control. The ability to feel comfortable with a complex

system that no single individual at any level completely controls is, therefore, a critical aspect of an effective management system.

The substantive or qualitative issue in designing an effective system is not how to move decisions to the senior management level to be handled by individuals who would like to presume they are still competent to make the decisions for which they will be held accountable. The issue is to obtain competence from the person who is de facto going to make the decisions whether the system is centrally organized or not. The attitudinal issue is how to develop the ability to feel comfortable with a complex system that no single individual controls. To elaborate on those issues further, we need to discuss the concept of leadership.

Despite all of the complex management literature on the subject, leadership is purely and simply the art of getting other people to do what you want them to. As the organization grows and as an individual moves up through the ranks, more and more time is necessarily spent getting things done through others. The rush of events often precludes a careful assessment of the consequences of a particular action and forces a reliance on reflex. Consequently, the degree of risk increases as an individual moves up through an organizational system and he or she must become emotionally comfortable with that risk.

In a study done in the United States recently, several hundred upper middle and senior managers from a broad range of organizations were asked to rate themselves, their subordinates and their bosses on a number of characteristics including dependability, responsiveness, creativity, pride in performance, alertness, and initiative, characteristics that a good professional presumably should have. In the resulting scores, subordinates received the highest ratings for the three following characteristics: 1) pride in performance or, in other words, wanting to do a good job; 2) dependability; and 3) alertness. The lowest ratings were given for creativity, ability to take a long-range perspective, and willingness to change. Clearly, while most managers will state that the ideal subordinate is creative, change-oriented, and responsive, in reality, managers prefer a subordinate who is dependable, alert, and takes pride in his or her performance.

Managers at all levels rated the performance of their bosses more highly than their own on every characteristic except creativity, willingness to take a long-range perspective and willingness to change. The low rating of all superiors on these three characteristics has certain important implications. The perception that subordinates lack creativity, willingness to change and the ability to take a long-run perspective makes it unlikely that management

will delegate responsibility. Moreover, given such perceptions, the manager will probably make an effort to create a social distance between him or herself and the subordinate. On the other hand, the perception that their superiors lack certain key qualities for leadership will lead subordinates to attempt to minimize the distance between themselves and their superiors, to demand delegation of responsibility from above, and to try to elevate themselves to the bosses' level. In my opinion, these effects represent problems of attitude and perceptions and not real differences in abilities or characteristics.

The substantive problem relates to a different set of factors which include authority, responsibility and accountability. Authority is the right to make the decision; it is a power that can be delegated. Responsibility is the obligation to make the decision and it too can be delegated. Accountability is the bearing of the consequences; it cannot be delegated. The manager who must ultimately be accountable for decisions made throughout the system can best control those decisions by articulating and communicating the organization's mission down through the organization so that people make decisions based on a clear understanding of their role in the organization. Each person in an organization should be able to clearly articulate why his or her position exists in terms of the larger, overall mission of the organization. If the staff cannot, management has not effectively designed the system and individuals will make decisions purely in their own self-interest. If the staff can articulate the organization's mission, their decisions can be expected to be consistent with the purpose of the organization, to some degree at least.

There are three kinds of information that are relevant to the making of a decision at any level in an organization. One is information about the problem itself. The second is contextual information, information about how often particular problems occur, and how they have been handled in the past. The third type is strategic information or policy guidelines about the way matters are intended to be handled in a given organization. It is much easier to get information about the organization down through the system than it is to get all the substantive information about a particular problem up through the organization from the bottom to the top level of management.

At this point, it might be worthwhile to introduce what I call the rate of information loss. Complicated mathematical models can be used to demonstrate rates of information loss but the final conclusion to be reached is straightforward and simple: the rate of information loss, moving down from the top of an organization is smaller at each step than the rate of information loss moving up the ladder. Information that comes from the top of

the organization tends to be written, stable, generic and often repeated. The information coming up through the system is episodic, technical and detailed rather than generic and abstract; it usually contains more facts per unit word or per "pound" than information moving from the top down. As information moves up it has to be condensed and in the process some of it is lost.

To maximize the quality of decisions, they must be made at the lowest level of the organization corresponding to the source of the problem to be resolved. In that way, the loss of problem specific information is minimized and the necessary generic information can still be available to assist the decision-maker.

The final factor that is crucial to good decision-making in any system is the competence or ability to process information. All too often, managers delegate responsibility for decision-making without attempting to equip subordinates to handle it. The result is that poor decisions are made and the management concludes that such responsibility ought not to be delegated. Senior management has a responsibility to train subordinates, to institute a learning system, so that the decisions which will inevitably be made throughout the system are the best possible.

Process information is a necessary factor, if we are to get decisions of high quality. We get process information into the system in several different ways, one of which is through standards and procedures. The question then is how to derive standards and procedures. Should they be experience and client-based or profession-based? The only kinds of standards that you ought to apply in organizations are those that intellectually reflect the specific objectives you are trying to accomplish. The only objectives that are legitimate are those that reflect the mission and the only mission that is legitimate is that which reflects the needs of the population you are trying to serve, whether it is a customer in a profit institution or a client in a not-for-profit agency. Standards establish the minimum performance that is acceptable. The standard is not something to shoot for, it is something to be met along the way towards excellence.

Process information can also be introduced into the system through in-service training. Typically, when we give people discretionary power, we do so without equipping them to use it, which is somewhat like throwing the kid in the pool and, if the kid drowns, saying "well it's a good thing we found out now that he can't handle things". And finally, we get quality and competence in decision-making through the professional qualification process.

The nature of professional organizations is such that we do not control the specific decision; we control the decision-making process by selecting the decision-maker, by establishing standards of performance and by supplying the necessary policy information.

ORGANIZATION SIZE AND DECISION-MAKING

Don Yeomans
Commissioner
The Correctional Service of Canada
Ottawa, Ontario

The Correctional Service of Canada, like other large, complex organizations, must operate with limited individual discretion and a set of consistently applied standards, if it is to provide a uniform, clearly understood service. In a large organization where communication is difficult, such standards are necessary in order to know what is being done, with what effect, and to ensure a consistent product or service on which the customer or client can rely.

The subject that we were asked to address was "Organizational Structure and Decision-Making". This happens to be a subject that is of particular interest to me so I fended off offers of assistance in preparing this talk and thought the process through for myself. I cannot blame anybody else for what I am about to say.

Decision-making is much more influenced by the size of the organization than by the structure. In a small organization of a few hundred people, everybody knows everybody. There is good communication, it is relatively easy to function as a team, it is very informal and can be highly successful. We have seen examples of that right here in Ottawa in the "Silicone Valley North". Organizations like Mitel, are imaginative, flexible, fast on their feet; according to those who work there, it is chaotic but fun. Once you get to a larger organization, say, over 1,000 employees, people do not know each

other, communication is far more difficult, the organization is much more difficult to control and manoeuvre, and the actions of the organization become much more deliberate. So, I decided that the title would better read "Organization Size and Decision-Making".

We are not really talking about all kinds of decision-making at the Conference today. We are concentrating on a very special kind of decision-making - discretionary decisions - and we are talking about discretionary decisions in, essentially, government organizations. Therefore, I decided that the title should be "The Exercise of Discretion in a Large Public Enterprise". Now we are beginning to focus, I think, on what the issue before us is. In so doing, however, I have created a dilemma because large public enterprises have great difficulty coping with discretion.

A union negotiates a contract but before very long it discovers that some of the locals are beginning to make local deals and those deals, at least some of them, can in fact begin to undermine the principles that were embodied in the contract. If we buy something from the Bay that proves to be defective, we feel that we should be able to go to any Bay store anywhere in Canada and cope with the problem in a reasonably consistent way. There is a company policy that ensures uniform treatment of customers across Canada. If you all came here by Air Canada or CP Air you would have expected fairly similar treatment and consistent treatment in dealing with those organizations. When you do not get consistent treatment, when somebody is exercising too much discretion, you get very upset. Why is McDonald's an enormous success? Because you have confidence in quality. You are going to get a product of a known quality, of a known value. The local manager of McDonald's has very little discretion in what he or she is permitted to do. But you say, "We are professionals, we are dealing with humans rather that hamburgers". Fair enough. So, let us talk about professionals who are dealing with humans. How many of you would like to be cared for by a doctor who did not believe in strict medical standards? Sure, you expect him to use discretion in the final decisions that he makes, but you expect him to make that decision within fairly rigidly circumscribed standards. The same applies to hospitals. Surely you would want to be treated in a hospital that has very high standards and enforces them.

Those of you from outside Ottawa came here on an aircraft. We all fly regularly. An airline pilot is a very highly paid, highly skilled professional. When the chips are down, there is no question but that he is in charge of that aircraft. But what is the reality of his daily life? Somebody else backs him away from the loading dock, he is told which runway he can use, which flight path he can follow, the rate at which he can climb and the rate

at which he must descend in order to conserve fuel. He is under the tight control of the air traffic controllers every second of the time. Only if he is in a life-threatening situation does he exercise the very profound discretion that he has. Would you want to fly with a free-spirited pilot who has decided he is not going to pay any attention to the air traffic controllers? There is no question about who is in charge of the aircraft but there is no question that his discretion is very tightly circumscribed.

In the Correctional Service of Canada four years ago, we had very few standards and we had very wide discretion. The Service was criticized at every turn and it could not defend itself because it corporately did not know what it was doing. Literally, we did not know how many cells we had, we did not know how many empty cells we had, we did not know how many inmates were escaping or were in segregation or why. We did not know how we classified inmates from one level of security to another. Individuals did. The individuals who did the classification knew how they did it. The wardens knew how many cells they had in each of their own institutions. But corporately the Service did not know. Why is it important? Who cares?

John Ekstedt, in his presentation, made reference to the biological analogy of an organization. I submit that a large organization, to survive, must have all of the characteristics of a small one. It must be able to learn to develop and to adapt. If the Correctional Service of Canada, corporately, did not know how it classifed inmates, to take an example, how could we learn to do it better? How could we develop a more effective system of classifying inmates? How could we adapt our system of classifying inmates to changing inmates or changing norms in society? In my view, in a large public enterprise, discretionary decisions must be very carefully circumscribed so that the enterprise can:

(1) assure the quality of its product or service;

(2) learn heuristically how to improve; and

(3) maintain the stability of its operations.

I will deal with each of those points in turn.

(1) Assure the quality of service. The courts have imposed a very reasonable requirement on the Correctional Service of Canada: the duty to act fairly. Therefore, every offender across a large and geographically dispersed system has the right to be treated the same way. As a Service we want our standards to be high and we must have some assurance that high standards are being

adhered to. We must assure and demonstrate fairness. Therefore, standards must be enforced. Otherwise, we would be operating some kind of benevolently chaotic system across the country.

(2) We must learn heuristically how to improve. In order to improve, we must first know what is happening. Therefore, we must be classifying inmates, for example, using the same standards across the country. We must have reasonable confidence that those standards are being used because consistent application of those standards means that the data gathering is meaningful and that the information gathered from the system of classifying inmates is reasonably comparable because it is reasonably consistent. The data can point out ways to improve but the results will be valid only if the improvement is consistently applied. Therefore, again, a decision to change the way we classify inmates has to be imposed with reasonable discipline on the system so that we know whether the change that we implemented, based on the results, was an improvement or a disaster.

(3) The stability of operations. I am not talking about no change and saying that whatever we do now, we should continue for the foreseeable future. I am talking about orderly change.

The previous point was the importance of learning heuristically what we are doing. The old Penitentiary Service was constantly being battered about by the public and the press. Because there were no data, a bad escape would cause ministerial concern and result in urgent orders that the rules be changed for all institutions, whether they needed it or not, and this chaotic or urgent change would be imposed from the outside.

Now, because we have detailed and consistent data, if there is a serious escape we can look at it in terms of trends; is the trend getting worse, staying the same or getting better? We can now show the Minister, the press, or anyone else, how that escape fits into the general pattern of things and, if it is within that general pattern, then there is no need for panic. That is the way the system is functioning today. Ministers will defend reasonable decisions within a reasonable policy if they have confidence that the organization is under control and knows what it is doing.

Let us translate this into discretionary decisions in the Correctional Service of Canada. Take for example, cascading of inmates from maximum to medium to minimum security establishments. We have established the standards. We must now closely circumscribe the discretion with which they are used. We must have discipline in the Service. Someday there will be a terrible incident -- an inmate will leave a minimum security institution, go

out and commit a murder, and there will be a hue and cry -- 'what was the inmate doing in that institution, why was he there, and we must tighten up'. If we do not have enough information about what we are doing, there will be a panic reaction. We will tighten up in some way that we do not really understand and go on hoping that things will be better tomorrow. If, however, we can say, or the Minister can say, "Yes, that inmate did leave, and yes, he did commit that murder, that is a tragedy, but we should bear in mind that in the past year, 2,387 inmates have been classified from medium to minimum, using those same standards, and this is the first incident that we have had in that time", then you are going to get a completely different reaction to that particular incident. Perhaps we should tighten up but at least we can tighten up in a rational way.

We go back to the second reason for disciplined discretion -- learning heuristically how to improve. There are many in our Service who believe that we have a lot more minimum security inmates than we presently classify as minimum. That could be true. Therefore, as we develop standards for classifying inmates and closely circumscribe the discretion with which those standards are applied, we can begin to change and learn heuristically. We can change one or two of those standards and watch what happens and cascade more inmates from medium to minimum, for example, watching the result in terms of escapes and other incidents. If that works we can say that that is a success and then begin changing another one. We can go about it in an orderly way, trying in a reasonable and logical fashion to improve.

Now we go back to the first reason for our disciplined discretion -- the assurance of quality. And I come back now to this question of duty to act fairly. This means acting consistently in our treatment of decisions with respect to inmates and offenders. Under those circumstances, if we do have closely circumscribed or disciplined discretion, and an inmate does take us to court, we will not be in the position that so many American institutions find themselves in now. We will be able to demonstrate to the Court that we do have standards, and that they are applied fairly. The reasons we are continuing to hold him (the inmate) in maximum security is based on a fair and reasonable process and we will be able to defend what we are doing. Otherwise, if we do not indicate that we understand what we are doing, the Court will impose decisions that may or may not be well thought through.

We began by talking about organizational structure and decision-making, but really discretion and decision-making are a function of the organization's size, not structure. Therefore, what we are really talking about is the exercise of discretion, not all kinds of decision-making, in large public

organizations. I submit that it is essential that an organization have well-developed standards and that they be administered by a well-trained and well-disciplined workforce. The result will be good decisions, consistent decisions, defensible decisions, fair decisions, and a built-in process to improve decisions.

PAROLE GUIDELINES: ARE THEY A WORTHWHILE CONTROL ON DISCRETION?

Joan Nuffield
Policy Analyst
Ministry Secretariat
Solicitor General of Canada
Ottawa, Ontario

Guidelines are important because they will fulfil the need for visibility, accountability and equity in individual case decisions. Guidelines are not mandatory rules but flexible statements of policy on a more specific level than can be contained in statutes. Through the use of guidelines, uniformity in the factors that enter into a parole decision and the weight accorded to each can be achieved without eliminating the discretion required to handle unique cases.

I will just assume from the outset that everyone knows what we mean today by "guideline": that is, a highly specific policy established administratively by a parole board in order to guide its actual case decisions. I would like to add, by way of introduction, that most of the things I have to say are based primarily on what I know of the federal correctional system, since that is where I work, but I think that most of what I have to say is equally applicable to other systems and parts of the system other than just parole. Finally, I should add that my personal view is that guidelines are a good idea, that, depending of course on the actual form which they take, guidelines would represent an improvement in the way we run parole and other systems too. That is not necessarily the view of most of the people here today, or of the government, though I often think that many of us agree a great deal more than we differ on the basic issues to do with "guidelines".

What I want to talk about today are the arguments that you hear in Canada these days about guidelines. The arguments against guidelines are of two general types. First, there are arguments which claim that there is no need for guidelines, for various reasons. And second, there are arguments that even if it were acknowledged that there is a need to control discretion and make it more visible - for that is what guidelines are generally intended to do - guidelines are not an effective way to do it, or that guidelines would ultimately cause more harm than good. I will then list the arguments that are heard in defence of guidelines.

As I implied above, guidelines, where they have been adopted in other jurisdictions, are largely intended to increase accountability. They force organizations to make parole policy more explicit, which in itself brings a type of accountability, and they force individuals within that organization to make explicit decisions about why a particular case does or does not fit the policy as stated in the guideline, and should or should not be subject to exception. Paroling policy thus becomes more visible. It is on the table for discussion. Now, the argument is sometimes heard that there is no need to make paroling policy more explicit, that it is already well understood. The Parole Act, after all, states three criteria which must be met by every decision to grant a parole: there must be no undue risk to society, the offender must have gained the maximum benefit from imprisonment, and the parole must aid in the reform and rehabilitation of the offender. Well, those criteria leave a great deal unsaid, unspecified, and a great deal to be desired. How much risk is an "undue" risk? Does that mean the probability of the offender causing some harm, the seriousness of the anticipated harm, or some combination of the two? If so, how are the two to be combined? And what are the benefits which the offender is to have derived from imprisonment, and how are these benefits assessed? Senior managers in The Correctional Service of Canada have said that the principal positive effect of imprisonment is to "keep them off the streets" until a "maturation" process occurs where the offender is no longer inclined towards crime or towards paying its occupational dues. So how is the criterion of "maximum benefit" handled, as a matter of parole policy? And we in this room are all aware of the open debate about the benefits of supervision, heard even among parole officers themselves who complain that supervision has become a form of "quantity control", paperwork, minimal contact. Certainly, few of us here would feel very comfortable trying to guess precisely what kind of effect will be produced on a specific individual from a specific experience on parole supervision. So I think it is quite clear that the statute does not provide much in the way of clear parole policies. Neither do other official sources but I will get to them in a minute.

It is also sometimes heard that even if the written word does not tell us much about parole policy, it is well understood by those who need to know it. Leaving aside the question of the untutored public's need to know, I do not think that even those who work directly in the system adequately understand the policies. During the consultations for the Solicitor General's Study of Conditional Release, on which I worked, we frequently heard both offenders and case preparation staff in four of the five regions complain that they did not know what was expected of and from individuals eligible for release. Unsure of whether the National Parole Board will insist on trying temporary absences prior to a day parole, or a day parole prior to a full parole, the case management team may prepare release plans for the "wrong" type of release. They may get mixed messages, crossed signals, and painful feedback from all sides. We heard it said that since the National Parole Board could in no way be committed to a certain policy or "game plan" on a specific case, uncertainty surrounded all forms of program decisions and difficulties in persuading inmates to co-operate in their own self-interest were rampant. Partly in order to alleviate this uncertainty problem the Correctional Service of Canada is now launched into a project designed to develop "guidelines for recommendations" for release.

So I conclude that it is fair to say that there is considerable room for parole policy to become more explicit, more visible, more specific. The other major "accountability" problem for which guidelines are a proposed solution is the problem of disparity. Even if parole policy were clear and well understood, we would also be concerned if we thought it were not being equitably applied. When parole policy is not clear, as I argue it is not, we have extra reason to be concerned about disparity for surely the difficulties of uniformly applying an unclear policy are enormous. Yet it has been said that if inequities do exist, they are not proven. It is even said that one need not worry so much about possible disparities in parole in Canada because the amount of discretion held by Canadian parole boards is so much less than elsewhere. Of provincial parole boards that is certainly true since all their clients are by definition serving less than two years, of which only the middle eight months, at maximum, are the usual effective province of parole discretion. But of the National Parole Board it cannot be said that the range of discretion - defined as the amount of the sentence to which parole is applicable - is particularly less than in, for example, many American jurisdictions. The most common type of sentence structure in the United States is identical to ours: a fixed term of years, with parole eligibility occurring after a fixed fraction of the sentence, such as one-third. And I would also argue that it is as important to make equitable decisions about persons who are serving short time, as about those who are serving long time. Though on an absolute scale the impact may be greater in a system where the

potential time served is much longer, the principle is always the same. People in comparable circumstances are entitled to comparable treatment from government.

Yet I think that there is considerable evidence of disparity in our federal system. Let me define "disparity": it is an unexplained or inexplicable variation in decisions, differences in the treatment of individuals which are not accounted for by differences in the characteristics of those individuals, which are in fact not accounted for at all. There are a few research studies on parole decision-making in Canada which have tried to "account for" National Parole Board decisions. These studies have been unable to "explain" only a very little of the variation in decisions made. Some of these studies have shown that parole decisions accord strongly with the recommendations of case preparation personnel, which is rather disturbing when we consider what so many case preparation personnel say about how little understood parole policy really is. This finding almost suggests that there may be not so much a single parole policy which is disparately pursued but there may be dozens or scores of individual parole policies being pursued by dozens or scores of individual staff and Board Members. We also see marked annual fluctuations in the full parole grant rate in Canada, which suggests disparity over time. It is sometimes said that the penitentiary population is becoming much tougher and harder to deal with; that may be true, but it does not account for increases in the parole rate which are sometimes observed in years following a period of decreases in the parole rate. A much closer connection, in fact, appears to be observable between the parole rate and the number of extraordinary and publicized failures by parolees which occur in a given time period. We also observe marked differences in the parole rate from region to region, differences which are not explained by variations in the penitentiary populations, or recidivism rates, in the regions. Finally, of course, you also hear variations in the philosophy, principles and policies of parole expressed by different individual Board Members. Unless philosophy bears no connection with behaviour, and we resist that hypothesis, differences in outlook will show up in disparities in decisions made.

I have just dealt, very briefly, with the first set of arguments against guidelines, namely, those which have it that there is no need for them. I hope that I have cast at least several shadows of doubt on that view. In short, I have argued that parole policy is not clear or visible and that it needs to be, both in order to make this important public institution fully accountable and in order to give guidance to offenders, casework staff, and the people who design the programs which lead to and comprise release. I have also argued that there are more than reasonable grounds to believe that there is unjustifiable variation in the treatment awarded to similar cases.

Let me turn now to the matter of whether guidelines are the way to respond to these problems, or whether there are other ways of effectively dealing with them. I would also like to discuss whether the drawbacks represented by guidelines outweigh their advantages. First, let us look at some of the possible alternatives to guidelines which are sometimes proposed as controls on discretion. If these alternatives could be somehow refined or improved, it is said, they could solve the disparity problem, if we acknowledge that there is a disparity problem, and they could provide clear "notice" of public policy.

From some quarters, it is heard that the community is a valuable potential control on discretion. The public certainly let us know when they are upset, and there is no question that strong public objections over parole decisions have loud echoes throughout a parole organization. But being accountable to the public is, in a sense, a matter of being accountable only for your failures; even more narrowly, it is a matter of being accountable only for the failures which make the news. No sane individual would argue, I hope, that a public institution should base its decisions on what appears in newspapers. And it is virtually impossible for the public to know about, let alone, understand, all the grants and refusals of parole which occur in a given year. For one thing, we do not reveal personal information about large numbers of cases of offenders, any more than the Immigration Appeal Board goes around telling the public about the lives of all the people it deals with. So public perceptions are built, not on an informed understanding of a representative range of decisions of all types, but almost entirely on the violent failures of a few.

It is also sometimes said that if further refinements could be added to the procedural safeguards which surround parole decisions, that a great deal of the confusion and inequity could be cleared up. This is a view held, I suppose, chiefly in the legal community. I think it is largely wrong, though I do not mean to imply that I am against further refinements in procedural safeguards; I am not. But we saw, even yesterday at this Conference during the opening remarks of the first speakers, a theme emerging with which I am in almost full agreement. That is that procedural safeguards speak almost entirely to procedural matters. In simple terms, mandating a hearing and various other types of procedural due process speaks mostly to the way in which government goes about making its decisions, and has very little to say about what those decisions will be or on what basis they will be made. A lawyer can argue until he is blue, about, for example, whether a certain piece of information was or was not used properly. But unless he and the decision-maker can truly "see" the policies for this type of case on a very specific level, the lawyer cannot adequately argue how the policy should or should not

apply in this particular case or how a particular piece of information was or was not incorporated into the policy and the decision. So I do not hold out much hope for procedural safeguards. Even if our courts could rule on the substance of parole decisions, which they cannot, there would not be a check on discretion. This is for two reasons; first, because the use of the courts is dependent on the inclination and the financial resources of inmates and for that reason, are invoked in few instances, and second, because the courts have only a limited capacity for comparing the treatment of one person to the treatment of the next. They need, in other words, a clear policy base from which to operate, if they are to operate effectively.

It is also sometimes said that, by articulating the types of factors which they take into account, parole boards can adequately clarify parole policy and prevent inequities. I call this type of approach the "shopping list" approach. Even if the factors listed were not rather general, which they often are, the "shopping list" approach gives no real guidance to the public, the offender, the casework staff, or the Board itself as to the weight which should be given to each factor, how it should be applied to each case and how the various factors are to be combined to produce the final decision. By just looking at the list of factors, you could not, in other words, work out with some degree of precision whether a particular offender would get a parole. You could only tell what types of characteristics he had on a list of dimensions and not the decision to which the Board would be led from that configuration of characteristics. Anyone here who has won or lost a Public Service competition on the grounds of "personal suitability" will immediately appreciate what I mean.

We also hear the view that if internal review and appeal mechanisms could be strengthened, policies would become clear and disparity would disappear. I think that argument has many of the same flaws as does the argument about procedural safeguards. In fact, I would argue that internal review, like judicial appeal, cannot be truly effective over a broad range of cases unless it can "see" a broad range of cases (which, almost by definition, it does not) and unless it has a set of fairly specific policies from which to proceed in the first place. Board Members sometimes can be heard to say that the presence of an internal review committee only causes them to be more careful in the way they record the reasons for their decisions, sometimes in ways which obscure, rather than illuminate, the "real grounds". And, of course, internal reviews, which are always just a little reluctant to criticize a colleague, are hamstrung in their ability to do so unless there are clear grounds. In my view, if we do not have parole policy guidelines, there are "clear" difficulties only in the extraordinary cases. You cannot formulate overall policy on the basis of extraordinary cases.

There are other supposed controls on discretion which are touted as being effective - hearing cases and making decisions in panels of more than one Board Member, for example. Since each Board Member is supposed to be independent of the others, using panels of two or more members is claimed as a check on capriciousness. I do think that you are safer with two decision-makers rather than one, by and large, but it is misleading to suggest that the two or more decision-makers operate independently. At the very least, they come to share certain norms, certain views and like all of us reaching shared decisions in a corporate environment they influence each other. We cannot say for sure just how these group decisions work nor why there are apparent differences in the decisions reached by different groups.

So in short, I do not see any alternatives which provide assurances, or even sound expectations, of resulting in clear policies or equitable decisions based on those policies. But what of the remaining set of questions - questions and concerns about guidelines themselves, especially that guidelines will do more harm than good? I would now like to review these arguments against guidelines and respond to each in turn briefly.

Of course, the main argument against guidelines is that they will effectively remove discretion thus causing a "paper equality" which hides a host of very real injustices. I think this concern arises largely out of a misconception of what guidelines really are. They are, as I said at the beginning, administrative in nature, a statement, ideally by the organization which makes the decisions, of the policies which will apply in normal cases and in normal circumstances. If the case is not normal, therefore, if it does not fit the model, if it is different from the run of cases in ways which can be perceived and defended, then the decision-maker may step outside the guideline and say why he did so. Nothing in the idea of guidelines implies that discretion is eliminated. Guidelines merely require the decision-making body to say what its policies are, usually in very specific terms, but if the policy does not fit the case - it is impossible to imagine a policy which would apply to Clifford Olson, for example, so unusual a case does he present - then the decision-maker may follow the dictates of the case, explaining all the way why he has found this case to be different.

I also heard it said yesterday that there is something wrong with guidelines because they do not permit an opportunity for rebuttal. This is simply a misconception too. If anything, I would argue that under a guidelines system the inmate has a better opportunity for arguing his case in an effective manner because he can clearly see the basis for the decision and how it has been applied in his case. He can see what factors have been used

and which have not and he can more easily speak to both kinds of factors. Under our present system, all he can do is argue that he fits the three statutory criteria; that he has a good attitude, that he has tried to upgrade his life skills and work skills while in penitentiary, that he has done enough time, that he has repented his crime and has truly changed - he says anything, that is, that he thinks might help. But under a system which does not have guidelines, it is still an acceptable answer to him that, all things considered, on balance, and in the circumstances, he is not believed to be good parole material. That is not an answer, it is not even honest because, as Dr. Gottfredson said in the previous session and as Canadian studies have pointed out, there are latent or invisible parole policies under which most parole boards operate but these policies are not "seen", not recognized, and not consciously or equitably pursued.

Another argument you hear against guidelines is that they will eliminate important and justifiable regional variations. They will only if the agency which sets the guidelines does not set them with due regard for those important and justifiable differences in regions which are worth preserving. So that argument is again a type of misconception. It assumes that guidelines cannot be geared to regional differences which is as silly as saying that guidelines cannot be geared to differences in offenders. If the agency setting the guidelines wants them to reflect regional variations or even norms, the agency is free to so design them. All it need do, really, is have a publicly defensible reason for making its distinctions.

We also hear it said that guidelines are unreliable because so many of them are based on statistical estimates of an offender's risk of recidivating, an inexact science to be sure. But, providing that risk is to be part of the guideline - and it need not be - it must also be acknowledged that statistical guesses of risk are more reliable than are clinical or human judgements. And the use of statistical aids assures us that everyone is being judged on the same basis, the same "best guess" of his risk. The offender does not run the risk of having his chances judged by someone who has a "theory", untested and perhaps untestable, about recidivism. And neither does the public. Furthermore, a statistical score allows you to see precisely what factors went into it and which did not so that these and others can be discussed more intelligently. A clinical assessment of risk can never be dissected in a way which will reveal what factors went into it; and how they were used.

I suppose that most of the arguments against guidelines can really, in some way or another, be traced to a feeling that they violate some general notion of individualization of justice as well as of humanity. I think these apprehensions are misplaced. It is the antithesis of humanity not to tell

people what the basis is for the decisions which will be made about them and to let them live in uncertainty about their future. As we have just seen, guidelines allow for decisions to be geared to the particularities of individual cases but the decision-maker must say why the particularities of the case cause it to be an exception to the general rule. Finally, there is little to brag about in a system of "individualized justice" if similar individuals committing similar crimes under similar circumstances do not receive similar treatment. By this analysis "individualized justice" may be more a matter of individualized disparities. For me, we do an injustice if we follow the present system of "laissez-faire" decision-making which hides behind the supposed uniqueness of all individuals. Sure, all individuals are unique, in at least one respect - I like to wear mismatched socks - but they also bear similarities which are relevant to criminal justice policy and which can be dealt with in a more systematic fashion than under the status quo.

PAROLE GUIDELINES: ARE THEY A WORTHWHILE CONTROL ON DISCRETION?

Mary Casey
Senior Board Member
Atlantic Regional Office
National Parole Board
Moncton, New Brunswick

The National Parole Board has trouble accepting parole guidelines because of the just deserts philosophy which is inherent in the use of guidelines. Guidelines do not take into consideration the fact that an inmate may have changed during his period of imprisonment. Present procedural safeguards have helped to meet the need to structure discretion in parole decision-making. A further articulation of parole criteria may, however, be necessary.

I would like to begin by defining guidelines. When I speak of guidelines, I refer to the guidelines that are based on scoring models such as those used by the United States Parole Commission and by various other boards in the United States.

I would like to describe the situation in Canada and to discuss why the National Parole Board has not approved any system of guidelines. This is not to say that we are opposed to the adoption of guidelines but we have not, at this time, agreed upon any particular system. There is, at present, a study under way on the criteria of parole and we have also undertaken a study of the decision-making process which, we believe, is going to lead to the adoption of some kind of more specific criteria or some kind of guidelines; whether they will resemble the United States parole guidelines is something I cannot answer at the present time.

Certainly, my approach to the idea of guidelines is a subjective one based on my observation of what is actually happening with guidelines in the United States Parole Commission and several other American parole boards and on discussions with many board members and officials of parole boards in the United States. The issue of guidelines is not one that any board member can approach without some trepidation. On the one hand, it is very difficult to come up with arguments against a process that is designed to promote fairness and equity and that can be seen as a means of harnessing the discretion that has been described as arrogant and capricious. On the other hand, it may be natural for members of the Parole Board to want to retain as much discretion as possible, believing, as many do, in the concept of individualized justice. As I said, my knowledge of guidelines for parole is based chiefly on what I and my fellow board members have observed in the United States.

The National Parole Board, of course, has not been free from the criticisms that led many American boards to adopt guidelines. We have not at this time decided that it is wise or useful to adopt a guidelines system because there are major differences between our system and any system in the United States and they, I believe, have to be studied carefully before we make any decision on the kinds of guidelines or criteria for decision-making in Canada.

One of the first observable differences is that Canada does not, to any great extent, use the indeterminate sentence, at least for adult offenders. Therefore, we do, in fact, avoid to a great extent the uncertainty of actual time served that many American liberals found unacceptable in their systems prior to guidelines. There is some uncertainty in our system but the inmate at least knows or can soon find out what the minimum and maximum times are that must be served before release. I do not want to indicate that the period of uncertainty is negligible. For half of our inmates who are serving five years or more it will be a minimum of 20 months, and that, I agree, can be a long time. However, if there are degrees of uncertainty, this perhaps is the lower end of the scale. In any event, parole guidelines do not necessarily lead to certainty.

Inmates do not always know how their previous records or their current offences will be scored. They may not know either if their case will be one where time above or below the guidelines will be set. Perhaps the major hurdle for the Canadian parole boards to overcome is the concept of punishment or of just deserts which seems to us to be inherent in guidelines. We do not see ourselves making decisions about punishment. Our Parole Act sets the eligibility date for parole which we see not only as the minimum sentence but also, and to a greater extent, as the punishment time, or the denunciation

period as the Law Reform Commission of Canada described it. At that point, we see ourselves not as assessing whether the offender has been punished enough but whether he or she now presents a risk to society and, if possible, the nature of that risk. Incidentally, when speaking of the issue of assessment of risk, it is true that clinical judgement is not better than objective criteria for assessing risk. But I think, certainly in the area of assessing the risk of violence, it is not worse.

I think our sentencing structure is close to what the Americans would call a "flat sentence". At least it has an end which the inmate knows and our decision process therefore seems to me to fall into the category not of when to parole but, of whether to parole, which reinforces the idea that we are assessing risk at the time of parole.

I would like also to refer briefly to what I see as a major difference in philosophy between the American and Canadian approaches to parole. It appears to be part of the accepted mandate of many American boards to reduce disparity in sentencing. This is not part of the mandate for Canadian boards and it could be said that, by setting statutory eligibility dates for release, Parliament has intended that we not exercise a mandate of that kind. I realize that this is not an argument against guidelines in the context of the criminal justice system as a whole but it is an argument against them in the context of current thought about sentencing and parole in this country. We are concerned, as well, that current guideline models base the release decision chiefly on factors that the inmate cannot change such as his previous record and his current offence. We still believe in the idea of change and even of rehabilitation.

Guidelines based on previous record and current offence could do an injustice to the inmate in at least two ways that I can think of. Every parole board member knows of inmates with very long records who have, in fact, become tired of committing crimes. They are not a risk if they are released and it seems to me that a guideline system might, in fact, do injustice to those cases. They might also block the release at the point of readiness of the person who has committed a very serious crime but who, we can almost be certain, will never commit another offence, unless you can think of a very good reason for judging a case outside of the guidelines system. I am not convinced either that our concept of gradual release, our legal responsibility for gradual release, can fit into a guideline model. My arguments against current guideline models do not mean that I feel that the National Parole Board or the provincial boards in Canada want to, or should be, permitted to exercise their discretion in darkness, according to principles hidden from the offenders we assess or the public we are responsible to protect. I do believe

that the procedural safeguards that have been adopted in the past five years by our Board have, in fact, structured the discretion to some extent, although I am not arguing that they have structured it to the extent that is desirable. We realize that we have certainly not gone far enough. We are sensitive to the complaint that an inmate cannot really judge from the statutory criteria, or from those guidelines which we include in our policy manual, whether or not he is a reasonable candidate for parole. Dr. Nuffield described them as a list of factors and that is what they are. As I said, we have begun to undertake a thorough study of our decision-making process to determine, first of all, the extent of inconsistency or unfairness in that process. For example, are there regional differences which cannot be explained by the diversity of the country, the nature of inmate populations, or the types of communities from which the inmates come? We have agreed that our statutory criteria need to be better articulated so that a prospective parolee can be better informed as to the basis of our decisions and perhaps have the opportunity to improve his chance of early release. More articulate criteria should also help the public in general to understand the basis of our decisions and thus improve our accountability.

My prediction would be that, if more articulate criteria or guidelines are developed within the current legislative mandate of parole in Canada, they will perhaps resemble the American guidelines in some ways. They will probably make more use of a salient factor score than in the past but I hope that they can be developed to help us assess not just how much time the subject deserves to be imprisoned for his crimes but also how great a risk he presents to society at the time of the Board's decision to release him. What will result will probably be in the classic tradition of Canadian compromise. I think it is likely that we will sacrifice some consistency and some individualized justice in order to achieve a decent balance between the two. In conclusion then, to answer the question of whether guidelines are a worthwhile control on discretion, I would say that, in my opinion, the faults of the Canadian system are not so serious as to require the total remake of the decision-making process along the lines of the United States Parole Commission. Certainly, an articulation of our criteria to make them more specific and more understandable and our decisions more predictable is worthwhile.

CONTINUED

2 OF 3

OPENNESS AND THE PAROLE SYSTEM: A LAWYER'S PERSPECTIVE

David Cole
Barrister and Solicitor
Toronto, Ontario

Partly due to confusion over Section 54 of the Human Rights Act, which pertains to access to information, and partly due to the attitude of some parole workers, information on which decisions that affect the rights and liberty of inmates is not being adequately disclosed. There is an urgent need to clarify the issue of access to information and to establish a bias towards full disclosure. If the exercise of discretion is to be fair and equitable, the National Parole Board can no longer rely on the phrase "absolute discretion" to hide information that may affect a person's liberty.

I have been asked by the organizers of this Conference to discuss my experience in obtaining information from correctional authorities and my perception of the exercise of discretion by such authorities. I wish at the outset to comment that I am restricting my remarks to my dealings with parole service officers and members of the National Parole Board. I do not regard myself as competent to talk about dealings with prison or penitentiary officials. Second, while my remarks today are sharply critical of the behaviour of persons connected with parole decisions, I am nonetheless aware of the difficult role these people occupy.

As a practising lawyer, involved in the day-to-day business of parole suspensions and revocations, I see far too much of what I would call power-tripping by officials when it comes to the release of information either to me or my client.

It might be said in response that I do not know what I am talking about because my informant- my client- is often not reliable in his or her accusations, or because I am biased about not being told things which affect him or her, since my duty is only to my client and not to the "greater good" that parole officials must look to. But tempting as it might be to dismiss my remarks on those grounds, we all know that games are played with the release of information, and the question really is what can be done to control such behaviour?

In my experience and that of my colleagues in the defence bar, the problem is nowhere more apparent than in the area of disclosure of supposedly confidential information. I want to talk about this in two contexts: the discretion to release information garnered from third parties; and the discretion to release reports by mental health professionals.

It has been my experience that parole officers, claiming to be bound by confidentiality, simply refuse to provide information from police reports. But the police themselves usually have no difficulty providing the content of such reports. In many instances, the investigating officer can be contacted directly and, in Ontario, as of October 1, 1981, formalized mechanisms exist for disclosure of information in the possession of the Crown. Except in rare cases where there is substantial reason to believe that the physical security of witnesses may be at risk, the Attorney-General's Guidelines on Disclosure provide that the Crown is now under a positive duty (a) to disclose the case for the Crown to the defence, and (b) to make available any other relevant evidence which the Crown does not intend to introduce as part of the Crown's case. Should those guidelines and disclosure not provide sufficient material to prepare my case, mechanisms exist which permit me to obtain additional information under oath. I can, if necessary, have the investigating officer testify at the bail hearing, or, in indictable matters, request a preliminary enquiry.

Obviously then, there is a strange schizophrenia in the provision of information. On the one hand we have the parole officer, the person most intimately connected with the parolee, declining to release information about

my or her client, while, on the other hand, the police officer, who has collected the information has no difficulty being accountable to the parolee or his counsel. In my dealings with the Parole Board, this schizophrenic attitude towards the provision of information has been even more pronounced. Prior to a post-suspension hearing, the Board rarely hesitates to provide me with a complete disclosure of the information received from the police. It is a simple matter, except where very high profile cases are involved, of calling up the Board and asking what the allegations against my client are.

When I ask why it is that parole officers will not provide the information I request, I am usually told, in the case of parole-granting decisions, that it is because of section 54 of the Canadian Human Rights Act. How can legislation which is supposed to guarantee access to information be used to prevent the obtaining of information? Similarly, in parole suspension cases, I am told that the information has been provided by the police in confidence. Since the police are willing to provide the information, and there are other mechanisms by which it can be obtained, the argument about confidentiality makes no sense at all.

One cannot help but be left with a suspicious attitude. But before I explore this further, I want to talk about the use of discretion in relation to confidential information. I frequently encounter cases that involve an allegation that the parolee is being physically abusive to his spouse. And in such cases, I note a tightening up on disclosure by both parole officers and Parole Board Members. The real reason for a suspension is often revealed in confidence only after a post-suspension hearing. At such times I might be told, for example, that while a parolee did get charged with impaired driving, the real reason his parole was revoked was that his wife called the parole officer and said he was beating her up.

As a lawyer, I find this outrageous. When a person's liberty is at stake, surely it is not too much to ask that the spouse's allegation be tested in some way, other than through internal Correctional Service mechanisms which are not visible to the person whose freedom is involved. The obvious questions to be answered are: has she caused a charge to be laid against the parolee?; has she moved out or taken steps to terminate the relationship?; can any person - a friend or a doctor - corroborate her allegation? I realize that the Board is not trammelled by legal fictions such as proof beyond a reasonable doubt, but on many occasions I cannot respond to allegations on behalf of my client because the Board, as advised by the Correctional Service, will not tell me what the allegations are until after the hearing and then only in confidence.

What is worse to my mind is that this discretion is so often used in a patronizing fashion. The whole of our legal system is premised on the principle that a person whose liberty is at stake can only be deprived of that liberty in circumstances which are clear to all. And at this point I want to briefly refer to two recent legal cases, the first of which is the Nicholson (1979) S.C.R. 311 case. The facts of that case were that Nicholson was a probationary constable who, at the end of his probationary period, applied to become a full constable. He was rejected. When he asked why, the local Board of Police Commissioners informed him that he had no right to know of the reasons for the negative decision. The majority of the Supreme Court of Canada ruled that "the duty to act fairly" meant that Nicholson, whose right to earn a living was in question, had a right to know why that decision was taken and to reply to negative allegations made against him. Significantly, the Court was no longer willing to accept the patronizing view taken by the Board of Police Commissioners which at most consisted of saying "well we know all kinds of things about you, but we're not going to tell you what they are".

Dubeau (1981) 54 C.C.C. (2d) 553, which relates to parole, is the second case to which I would like to refer. In this instance, the parole officer found that Mr. Dubeau had been opening charge accounts without the prior permission of his parole officer. Following a disciplinary interview, a special condition was placed on his parole certificate, limiting his right to use credit. That same day he was arrested by the police. Parole was suspended and Dubeau was informed prior to his post-suspension hearing that the reason for suspension was his abuse of credit. However, subsequent to the disciplinary interview, Dubeau was in custody and had had no opportunity to again abuse credit. When Dubeau went to his post-suspension hearing, he was not questioned very much about his use of credit. He was questioned about the criminal charges. But the Board's reasons for revocation reflect only the fact that he had "displayed financial irresponsibility". Had the Board said in that case, "look, we are going to consider both the credit factor and the charges laid by the police", I doubt that the Court would have interfered, given section 6 of the Parole Act, which states that the Board has "absolute discretion" to make "such inquiries...as the Board deems necessary". But the significance of the decision surely is that the Court, by overturning the revocation decision, was saying that the Parole Board and, by inference, parole supervisors, cannot behave like "Big Brother". As contemporary notions of human rights evolve, so too do the responsibilities of decision-makers to be up-front about decisions that can affect personal liberties (see also Morgan & Sango v. The National Parole Board (No. 2) F.C.A. 7W.C.B. 152).

Parole decision-makers, however, often do not manifest the slightest comprehension of these crucial issues. Power-tripping through the control of information goes on regardless. My legal colleagues and I are firmly of the opinion that parole officers and to a lesser extent Board Members, regard issues surrounding the disclosure of information at best as a nuisance, and at worst as threatening to what Laskin C.J.C. has called their "tyrannical authority". It is simply a contemptuous attitude towards the dignity of the human person to base decisions about freedom on information which is not disclosed.

The third type of rationale for not disclosing information arises most frequently in the area of reports prepared by mental health professionals. That rationale is sometimes couched in terms of protecting the person who prepared the report in question. More frequently, however, the objection to disclosure is that releasing information to prisoners or parolees would somehow interfere with a therapeutic relationship.

In his recently released Report Into The Confidentiality of Health Information, Krever J. discussed both of these issues within the context of disclosure of psychiatric reports prepared by institutional staff to prisoners at Penetang who have hearings before the Mental Health Advisory Review Board. He stated: " I cannot accept a result that defers entirely to the judgement of those treating the patient. To do so is to encounter...professional paternalism...(which)...however well intended...is less justifiable than it was in a day when clients were less sophisticated and less educated.... I do not know of any ethical or legal obligation a physician may have to keep his or her patient in ignorance where the patient wants to know." Given the Krever Report, it is inconceivable to me that reports prepared by mental health professionals should not be disclosed in full to prisoners and parolees.

A second game played by parole officers and Board Members is in line with a suggestion made by Arnup J.A. in the Ontario Court of Appeal decision in the Abel case (1981) 56 C.C.C. (2d) 153. His Lordship expressed the view that in the Penetang setting it might, in some circumstances, be appropriate to disclose the contents of a confidential psychiatric report to the lawyer upon his agreement that the contents not be disclosed to the client. I frequently encounter this in the parole context. A parole officer or Board Member will agree to disclose confidential information, if I will promise not to pass the information to my client. I find this unacceptable for two reasons. First, it is a fairly transparent attempt to engage me in the game of withholding information. Second, and more important, it displays a fundamental misconception of the relationship between a lawyer and his or her client. The

law in many countries seems to be rapidly evolving towards the view that, if the client insists, the decision-maker must disclose what the decision-maker knows. In this vein, I commend to you Krever J.'s Report on the Confidentiality of Health Information. Throughout that report, and specifically at Chapter 24, there is a detailed discussion of these issues.

Let me now return to my original question. Why do parole officers and Board Members play games with information? One answer, which cannot be ignored, is that there are, without a doubt, a few misfits within the correctional system. Unfortunately, there are persons who derive almost sadistic pleasure from their power over parolees, and they are the ones who most frequently abuse their discretion. But the question does not end there. It is not a sufficient answer to say that the problem really comes from a few rotten apples.

For the most part, those who work in the field of parole, both federally and provincially, are a decent bunch of people, who are, unfortunately, somewhat confused and, to some extent, threatened by this whole disclosure issue. I am fully aware that parole officers deal with difficult and manipulative individuals, with poignant and intricate human dilemmas, and with conflicting demands and expectations, all of which are exacerbated by the fact that the parole workers are understaffed and underpaid. What I see as being urgently necessary is a clarification of where parole officers stand vis-à-vis this complex issue of disclosure. In my view, all of the legislation, all of the policy manuals and all of the continuing training of parole officers should now be directed towards a bias in favour of disclosure of all information upon request. I do appreciate that there are some things which properly should remain private - the personal notes of parole officials being a good example - but the Board and the Correctional Service can no longer rely on that phrase "absolute discretion" to hide information which may affect a person's liberty. The significance of the cases I have described is that the courts are demonstrating an increased willingness, under the doctrine of the duty to act fairly, to examine the substance of parole decisions. I have no doubt that if the real reasons for the decisions made by parole officials are not disclosed, the courts will strike down decisions to refuse to grant, revoke, or modify conditions of parole.

ORGANIZATIONAL STRUCTURE AND DECISION-MAKING

Dave Kennedy
Executive Director
John Howard and Elizabeth
Fry Society of Manitoba
Winnipeg, Manitoba

The organizational structure and the physical environment in which discretion is exercised strongly affects the nature of decisions. An oppressive atmosphere will consistently hamper efforts to improve the quality of decision-making. In addition, structuring the environment or framework in which discretion takes place, especially through centralization, inevitably leads to the supremacy of system requirements over the requirements of the individuals for whom the system is responsible.

For the purposes of this presentation, my working definition of discretion is that it occurs whenever someone, usually a professional in the criminal justice field, makes a decision to do or not to do something which has a potential to significantly improve or alter the future of the offender. Whether he or she deserves to have their future interfered with beneficially or detrimentally is not the issue; rather, it is the potential for change that makes the issue of discretionary powers an important one. My remarks will relate to the question of power and will primarily centre on the points in the system that afford the discretionary power to significantly alter an inmate's future.

A partial list of major points of discretion includes the following:

1) when a victim or witness decides whether to report an offence;

2) when the policeman decides whether to proceed with a specific charge;

3) when the Crown decides whether to proceed with a specific charge;

4) when a bail decision is made;

5) when the sentence is determined.

I deliberately omitted the finding of guilt or innocence. In theory, the judge or jury must find a person innocent if there is any doubt in their minds; the verdict follows automatically from the evidence. In practice, such clarity is not always possible, and judges frequently choose to believe one of two opposing testimonies, thereby exercising discretion according to some objective evaluation of a situation. Thus, in theory, the verdict is not a discretionary matter but in practice, it often is.

The remaining points of major discretionary power are:

6) institutional placement;

7) acceptance of requests for and the provision of helping services--psychological, vocational, educational, social, recreational, medical, etc.;

8) recording and reporting of assessments of performance and potential of each inmate. This is a potentially significant point of discretion since the initial assessment of an inmate might be with the individual for the rest of his sentence and might have an extreme impact on his or her future, whether or not it is accurate;

9) the quality of the prison existence. This is a general category that includes a multitude of decision points that will determine the quality of life of the individual while in prison. Some such decisions include the taking away or the granting of earned remission; the restoration of forfeited statutory remission; transfer decisions; work assignments; and disciplinary board sentences. Most of these discretionary decisions would not be significant in the context of my working definition in and of themselves, but the cumulative effect of these various decisions significantly

affects the future of the individual. The one exception to this would be the discretionary decision to use disassociation. I think that is significant in and by itself.

I have not included the Individual Programme Plan as a significant discretionary decision, since, in my opinion, any Individual Programme Plan is worthless and meaningless unless some other discretionary decisions are made. The discretionary decision not to provide access to the helping services and resources needed can render the IPP itself impotent.

The final series of discretionary points relates to the various release decisions such as:

10) temporary absence decisions;

11) parole decisions; and

12) revocation decisions.

The first issue I would like to address is the structure within which discretion is exercised. The ability to exercise discretion and the quality of the discretionary decision is frequently influenced by the organizational structure within which it must be exercised. If the atmosphere of an institution is negative, destructive, harsh, impersonal or inhumane, then the discretionary decisions will tend to be destructive, harsh and inhumane. We all know that the atmosphere of any setting is created by a variety of physical and human characteristics. Certain colours have a calming influence. The texture of building materials is warm or cold. The amount of space and freedom of movement can increase or decrease the tension in a building. Attitudes of individuals have a significant impact on atmosphere. If one is in a bad mood, one tends to make harsh decisions. When prison and union officials are locked into particularly difficult and strained contract negotiations, the atmosphere in a prison changes, and discretionary decisions will change in quality, also.

Most prisons are fortresses of cold, grey cement, where drab surroundings, confined space, excessive noise, and a we/they attitude between staff and inmates beg conflict. Within this setting how can we possibly expect warm, humane and constructive discretionary decisions? Even in new correctional institutions where the colours are bright and cheery, one cannot escape the feeling of confinement and the lack of visual distance. Prison, by its very nature, cannot produce consistently constructive discretionary decisions. This is not a criticism of those who work in the institutions but of the basic institutions in which they must exercise discretion.

Even the organization of the institution in which discretion must be exercised mitigates against just decisions, true to the purpose and goal of the criminal justice system. The huge Case Management Manual illustrates my point. Its very size argues against the necessity of centralizing and structuring the framework within which discretion takes place. The further up in the system that discretionary decisions pertaining to individual inmates are made, the less likely that decisions will be based on the needs of the individual, and the more likely it becomes that they will be based on organizational requirements. In other words, the basic goals of an organization are geared to the client for which it is working, but on top of that is imposed a whole series of organizational requirements. The farther away from the client group that you get, the more likely it becomes that decisions will be based on organizational needs rather than the client's needs.

Minimum frequency standards for parole supervision provide an example of the effect of organizational needs on decision-making. According to the Case Management Manual of the Correctional Service of Canada, the purpose of parole is to assist conditionally-released inmates to sucessfully reintegrate into society following a period of incarceration:

> Parole provides a means to monitor the conduct of the released inmate, to ensure that he or she does not become an undue risk to society, but instead lives within the limits placed on his behaviour by the National Parole Board, under terms and conditions acceptable to the community at large. Parole supervision provides the opportunity to apply limited controls by maintaining surveillance of the inmate's conduct while also ensuring that the inmate will be assisted in meeting his assessed needs by the provision of service on a direct basis or following referral to appropriate services and resources found in the community.[1]

According to this description, parole supervision is oriented to the needs of both the parolee and the community. The minimum supervision standards are, according to the Case Management Manual, consistent with the

---

1 Correctional Service Canada, Case Management Manual, Chapter 12, Section 1, May 1980.

purposes of parole supervision. But the manual also states there is an equal need for correctional resources to carry out the functions of parole supervision in a manner that achieves both efficiency and effectiveness. The allocation of resources to achieve these goals is based in part on the fact that the needs and risks presented by conditionally-released inmates may be assessed in terms of categories which reflect, in relative terms, the intensity of contact, monitoring of conduct, and assistance which are required.[2]

Thus, as an organizational requirement, there is an efficiency and an effectiveness expectation which may bring better service to the client in the community, but not necessarily. The minimum standards are detailed in Chapter 12, Section 3, subsection 5 of the Case Management Manual which states in part: "A service delivery format has been developed to guide the allocation of resources and to outline the minimum frequency of contact with inmates that may be undertaken while attempting to achieve the goals of parole supervision." The section further states: "The performance of parole supervisors and the overall accountability of parole supervision is, in part, reflected by the achievement of standards of parole supervision as a minimum acceptable level of service delivery that may be authorized." Significantly, the performance of parole supervisors, and overall accountability of parole supervision is the focus of concern. The needs of the system, not those of the client or the community, take precedence. Subsection 9 states that "All cases shall be reviewed by the Section Supervisor and the supervisor from the involved agency prior to moving either to a lower or a higher supervision category. The Section Supervisor will be the decision-making authority for such movement between categories. In cases of disagreement, the District Director will retain decision-making authority."[3]

Clearly, the section of the Case Management Manual that pertains to parole supervision begins with an emphasis on the delivery of services to the parolee and the community. But a shift in emphasis takes place when supervision standards are introduced. The standards are based on a set of arbitrary criteria that may have more to do with organizational efficiency than with the stated goals of supervision. The introduction of accountability measures creates a further shift in emphasis away from the needs of the parolee to

---

2 Ibid, Chapter 12, Section 2, Subsection 3.

3 Ibid, Section 3, Subsection 9.

those of the organization. The final effect is that the responsibility for decisions pertaining to individual parolees is moved upstream in the organization, away from the front line staff to the administrative level. Thus, decisions to change the category of supervision, for example, are reviewed by persons not in direct contact with the client or his or her community.

Having raised the problem, I want to end with a suggested approach to the solution. The first step is to take all the resources presently directed at structuring the environment within which discretionary decisions are made and redirect those resources into improving the ability of staff to make high quality discretionary decisions that relate directly to the goals of the organization, not the structural needs. The second is to let the community monitor the exercise of discretion more directly so that it can have some direct input into the needs of the offender. We might be surprised by how tolerant and helpful the public proved to be if we were responsible to the community, and allowed opportunity for involvement.

In conclusion, I leave you with two main points: The first, is a question: Can discretion ever be exercised justly in a prison setting? The second, is a conclusion: structuring the environment or framework in which discretion takes place, especially through centralization, inevitably leads to the supremacy of system requirements rather than client requirements around which the goals of the organization are established.

THE HUMAN DIMENSION IN DECISION-MAKING

Gerald Gall
Associate Professor
Faculty of Law
University of Alberta

Studies on decision-making must acknowledge not only objective but also subjective aspects of the decision-making process. In addition to clearly identifiable steps - such as gathering information and outlining alternatives - decision-making involves a number of subjective elements which are deeply rooted in the nature and personality of the decision-maker. By recognizing the influence of subjective factors, we may arrive at a better understanding of the decision-making process and be in a position to improve the quality of decision.

At the outset, I would like to make a few remarks concerning the exercise of discretion in our judicial system. I am of the strong view that discretion, provided it is properly exercised in the appropriate circumstances, is a vital feature of our system. Put simply, it provides for flexibility in an otherwise somewhat rigid system. And by providing for flexibility, the use of discretion ultimately serves to attain just results. One can observe the omnipresence of discretion throughout our criminal justice system. For example, the decision by policing authorities as to whether to conduct a particular investigation or the decision as to which resources should be extended to a particular investigation is discretionary in nature. After investigation, the decision whether to charge, and if so, the decision as to

which charges should be laid are also discretionary. With respect to some offences, one must obtain the leave of the Attorney-General before a charge can be laid and a decision to that effect by an Attorney-General is also discretionary.

With respect to the role of the Crown prosecutor, there is discretion here as well. The Crown must decide whether to proceed and, if so, in some instances, whether to proceed by way of summary conviction procedure or by way of indictment. Indeed, this very discretion was challenged in the Smythe case in which the Supreme Court of Canada held that the exercise of this discretion does not offend the provisions of the Canadian Bill of Rights. There is also, in the course of trial, considerable discretion vested in the Crown as to which evidence should be adduced and, indeed, in advance of trial, which evidence should be disclosed to the counsel for the accused. If there is a conviction, the Crown has the discretion, for example, in impaired driving cases, to decide whether to advise the Court of a previous conviction. This is, of course, very significant because for a second conviction of impaired driving, there is a mandatory jail term.

The largest source of discretionary power is that which rests in the hands of the sentencing trial judge. The judge admittedly does have certain guidelines in the exercise of this discretion. First, with respect to some relatively few offences, the Criminal Code prescribes minimum penalties. The judge then must begin with that minimum and decide whether to impose a higher sentence. With respect to most other offences, the Criminal Code prescribes a maximum sentence, permitting the judge to exercise considerable discretion as to the sentence that should be imposed. The judge is aided in the exercise of this discretion by case authority which usually describes the range of sentence that should be imposed, given a certain set of factual circumstances. These precedent cases, particularly at the level of the provincial court of appeal and in the Supreme Court of Canada, take into account not only the fundamental principles of sentencing, but also particular circumstances which are present in instant cases. By relying upon precedent cases, in addition to the statutory guidelines contained in the Criminal Code, the judge has a set of judicial guidelines which are superimposed thereupon. Before leaving the question of discretion at the judicial level, it should be noted that, in recent years, the judge has a new form of discretion with respect to a relatively small number of major offences. I am referring to the requirement that, in first and second degree murder cases, the judge must specify a minimum period of incarceration before parole eligibility. This is an area of discretion which is very important to all of us gathered here and it is something that is still relatively new since these provisions were enacted only five years ago.

One also finds discretion in connection with correctional decisions. Probably, there is more discretion exercised at this point than at any other in our criminal justice system. Correctional officials must decide where an individual must serve his term of imprisonment, how the individual's time is to be spent, and generally what degree of control and supervision must be imposed upon the individual. When the date for parole eligibility arrives, the National Parole Board then has the discretion to decide whether to release, what form the release should take (i.e. unescorted temporary absence, day parole or full parole), and what conditions should be attached to the release. Finally, the parole service also has discretion concerning the degree of supervision to be imposed during release.

I am sure I have missed a few things, but the picture that emerges is very clear: namely, that discretion is an omnipresent feature of our criminal justice system. It is, moreover, a valuable feature in that it allows our system to seek the ends of justice through an exercise of flexibility. A regime of rigidity in our criminal law would lead to hardships and injustice, and would not allow our system to respond and adapt to changing values and changing social circumstances. All this, however, presupposes that discretion is exercised in a fair and just manner and for the right reasons. Through a system of internal accountability, buttressed by the availability of judicially-granted administrative law remedies, we presumably have the necessary protection against abuse. Moreover, further remedies will become available when the new Charter of Rights and Freedom is enacted. Assuming, therefore, that discretion is properly exercised, the argument for a discretionary regime in the administration of our criminal justice system is a compelling one that should be kept in mind at a time when we are re-thinking the fundamental objectives underlying our criminal law and the means by which those objectives are achieved.

Implicit in a discretionary regime is the making of decisions. And the making of decisions can, itself, be examined from many perspectives. I have chosen, however, to place an emphasis on two particular perspectives and their interrelationship. The first relies upon the research and scientific knowledge gained from the discipline of psychology. The second perspective, although the subject of some sociological research and although susceptible to even greater research in the future, is essentially that of the non-scientific or subjective aspects of decision-making. Although I have divided my analysis into the scientific vs. non-scientific aspects of decision-making and although I have limited the science of decision-making to that of psychology, at the same time, there are other scientific aspects to the study of decision-making. For example, one finds not only psychological but also anthropological, sociological and even psychiatric studies in this area. Indeed, in

terms of pure physiology, one encounters diseases which manifest themselves by, among other things, an inability to make decisions.

Before embarking further on this discussion, I should say that this talk draws significantly from the work of Dr. Elaine Borins, a Toronto psychiatrist, and her husband, His Honour Judge Stephen Borins, a Judge of the County Court of Ontario. In a paper, entitled "The Psychopathology of the Judicial Decision-Making Process", delivered to a national conference on "The Trial Process" in Vancouver last year, Judge and Dr. Borins primarily directed themselves to the judge as decision-maker. Given the focus on the judiciary, some of their work is not applicable to our deliberations here. Yet, in the course of their paper, several remarks were made that are highly relevant to decision-making in general, and, in the case of certain findings, to decision-making by paroling authorities, in particular.

Decision Theory: A Psychological Perspective

I would now like to examine decision-making from a scientific point of view. It has been argued that the study of judicial decision-making should utilize the theories and methods of all the relevant social science disciplines. In Canada, that has not been done, at least not to a significant extent. However, psychologists have explored the subject and have constructed a modern, generalized decision-making theory. Functionally speaking, the making of a decision can be summed up as follows. The decision-maker, for example, the judge or parole board member, must ascertain certain facts which must then be applied to the legal context in which the decision is being made, in order to arrive at a decision. But, in reality, decision-making is far more complex.

In a 1922 article, Charles C. Haines commented that "a complex thing like a judicial decision involves factors, personal and legal, which carry to the very roots of human nature and human conduct". That observation is likely true of all decision-making, not merely judicial decision-making. In the Borins paper, referred to above, the authors look at decision-making in this manner:

> Basic to the making of a decision is the making of a choice between the exercise of at least two different courses of conduct leading to different results. Modern decision theory generally recognizes that decision-making is perceived to involve the process of weighing positive and negative attitudes towards, or evaluations of, decision alternatives and then selecting the most satisfying alternative. In the generalized decision problem the decision-maker will have

available to him a number of alternative courses of action, each of which will eventually result in a certain set of outcomes or consequences. Since at the time the choice must be made he is uncertain about which outcome will actually result from the decision, his problem is to select a course of action that takes into account both his uncertainty and his preferences for the various possible outcomes. The decision-maker generally must analyze the result of various possible decisions. In doing so, it is assumed that the decision-maker's best course of action will depend on two factors:

(1) the probabilities that this action will result in each outcome of interest; and

(2) the relative importance he attaches to each outcome.

To make the optimal decision, it is necessary that the decision-maker be able to quantify his judgements regarding outcome probabilities and importance so that he can synthesize this information and arrive at a preferred course of action.[1]

The authors then proceed to identify the six major steps in the making of a decision, in accordance with modern generalized decision theory. Those steps are as follows:

1. gathering information;
2. interpreting information;
3. outlining alternatives;
4. weighing alternatives;
5. deciding priorities; and,
6. making a final choice.

The authors then point out that decision theory has isolated six parameters of decisiveness "as reflecting some of the most important indices of one's ability to make decisions".[2] They are as follows:

1. the need for information;

1. Borins and Borins, "The Psychopathology of the Judicial Decision-Making Process" in C.I.A.J., The Trial Process, (1980), p. 197.

2. Ibid, P. 198.

2. confidence in the accuracy of one's decision;
3. perceived ability as evidenced by the willingness to take risks;
4. tendency to defer decisions;
5. the decision-maker's own view of his decision-making ability; and,
6. the peer-rating of decisiveness.

The Borins paper also points out that an analysis of the decision-making process must be interrelated with what is referred to as role theory. For the purposes of this discussion it is important to note that role theory has some significance for an understanding of decision-making but a proper examination of this theory is beyond the scope of this talk. I would like now to turn to the non-scientific components of decision-making. These components are truly the human dimension in decision-making.

The Non-Scientific Factors in Decision-Making

Essentially, a decision-maker is influenced by the "effect of the totality of a person's experience on his present view of himself and his world-both conscious and unconscious".[3] In the classic treatise, Courts on Trial, by Jerome Frank, the human element that enters judicial decision-making is discussed at length. His remarks are pertinent to all types of decisions and are worth quoting at length:

> "A judge is a man, with a susceptibility to unconscious prejudiced identifications originating in his infant experiences .... His impressions, coloured by his unconscious biases with respect to the witnesses, as to what they said, and with what truthfulness and accuracy they said it, will determine what he believes to be the 'facts of the case'. His innumerable hidden traits and predispositions often get in their work in shaping his decision in the very process by which he becomes convinced what those facts are. The judge's belief about the facts result from the impact of numerous stimuli-including the words, gestures, postures and grimaces of the witnesses - on his distinctive 'personality'; that personality, in turn, is a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did

3. Supra, note 2, 203.

not marry), his children, the books and articles he has read...."[4]

In terms of judicial philosophy, this view represents the realist or sociological school of jurisprudence according to which, what is important, realistically speaking, with respect to the exercise of a decision is what the decision-maker ate for breakfast or whether the decision-maker had a fight with his wife before embarking upon his work. The realist school of thought emphasizes the subjective, rather than the objective, aspects of decision-making. It places an emphasis on the decision-maker, not as an isolated individual exercising discretion with respect to a particular case, but as an individual exercising his role and function in the context of the total world, both personal and professional, in which he operates. It also emphasizes that the decision-maker will be influenced by the global experience of his or her life. It recognizes that bias might enter into the making of a decision, either consciously or subconsciously. While it is true that some biases are rationally based, clearly others are not, and the realist school of thought takes into account the potential effect that subsconscious biases might have on decision-making.

In describing the psychopathology of decision-making by judges, Jerome Frank, in his work mentioned above, stated that "judges are human and share the virtues and weaknesses of mortals generally". In turn, Judge and Dr. Borins agree with Frank that the humaneness of judges does in fact play a role in their decision-making. The authors comment further that:

> Frank was critical of sociological jurisprudence for not going far enough. While he agreed the political, economic and professional background and activities of various judges were forces which tended to mold judicial decisions, he argued that the idiosyncratic personalities also played a role in the deciding of cases.[5]

Along similar lines, the authors refer to the great American jurist Benjamin Cardozo who said some 60 years ago that:

---

4. Jerome Frank, Court on Trial, (1971), 152-153.

5. Supra, note 2, 203.

> Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge.[6]

They also refer to the words of Lord Macmillan who wrote that:

> The judicial mind is subject to the laws of psychology like any other mind.... The judge ... does not divest himself of humanity. He has sworn to do justice to all men without fear or favour, but with ... impartiality ... does not imply that judge's mind remains a human instrument working as do other minds, though no doubt on specialized lines, and often characterized by individual traits of personality, engaging or otherwise.[7]

If the above is true with respect to judges as decision-makers, it must equally be true of parole board members, correctional officials or any other actor exercising discretion in our criminal justice system.

Decision Theory and the Non-Scientific Factors: Decision-Making in Parole

I would now like to apply the six steps in making a decision, including their interrelationships with the non-scientific or subjective factors, to the process by which parole decisions are made.

As mentioned earlier, modern decision theory holds that the first step in reaching a decision is the gathering of information. Generally speaking, in our criminal justice system, those people who make the decisions are not the same people who gather the information upon which those decisions are made. For example, a trial judge will rely on evidence adduced by counsel before him, be it in the nature of viva voce or documentary evidence. An appeal judge will rely on the facts filed before him, although he is, of course, at liberty to research the law independently. A parole board member will rely on documentary evidence prepared by police, the correctional service, the parole service, psychiatric and/or psychological consultants and the like. In some

---

6. Supra, note 2, 203.

7. Supra, note 2, 203.

instances, he will have an opportunity to interview the applicant and, only recently, may also have the opportunity to hear submissions made by a representative of the applicant. The parole board member, like the judge or any other decision-maker, can always request further information. Now, consider the subjective aspects of this process. First, all the non-scientific factors ascribed earlier to the decision-maker also apply to the decision-gatherer. In the case of parole, these "biases", for the sake of a better term, might be reflected in must of the information gathered, including for example, psychiatric reports, police reports and community assessments and might very well contribute to a recommendation made by a case management team. Secondly, the "biases" of the decision-maker might also bear on whether he is satisfied with the information and, if so, what information he requires.

The second step identified by generalized decision theory is the interpreting of the information. As indicated in the passages quoted from Borins, Frank, Cardozo, and Macmillan, the interpreter of the information will be influenced by the total history of his or her life including, if I may repeat such factors, "the effect of the totality of a person's experience on his present view of himself and his world, both conscious and unconscious"; his "innumerable hidden traits and predispositions"; his "personality" which, "in turn, is a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did not marry), his children, the books and articles he has read". It is somewhat of a truism but "the making of a decision implies the exercise of choice",[8] including the choice by the decision-maker, as the interpreter of information, as to which date or information should be given greater weight or credibility, or indeed, as Ms. Hart of the National Parole Board has studied, the choice as to which kinds of information should be considered before a decision is made.

The third, fourth, fifth, and sixth steps of decision theory, namely, outlining alternatives, weighing alternatives, deciding priorities, and making a final choice may all be considered together. These processes are all, of course, susceptible to the same subjective influences as discussed above. However, once information is gathered and interpreted, to a large extent, the subsequent steps in making a decision follow almost automatically. However, the influence of non-scientific subjective factors is still a reality in respect of these components of the decision-making process.

---

8. Supra, note 2, 204.

Equally important, however, these latter components are also affected by five other, miscellaneous factors identified by Judge and Dr. Borins. First, a system of precedent and stare decisis, under which decisions in previous cases either bind or strongly persuade the decision-maker in an instant case with a similar fact situation, obviously will affect the making of a final choice, and will also have influence on the exercise of the antecedent components of the decision-making process. Secondly, the decision-maker might want to be influenced by, and therefore take into account, 'public policy'. To do so, the decision-maker must perceive what, in fact, constitutes 'public policy' and that determination is also, to be sure, susceptible to subjective factors unique to the 'personality' of the decision-maker. Thirdly, as the Borins article stated:

> ... transcending the entire decision-making process is the fact that the result of the decision will have an effect on the liberty (of the subject).... The result will have an effect - sometimes an extremely crucial effect - upon some other person. This is an ever-present phenomenon in every case and will have a greater or lesser effect upon decision-making depending upon how well the decision-maker meets the parameters of decisiveness....[9]

Fourthly, the decision-maker might, by virtue of his position, feel a sense of remoteness and isolation. With respect to judges, it has been said, in an English study cited by Judge and Dr. Borins:

> (The Judge) is to be less than human in that he is required to rid himself of prejudice, he is to be more than human in that he is (formally) required to be always right. We are advised that both these requirements, being unreal, can affect behaviour and even judgement, particularly of a psychologically vulnerable personality. We doubt whether either of these requirements can be removed; their oppressive effect could however be mitigated if fewer opportunities were given to the judge to shelter behind the judicial trappings, if he were to be given more time in which to exercise his judgement and more opportunities to lead a normal social life.[10]

---

9. Supra, note 2, 206.

10. The Judiciary - The Report of a Justice Sub-Committee, (1972), 37 and 39.

This in turn, can lead to what is medically described as "alienation".

Fifth and finally, the Supreme Court of Canada has held that, in connection with parole hearings, the hearings and the determinations made pursuant to those hearings do not constitute quasi-judicial proceedings, and, subject to the new fairness requirements, need not conform to the rules of natural justice. Consistent with that conclusion is the notion and, indeed the practice of the Board, not to conduct its hearings in an adversarial fashion. Recent changes to the regulations which now allow inmates to be represented at parole hearings have caused concern to some that parole hearings might turn into adversarial proceedings. If that is, in part, a realistic danger, consider the following remarks by Judge and Dr. Borins concerning the effect of the adversarial process on the judge as decision-maker:

> It is Judge Frankel's thesis that the very nature of the adversary process generates forces that work against the judge's efforts to be neutral and detached. While he acknowledges that role strain - the difficulty in meeting given role demands - is normal in all responsible jobs, he seeks to identify certain disturbing features in the trial process which create added strain and threaten the neutrality of the trial judge.[11]

In addition, the English study, referred to above, concluded as follows:

> Both the adversarial system and the rules of evidence and procedure, where they favour one party ... inevitably tempt the judge to lose some of his impartiality and to 'take sides', if only to redress an imbalance either inherent in the system or present in the particular case.[12]

Conclusion

In conclusion, I have briefly outlined the decision-making process, having regard to psychological decision theory together with the interrelated non-scientific, subjective components of the decision-making process. On one

11. Supra, note 2, 211.

12. Supra, note 2, 40.

hand, I can be accused of stating the obvious: namely, that the psychological dynamics of decision-making are largely affected by other non-scientific factors. That is to say, the human dimension of decision-making combines both scientific and non-scientific components. On the other hand, Oliver Wendall Holmes Jr. once said that "the vindication of the obvious is sometimes more important than the elucidation of the obscure". If in fact, I have vindicated the obvious, then let it be further vindicated through empirical social science research. At the end of the day, let us recognize the inevitable, namely, that decision-making, that is, the exercise of discretion, will always have a 'human dimension'. Whether that is desirable is another matter, perhaps the subject of another presentation at this Conference. My own thoughts are that it is better to have a 'human dimension' in decision-making than, say, a 'computer dimension', but, that presupposes that the humans who make these decisions are decent, right-thinking individuals. I, for one, hope that they are, throughout our criminal justice system.

THE EXCEPTION TO THE NORM: WOMEN IN JUSTICE

Christie Jefferson
Executive Director
Canadian Association of
Elizabeth Fry Societies

"Hidden" discretion, that is discretion which is not subject to some form of public scrutiny, opens the door to discriminatory practices in our criminal justice system. Women are particularly affected by hidden discretion, some favourably, many adversely. The solution is not to adopt the type of guidelines that reflect past practice and, therefore, discriminatory practices but to develop mechanisms that prohibit discrimination. What we must look for is a balance between the human compassion and judgement involved in discretion and the need to protect individuals from discriminatory decisions. We can achieve this by taking a fresh approach to guidelines, increasing due process, enforcement of our Human Rights legislation, and public scrutiny of discretionary decisions and by ensuring that those who exercise discretion have a compassionate understanding of the people before them.

According to the Funk and Wagnall dictionary, discretion is "the freedom or power to make one's own judgements and decisions, and to act as one sees fit." When discretion is discussed, a rare event in itself, we tend to focus on formal discretionary powers such as those of parole boards and the courts. The discretionary activities of these bodies are, however, relatively open to

public scrutiny compared with the "hidden" discretion exercised by a number of individuals in the criminal justice system. These individuals have the power to make decisions that might dramatically affect the lives of offenders, yet they exercise this power exclusively on the basis of their own judgement and without any form of public scrutiny or observation.

The following are but a few examples of what I call "hidden" discretion: police decisions about which areas to patrol on a priority basis, who to charge for a minor offence; administrative decisions about which laws to enforce most emphatically;[1] legal decisions such as a decision to attach a severe penalty to a minor offence; classification decisions; institutional decisions concerning living conditions, program choices, remission and recommendations for parole.

The problem with discretion is that it can be exercised in a discriminatory manner, either positively or negatively. That, I might add, is the underlying reason for holding a Conference on Discretion and yet it is a topic that we have not properly addressed. To support the contention that discretion can be and is exercised in a discriminatory fashion, we need only consider who, in fact, ends up in prison. Hidden crime studies indicate that at some point most individuals commit crimes for which they might be liable to imprisonment. But the vast majority of people who are incarcerated are the powerless in society - the poor and minority groups. These observations alone suggest the need to examine the role of discretion in the process of selecting who to charge and prosecute, who to send to prison and who to conditionally release.

Unfortunately, with respect to the way in which discretion is exercised in the case of females, there is little official information on which to draw. In general, there is little information available on the female offender, largely, I suspect, because there are so few women offenders. In addition, the question of discretion is not one that people want to talk about; indeed, it is not something that most people in criminal justice will admit they have, particularly the police forces. Judging from my own observations and what information is available, it seems quite possible that discrimination affects many women favourably in criminal justice. Although we have no actual figures, it seems that a great number of women - particularly, I suspect, from the middle class up - are not charged for committing minor offences or for participation in a group crime. But the discretion exercised by criminal jus-

---

1 Here I am referring specifically to the directives of provincial Attorneys General that specify which offences should be given emphasis by the police.

tice officials does not favour all women. Some groups of women, particularly Native women, are subjected to negative discrimination. I will now briefly address the subject of discrimination against Native women and then go on to discuss the question of discretion and female offenders in general.

The vast majority of women who are in prison, particularly West of Ontario, are Native women. In Kingston's Prison for Women, one-third of the population is Native, which is a drastic over-representation given the number of Native women in Canadian society. It behooves us to ask, "Why?" Do Indian women commit more crimes to the extent that their numbers in prison would suggest? Are Indian women more dangerous than non-Indian women, therefore requiring incarceration in a secure setting for their protection and ours? Do they represent a greater security threat?

Indian women do not appear to commit different types of crime, on the whole, than non-Indian women. Perhaps there is a slightly higher representation in violent crime; but, in provincial institutions, most Native women are imprisoned for theft, usually under $200, shoplifting, Highway Traffic Act violations or general nuisance offences. It is likely that some of the factors that account for the high proportion of Native women offenders relates to their socio-economic position in Canadian society. Many have to steal for food or clothing. But certainly discretion has some impact and it is my contention that the hidden discretion I described at the outset adversely affects Native Women.

Given the lack of hard data, we can do no more than speculate - on the basis of observation - about the way in which discretion is exercised negatively in the case of Native women. For example, social welfare administrators exercise considerable discretion in determining what services to provide the community. There is a notable lack of services for Native people, particularly in cities. Moreover, criminal justice personnel, in general, lack knowledge of the few services to which Natives could be referred. Given the lack of support services and the oppressive socio-economic conditions under which many Native women live, a number of them commit crimes simply to feed and clothe themselves. Native women as a group are consequently considered to be a social problem and therefore are dealt with more severely for the crimes they commit than non-Indian offenders.

Once in prison, Native women are subject to conditions which reflect a discriminatory bias towards female offenders in general. The physical conditions of some provincial institutions are so appalling that, in several instances, women have been given federal terms in order to spare them from in-

carceration in the provincial prison. A Labrador woman, for example, was given three two-year sentences for several minor offences in order to spare her from incarceration in Her Majesty's prison in Newfoundland in which women are locked up in bucket cells for all but one half hour each day.

Another factor that we cannot underestimate is that men largely staff the criminal justice system. It is difficult to estimate the impact of this factor but certainly program opportunities and the classification of women, which is based on the male classification system, reflect the presence of male decision-makers.

What programs are available to women? If you happen to be in Portage in Manitoba, you might have beads on the table to work with during the day. If you are particularly lucky, you might end up in an institution that has a hairdressing or sewing course, although in all likelihood it will not be a credit course. In some instances, you might have the opportunity to take advantage of the correspondence or grade school courses that are sporadically offered in various institutions. But, in many institutions, you would simply sit in your cell or living area all day with absolutely nothing to do except to clean toilets for half an hour each day.

The lack of training programs for female inmates is particularly serious in view of harsh reality of working conditions for women in general. At present in Canada, women do 72 per cent of all part-time work and constitute 75 per cent of the minimum wage earning category. In 1980, women employed full-time earned, on average, 62 per cent of the average full-time male wage and studies indicate that this disparity is worsening. Over 80 per cent of women are in clerical, sales or services occupations. The unemployment rate in the eighties might intensify this trend. For female offenders, just as for male offenders, successful reintegration into society often depends upon their ability to earn an honest, living wage. I would argue that the training programs available to female inmates are neither appropriate nor adequate to assist them in re-integrating into society as law-abiding citizens. In my opinion, any woman sent to jail for a few days need not be there at all. There should be an extensive use of alternatives for those who do not really need a secure setting.

What should be done, then about the effect that discretion in the criminal justice system has on female offenders? Two basic routes, each involving a different set of methods, are available to us. One is to leave discretionary powers in place to adopt measures to improve decision-making, including changes in our choice of decision-makers. At present, the majority of people who exercise discretion in criminal justice are white, middle class

males. This is particularly true in the case of judges, Crown prosecutors, classification officers and social workers, all of whom exercise tremendous influence over the fate of the female offender. An important step and one that seems obvious would be to hire more women and Natives in our criminal justice system. The employment of more women and Natives in these capacities would result in decisions informed by a greater sensitivity to the particular needs of female offenders. Government agencies have agreed in principle to such a step but have not instituted affirmative action programmes. In this era of restraint in government spending, positions tend to be staffed from within, both at the federal and provincial levels. Few women or natives hold government positions in the criminal justice area; thus, not surprisingly, their numbers are not increasing. Only through an all out, well-coordinated affirmative action program can we hope to bring more women and Natives into positions that will allow them to influence the exercise of discretion over female offenders.

Another approach that could be taken, in addition to hiring more women, would be to set up a program designed to sensitize present staff to women's issues, to the status of women in Canada, the type of society to which female offenders must return, the factors involved in Native criminality and to the poverty, lack of employment opportunities, the discrimination, despair and powerlessness that a Native person must confront. Such a program would provide individuals who exercise discretion with the tools, the information and the sensitivity, to make decisions that serve the needs of Native and other female offenders.

We could also encourage the development of community alternatives for women and provide more information about the few that are now available. Too often women are forced to spend short periods in prisons which jeopardizes their employment and involves an enormous cost to society and to their families, when a community alternative would have been far more appropriate.

The second route that we could take is the one the United States is following: implementing controls on discretion. Such controls include guidelines for charging and sentencing and paroling offenders and the establishment of correctional standards. But while regulatory controls such as guidelines could be an important mechanism for preventing discretionary abuses, I am not in favour of the guideline models that have been implemented in the United States. American guidelines have been established on the basis of past practice. Such an approach does nothing to eliminate discriminatory practices; on the contrary, it imbeds them into regulation. I recommend that we take a fresh approach to the concept of guidelines and develop a model that excludes discriminatory factors that weigh unjustly against particular groups.

We could also require that the exercise of discretion at all points in the system be open to some form of public scrutiny. I realize that exactly what form this public scrutiny should take is a difficult question. Whether we should adopt all of the due process mechanisms of our Court system or only some of them is open to debate. But we must ensure that inmates receive a fair hearing whenever decisions which will affect their welfare are to be made. Steps such as assistance at hearings recently implemented by the National Parole Board whereby the inmate is entitled to have someone of his or her choosing present at the hearing seem to me to be in the right direction. Furthermore, we would legally recognize the supremacy of the Human Rights Act over any penitentiary or parole act, rules or regulations. It is my contention that the loss of the right of liberty places a sufficient restriction on the right of inmates; their remaining rights should be protected from abuse by our Human Rights legislation.

In addition, we could require the publication of all policy directives and regulations including those of the Attorneys General departments, police departments, prison and paroling authorities. By publication I do not mean that directives and regulations should simply be available for public perusal on request; they should be widely disseminated to the general public.

One of the ironies in this whole issue of discretion is that not only the existence but also the absence of discretionary powers often negatively affects women. For example, I would like to cite the case of a young woman who is serving a 25-year minimum sentence for being involved in a crime that resulted in the death of a policeman. Most people who are familiar with this case, including some of the guards that I have spoken with at the Kingston Prison for Women, feel that this woman does not need to be imprisoned for 25 years. She did not commit the crime herself. She, and other women like her, find themselves present during the commission of a crime not because they agree with the act but because they feel obliged to follow the man committing the crime, perhaps out of love, perhaps out of fear. While many judges faced with such cases would like to take these factors into account, they cannot. The limitations on sentencing discretion that exist in law prevent judges from adjusting the penalty to fit such circumstances. Women, in particular, suffer serious negative effects from this lack of sentencing discretion.

In conclusion, despite my serious concerns about the present use of discretion, I am not recommending that we attempt to eliminate it entirely. Nor would I recommend following the American approach to limiting discretion. A wholesale implementation of guidelines along the American pattern, would, in my estimation, work to the disadvantage of Natives and women, since they incorporate racially and gender sensitive factors. I think we must look for a

balance between the human compassion and judgement involved in discretion and the need to protect individuals from discriminatory decisions. We can achieve the proper balance through the measures I discussed earlier: a new approach to guidelines; more due process measures; enforcement of the Human Rights Act; public scrutiny of discretionary decisions in criminal justice and a sincere effort to ensure that those who exercise discretion have a compassionate understanding of the people before them.

THE CLIMATE OF THE TIMES AND ITS INFLUENCE ON DISCRETION IN CORRECTIONS

Olé Insgtrup
President
Standing Committee on
Prison Regimes
Council of Europe

In Europe, prison administrators are currently faced with a new set of problems that stem from the socio-economic conditions of our times. These problems include economic constraint, an increase in crime coupled with increased demands for public protection and growing pressure from staff unions and from inmates' rights groups. To resolve these problems we must use the vast and largely untapped human resources that exist in our correctional systems. And to properly utilize this resource we must allow individuals at all levels of the system enough discretionary power to develop creative, effective answers to the difficulties facing us.

Discretion can of course be seen as a legal phenomenon but, in this session, I think that discretion should be seen as one of the many elements that all together could be called correctional administration or, to use a more modern term, prison management. If the process of management is defined as "to plan, to organize, to co-ordinate, and to control the attainment of specific goals through the organization", discretion must be centrally placed in the discussion of correctional management and in the description of its development.

Management technique became a matter of concern in the public sector much later than in private organizations and there has been a tendency to simply adopt the findings of the private sector without adjusting them to the obvious differences between private and public organizations and their operational conditions. What are some of the significant differences between management in the public and private sectors that are pertinent to a discussion of correctional management and the exercise of discretion in corrections? First and foremost is the fact that public administration, including the administration and the management of the correctional system, is subject to political leadership. This means that the ties between the political scene, the correctional administration and its operation are a factor of decisive importance that must be taken into account when considering or reconsidering the managerial system - including the question of delegation of power and the exercise of discretion - in a correctional setting.

The political and the public response to public agencies' mistakes is much more direct and outspoken than is the case in the private area. This is particularly true in relation to decisions in the correctional field. Many of the decisions taken in this area are of interest to the public as a whole or to particular groups in the population; numerous decisions in the correctional field cause reactions in the mass media with the risk of political implication. This means not only that the decision must be easy to explain but also that the process by which the decision has been taken must be easy to explain and fair to the person in question and to society. It also means that the correctional system must operate in an efficient way.

To that end, it is often necessary to be able to demonstrate that the decision has been taken in accordance with legal provisions, administrative regulations or general guidelines covering the area in question. Politically, it is impossible to defend a controversial decision that is seen as an arbitrary one. This leads me to the opinion that public agencies, in particular the correctional system, should pay a lot more attention to the question of communication with the public, especially the mass media, to engender public understanding of its policies and its way of operating, including the degree to which power has been delegated and the extent to which discretionary power is exercised at different levels in the organization.

The Danish correctional system is characterized by a high degree of power-delegation and a very high degree of discretion in its decision-making processes. In my opinion, not only our open administration but also our

active information policy makes our administration much less vulnerable than it was before we introduced this type of active information policy. In this connection it is worth noting that the European Council is dealing with this subject in a select committee on "Public Opinion and Crime Policy", a report which will probably be published in 1983.

Another factor which should be taken into account when dealing with correctional management and especially when dealing with delegation of power and discretion, is the change in staff attitude that we in Europe have experienced throughout the last decade. Civil servants in Europe have become increasingly unionized during this period of time and, in addition, the unions have taken much more interest in policy-formulation and in the managerial set-up in European correctional systems. The demand for participation in the decision-making processes, particularly in Scandinavia, has been outspoken and such demands have been gaining political backing. As a consequence, the correctional systems in Europe, with the possible exception of France, have become more and more decentralized and more discretion has been delegated to the lower levels of correctional organizations. Nonetheless some top leaders consider this development to be an obstacle for efficient management and therefore undesirable.

The other group of people that we are dealing with - the convicts - are also of great interest in this connection. Throughout the last two decades in Europe, convicts' demands for changes in the system and the way it operates have increased. In addition, more and more groups and individuals have taken an interest in the treatment of convicts - especially that of prisoners - and in the legal framework that defines and protects their rights. Prisoners and pressure-groups have demanded more precise clarification of the legal rights of inmates, faster treatment of their applications and complaints, and the reasons for decisions that affect them. In addition, inmates have asked for more influence in their daily life in the institutions. These demands - which I personally find reasonable and acceptable - mirror general developments in society and are not peculiar to the correctional field. They are a consequence of general political and social developments in our society today.

In addition to the situation described above, European correctional systems are under strain. Crime is increasing, the number of inmates is increasing, the proportion of disturbed inmates is increasing significantly and the available financial resources in many systems have been reduced to a minimum with no increase possible in the foreseeable future. Other changes in our operational conditions are excellently described in "The Enquiry into the United Kingdom Prison Service", published in 1980. It is in this context and

in the socio-economic climate of the times that correctional systems must operate in a fair and just way, smoothly and efficiently. Precisely because of this climate I believe that delegation of power and the use of discretion must be regarded as useful and unavoidable managerial tools. Limitations in financial and other material resources should not be regarded simply as a problem. Such a situation requires that an effort be made to obtain the same goals by developing other, already existing, resources, the first and foremost being the almost unlimited, unused human resources at our disposal among our staff and inmates.

That this must be done in the future is, in my opinion, both obvious and urgent. How it can be done, however, is a much more complicated question to answer. Clearly, this is not something that can be achieved overnight but is a process that will take time and that calls for careful planning and clear-cut goals. While I cannot offer a simple prescription for change, it might be useful to outline the basic premises on which we based our efforts to decentralize and to redistribute discretionary power in the Danish correctional system. The following summarizes the main principles that we took into account:

1. Correctional systems consist of a headquarters and a number of smaller and larger institutions.

2. That the headquarters functions does not necessarily mean that the organization functions.

3. That all the local units function means that the organization functions.

4. People - staff and inmates - normally behave as they are expected to behave.

5. If people are not given responsibility, they do not act neutrally but irresponsibly.

6. If people are supposed to act in a responsible way, they must have something to be responsible for.

7. There is a tie between the ability to take responsibility and the level of education and experience.

8. Learning by doing is an important way of learning.

9. Delegation of power - including discretionary power - does not mean loss of control and influence but leads to real leadership. It changes the position of management at all levels from that of decision-maker to that of leader.

10. When a manager loses confidence in human beings and no longer understands what responsibility means to them and to the organization at large, it is time to leave.

CONFINING DISCRETION: ARE WE HEADED TOWARD A MORE JUST SYSTEM?

Don M. Gottfredson
Dean of the School
of Criminal Justice
Rutgers University
Newark, New Jersey

The current trend in the United States is to curb discretionary powers in corrections by mechanisms such as determinate sentencing and parole guidelines. This trend is the product of criticisms about the rehabilitative concept, criticisms that are based on what, in some cases, is questionable research. While there is quite clearly a need to find measures that will improve equity and fairness in correctional decision-making, the efficacy of the measures that have been adopted is still in doubt. Since they may be premised on false assumptions or may lead to unwanted results, such as longer sentences and overcrowding, their impact must be closely monitored.

In order to determine if, by confining discretion, we are headed toward a more just system it seems necessary first to determine if there are any trends that have to do with confining discretion, and second, assuming that we know what justice means, to decide whether we are headed toward a greater degree of justice. That is no small task. I will press on in pursuit of that objective, but I make no claim that I will be able to fulfil it.

I would like to talk about what I perceive to be some definite, easily discernible trends in the United States that have to do with reduced

discretion. The trends toward a reduction in discretion, particularly with respect to the judiciary and paroling authorities, are one aspect of two more general trends. The first relates to the fundamental purposes of sentencing and paroling. The second is a trend toward greater determinacy.

I would like to review the traditional purposes of sentencing in order to identify the trend toward a reduction in discretion which is a quite definite trend, at least in the United States. In his studies on sentencing, Professor Waller has pointed out that the first sanction imposed by a court when a defendant is found guilty of some offence is the conviction itself. By this action the defendant is told authoritatively, publicly, decisively and enduringly that he or she is guilty of inflicting harm on an innocent victim. And for many people that can certainly be a very considerable sanction. Professor Waller further states that most often the conviction is not thought to be a sufficient sanction so that a variety of others have been invented throughout history.

This morning when Professor Normandeau referred to Plato he brought to mind what Plato wrote about the purposes of sanctioning offenders. He claimed that the only justification for punishment is found not in the past harm done but in the good to follow in so far as punishment serves as a warning to other people (general deterrence in our common language) or as a means of correcting the individual's behaviour (treatment or special deterrence). The utilitarian concept of sentencing is, therefore, at least 2,000 years old. It was looked upon mainly as a means of rehabilitating or reforming the offender. The other general utilitarian aim has been, of course, incapacitation, the argument being that you may have to lock a person up in order to prevent him or her from committing a crime.

In contrast to these three principle utilitarian aims of sentencing is the retributive aim. More recently, we hear the principle of sentencing talked about in terms of deserved punishment, or just deserts. It is fair to say that there is a distinction between just deserts and retributionism although they are certainly closely related. The major distinction between the utilitarian and retributive concepts is that sentencing based on the utilitarian principle is intended to achieve some purpose for the good of society, generally. In addition it has a predictive component while the just deserts concept of punishment simply looks back to the harm done. In the latter case punishment may only and must be commensurate with both the degree of harm done and the culpability of the offender. Punishment is justified on moral grounds and not on grounds of effectiveness or utilitarianism. The trend recently, at least in the United States, very definitely is away from those utilitarian aims of sentencing and paroling, and very strongly toward a just deserts orientation.

A second, related trend is one toward a greater degree of determinacy in sentencing and away from the concept of the indeterminate sentence. Indeterminate sentencing has existed in the United States since early in the century, beginning in about 1908 with the State of Washington. California had an indeterminate sentencing law by 1918. And, since the early part of the century, the concepts of probation and parole have developed in conjunction with the concept of indeterminate sentencing. Under indeterminate sentencing the penalty was often not fixed at the time of sentence, but later, often much later, by a parole board. This is changing: the trend is now toward a narrowing of the range of permissible punishments, toward fixing the penalty early and, thus, toward a greater degree of determinacy in sentencing.

These trends have come from three general types of criticisms about both sentencing and parole. The first set of criticisms concerns procedural issues, issues of due process and fairness. The second criticism centres on the uncertainty experienced by an offender who must go to prison without knowing when he or she will be released. It is argued that this is counterproductive to rehabilitative aims. Moreover, it is argued, this uncertainty is not fair. The third general type of criticism is that the system simply is not effective. There is a large volume of literature about the rehabilitation model and whether or not it does work. Much of the research may easily be questioned and indeed has been recently in the United States by a panel on rehabilitation research from the National Academy of Science which came to a conclusion that differs significantly from what we have been reading for several years.

Their main conclusions were: one, that the effectiveness of the rehabilitation model has not been properly researched, and two, that treatment programs have been implemented with little regard for the integrity of the concept and without due attention to the required strength or "dosage" of treatment. Given the methodological flaws in the research that has been done, the panel concluded that we cannot inform policy from what is now known about rehabilitation.

We do not yet know what the trends in sentencing and parole, which are the product of criticisms about the rehabilitation model, will bring. This is all still too recent a phenomenon. There is, however, some evidence to suggest that these trends have increased the time served by offenders in some places.

Three general solutions have been proposed for the problems identified by critics of the system. The first is fixed-sentencing, that is, sentences flatly-fixed either by the legislature or by the judiciary at the time of

sentencing. A related, if somewhat different concept, is that of mandatory sentencing. In a number of States new legislation has been passed for mandatory sentences or mandatory minimum sentences which reduce, if not altogether eliminate, discretion. In my State, New Jersey, a mandatory sentence of two years has been passed recently for any property offence that involves possession of a weapon. This is one proposed solution.

The second solution is referred to as presumptive sentencing or sometimes presumptive parole. This means that there is an assumed sentence for a given offence but with some leeway. The sentence might be increased (the phrase in California is "enhanced") or decreased for a specific reason. Thus, some discretion exists but not as much as before.

The third general solution advocated is the development and implementation of guidelines for both sentencing and parole. For example, the United States Parole Commission operates according to procedures that seek to structure and control discretion without removing it. Guidelines are an attempt to provide a middle ground between discretion and control. That is to say, discretion is a necessary element of sentencing, given the complexity and variety of offenders and their behaviours, but it must be controlled. According to this approach, people may be qualified to exercise discretion but they also have to be able to provide reasons for their decisions. Therefore, a more open system, one that makes policy publicly known and open to criticism and debate, is part of this solution.

The three trends I have discussed are bound to have major consequences not only for offenders and corrections systems, but for all of us. While it is too early to know exactly what these consequences will be, I think that it is extremely important to monitor what is happening. If the predictions are correct, the current trends toward fixed or mandatory sentences and presumptive sentences will increase overcrowding in our prisons.

There are very great problems in deciding how to manage the problem of overcrowding during a time of fiscal restraint such as the one we are experiencing. There are many empirical questions related to these issues that ought to be tested and there are ways available to test them. I think we should be urging that the situation be monitored closely to ascertain whether we are moving toward a greater degree of justice and effectiveness.

David Rothman recently suggested that the current trends in sentencing may be part of a more general social trend in the United States. He suggests that, in the heyday of the indeterminate sentence and the rehabilitative ideal, everyone assumed that the treaters and the treated were on the same

side. But the current generation of reformers question whether the paternalism of the state should be trusted. Rothman argues that the trends I have been discussing have emerged from a concern about the issues of equity and fairness, and that probably they are taking us in the right direction, that is, toward increased fairness and equity. But he suggests that, in proposing these reforms, this generation of reformers has inadvertently pitted rights against needs. He suggests further, and I agree with him, that the challenge now is to achieve reforms that might increase fairness and equity while, at the same time, preserving our ability to provide needed correctional services to offenders.

PAROLE AND DISCRETION IN THE U.S.S.R.

Peter H. Solomon Jr.
Professor of Political Economy
University of Toronto
Toronto, Ontario

The history of parole in the U.S.S.R. demonstrates that, without clear directives from the central authorities, prison and parole officials will be forced to make decisions without guidance, to set their own priorities and they may well do so capriciously. In the Soviet Union, extraordinary laws and directives have frequently given policemen and judges the opportunity to enforce the law virtually as they see fit. In the case of parole, a long series of ambiguous and at times conflicting directives have shown how easily the system can be subverted when there is no clear statement of its purpose.

I am going to restrict myself to discretion and parole in the Soviet Union and not try to go very far beyond that. Needless to say, I am speaking as an outsider. I spent a year in the Soviet Union doing research on penal policy-making and I have been back other times. I do not have first hand information about how officials in prisons are actually making decisions, but I think a fair amount can reasonably be inferred from what I have observed of the system.

I would like to use the checkered history of parole in the U.S.S.R. to illustrate a simple, obvious but nonetheless important proposition. If politicians or central authorities wish to guide or direct the exercise of

discretion by officials, and usually they do, the politicians must supply those officials with clear directives and clear guidelines and must avoid making demands which have contradictory implications. Otherwise, the officials will be forced to take decisions without guidance, to set their own priorities, and they may well do that capriciously. In the Soviet Union, and one expects, in other authoritarian states as well, this has happened all too often. In the Soviet Union, for example, special campaigns and extraordinary laws and directives frequently give policemen and judges the opportunity to enforce the law virtually as they see fit. These things can probably happen in democratic countries as well.

In the Soviet context, parole has always referred to conditional early release without supervision. Twice in Soviet history, politicians have responded to the desires of penologists and mandated a sophisticated plan for conditional early release, plans which required prison officials, commissions and judges to release prisoners on an assessment of their progress towards rehabilitation. But in each instance the officials were forced, in time, to respond to other pressures deriving from the same politicians' economic policies, pressures which undermined the officials' reliance on penological considerations in rendering discretionary judgements.

Although the Czarist government hesitatingly allowed the establishment of a modest parole scheme in 1909, it was only under the Bolsheviks that Russia acquired a system of early release with broad eligibility. Captivated by the progressive penology of the day, Bolshevik politicans tried to introduce in their prisons the progressive stage system of which early release was the ultimate reward. In theory, the prisoner had to demonstrate good behaviour before being released and a special commission in each province was supposed to screen the recommendations for parole that were forwarded by prison authorities. In practice, however, neither prison officials nor the commissions had the chance to make judgements. Reeling under the pressure of overcrowded prisons, itself a reflection of the new commitment to police petty crime, and the absence of funds for new prisons, prison officials paroled almost every offender as soon as he became legally eligible; the commissions simply provided the necessary rubber stamp. Moreover, politicians tried to ease the pressure with frequent amnesties, through which many offenders gained release even earlier than they would have if paroled.

In the 1930s, when Soviet prisons and camps assumed an economic role and their numbers increased dramatically, the pressure to parole every prisoner disappeared. Prison officials were still not free to base decisions about early release on penological considerations alone. Now that the effectiveness of penal institutions was judged according to their productive output (the

prison was after all part of industry), the officials found it expedient to use early release as a reward for hard work, regardless of whether prisoners showed signs of rehabilitation. Parole remained a part of Soviet law until 1939; however, in practice, officials replaced it with a system of labour day accounts in which one day of productive work counted for two days of the sentence, sometimes even for three. Release according to labour day accounts involved the exercise of discretion, it is true, but not of the sort which penologists had in mind when they designed parole. It might be argued that Soviet politicians tacitly supported the replacement of one principle of discretion by another, but the message which they sent to prison officials was ambiguous.

The second attempt to establish a parole system in the U.S.S.R. came after Stalin's death. As one part of the liberalization of the criminal law, in reaction to Stalin's excesses, Soviet leaders re-established parole in 1954. They allowed jurists to develop a sophisticated system of eligibility and principles for parole decisions, all of which were in operation by the end of the decade. At the prompting of penologists, the alternative scheme of release by labour day accounts was officially abolished. By the mid-1960s, the new parole system was well established. But it then became a prime target of criticism in a new surge of law and order sentiment, and this in turn led to some tightening of the rules for parole eligibility and the development in law of even more sophisticated criteria for parole decisions. The criteria included the particular crime committed, the criminal record, and evidence of rehabilitation.

Yet at the very time that the jurists were elaborating these refinements, penal practices began to respond to new economic pressures. In 1964, a semi-secret edict to the Presidium of the Supreme Soviet established another variation of parole, a system called "conditional release for work on construction sites". The purpose of this new measure was clear enough. It was to supply convict labour for large construction projects in remote areas, for example, for the construction of the Baikal-Amur Railroad, and the opening of the Tiumen oilfields. Unlike parole, which was supposed to be rationed carefully according to the offender's crime, his record and his behaviour in prison, the new conditional release could be applied to the overwhelming majority of prisoners early in their terms, as long as prison officials so decided and the prisoners agreed. There were very few exclusions. Murderers and some people with particularly bad records were exempted but almost everybody, including people who would normally be paroled only after serving three-quarters of their term, could be sent off after serving less than a quarter of the term under this system of conditional release.

One can safely assume that the number of persons awarded conditional release for work on construction sites was controlled by labour demands rather than by the success of the prisoner's rehabilitation. As a result, both the type of early release that a particular prisoner would receive and its rationale became unpredictable and remained so for a number of years. The ambiguity was for the most part removed in 1977 when conditional release for work on construction sites was upgraded into what is now called "conditional release with compulsory labour assignment". This was publicized as a progressive penal measure, as a form of gradual decarceration which was to accompany a new sanction known as "suspended sentence with compulsory labour". The demand for convict labour had reached the point that Soviet authorities decided to despatch most prisoners to construction sites.

According to the testimony of a particularly reliable penologist, almost every prisoner became a beneficiary of the new version of conditional release, so that, to quote Mikhlin, "Work on construction was converted into a stage of punishment for persons deprived of their freedom". As Mikhlin depicts it, almost everyone sent to a prison or colony would, after a quarter, third or half of his term, be sent to a construction site, where he would be compelled to work and to periodically report to the police.

What effect did this have on the Soviet prison official committed to choosing candidates for parole on the basis of penological considerations? The bulk of his clientele now disappeared from his control long before they became legally eligible for parole. His exercise of discretion was restricted to prisoners with terms too short to involve a transfer to construction sites and to the few invalids not sent to the construction sites. Admittedly, the new law did allow convicts who had compiled good work records on the construction sites to apply for parole. However, the criteria for parole and its administrative organization remained obscure. My impression is that no one was appointed to this task. The convicts eligible for parole are often in places where there are no penal authorities, there is only the local police, and I doubt very much that they are being released early.

It is difficult enough to gain the compliance of officials making discretionary decisions when politicians supply clear guidelines and consistent criteria. The Soviet experience with parole demonstrates how easy it is to subvert a system of discretion by introducing conflicting principles into the choices that one expects officials to make.

END