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SENTENCING AND PUBLIC OPINION: TAKING FALSE SHADOWS FOR TRUE SUBSTANCES[©]

BY JULIAN V. ROBERTS* AND ANTHONY N. DOOB**

I. INTRODUCTION

It is not so much the laws or even the agencies of the criminal justice system that have the major impact on creating a just, peaceful and safe society. Rather, it is the attitudes and behaviours of individual citizens. The understanding and support of the public is essential to any reform process.¹

As this quote from the Government of Canada's most recent publication on sentencing suggests, attempts at reform which proceed without considering public opinion can have only limited success.

Recent events in Canada have provoked a resurgence of interest in public opinion concerning sentencing. The release of the Canadian Sentencing Commission Report² in April 1987, after almost three years of research and deliberation, has rekindled the public's interest in, and focused debate upon, the sentencing process. That the Commission would invest a significant proportion of its research

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The opinions expressed in this article are those of the authors and do not necessarily represent those of the Department of Justice, Canada or the Canadian Sentencing Commission.

¹ Canada, *Sentencing* (Ottawa: Supply and Services Canada, 1984) at 71.

² *Report of The Canadian Sentencing Commission: Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) (Chair: O. Archambault) [hereinafter *Commission*].

energies in an investigation of the public's views, attests to the importance it attached to this topic. Research by the Canadian Sentencing Commission represents the most systematic attempt to assess opinion and knowledge in this critical area of criminal justice.³

Concurrent with these developments, the academic literature in the field of criminal justice has reflected an increasing awareness of the importance of public opinion. This has resulted in a proliferation of empirical reports,⁴ as well as a series of theoretical works upon the topic. Leslie Wilkins' monograph *Consumerist Criminology* represents the apotheosis of this trend.⁵ It is no longer sufficient merely to document public disenchantment with sentencing trends, any more than it is sufficient merely to demonstrate disparity in sentencing. We need to know which sentencing patterns the public disagrees with, and why, just as we need to know what causes unwarranted disparity and for which offences the problem is most severe.

³ The national surveys of public opinion conducted by the Canadian Sentencing Commission in 1985 and 1986 are the major source of the findings discussed in this paper. They consist of a comprehensive, systematic examination of the views of the Canadian public upon sentencing issues. There have been other earlier studies which have employed smaller, less representative samples of respondents or which have examined a limited number of issues. See C.L. Boydell & C.F. Grindstaff, "Public Opinion and the Criminal Law: An Empirical Test of Public Attitudes Toward Legal Sanctions" in C.L. Boydell, C.F. Grindstaff & P.C. Whitehead eds, *Deviant Behaviour and Societal Reaction* (Toronto: Holt, Rinehart and Winston, 1972); A.N. Doob & J.V. Roberts, *Crime and Official Response to Crime: The View of the Canadian Public* (Ottawa: Department of Justice, 1982); A.N. Doob & J.V. Roberts, *Sentencing: An Analysis of the Public's View of Sentencing* (Ottawa: Department of Justice, 1983).

⁴ See, for example, Y. Brillon, C. Louis-Guérin & M. Lamarche, *Attitudes of the Canadian Public Toward Crime Policies* (Montreal: Centre international de criminologie comparée, 1984) at 185-201; M. Hough & D. Moxon, "Dealing with Offenders: Popular Opinion and the Views of Victims" (1985) 24 *The Howard J.* 160; Y. Brillon, "Les attitudes de la population à l'égard du système pénal: une perception négative de la justice criminelle" (1983) 36 *Revue International de criminologie et de police technique* 76; A.N. Doob & J.V. Roberts, "Social Psychology, Social Attitudes and Attitudes Toward Sentencing" (1984) 16 *Canadian Journal of Behavioural Science* 269; W. Samuels & E. Moulds, "The Effect of Crime Severity on Perceptions of Fair Punishment: A California Case Study" (1986) 77 *J. Crim. L. & Crimin.* 931.

⁵ L. Wilkins, *Consumerist Criminology* (London: Heinemann, 1984). See also D. Gibson, "Public Opinion and Law, Dicey to Today," chapter 1 in *Law in a Cynical Society? Opinion and Law in the 1980s* (Calgary: Carswell, 1985).

Two questions lie at the heart of this issue: First, how does the public view sentencing? Second, what formal role, if any, should public opinion play in the determination of sentencing and policy?⁶ This paper addresses the first of these questions. We shall briefly review the research literature on this topic and then present analyses of recent data which make possible a direct comparison between public opinion and judicial practice.

Most writers⁷ contend that members of the public are consistently more punitive in sentencing than are judges. According to this view, following the desires of the person on the street would result in overloading correctional facilities with more offenders, incarcerated for substantially longer terms than at present. But is this in fact the case? In this paper we present new data testing the hypothesis that members of the Canadian public are highly punitive or even more punitive than the courts. We contend that to say the public is more severe than the judiciary is, at best, an extreme oversimplification and is, at worst, simply wrong.

II. PREVIOUS RESEARCH ON THE VIEWS OF THE PUBLIC

Support of the perception that the public favour harsher sentencing derives almost exclusively from opinion polls which have posed a single, simple question: "In general, would you say that sentences handed down by the courts are too severe, about right, or not severe enough?" Table 1 presents the distribution of responses in Canada to this question over the past twenty years. Taken at face

⁶ There is no systematic empirical research in Canada upon the issue of whether (and to what extent) judges take public views – or their perceptions of public views – into account when sentencing offenders. There is some research in the United States, but the results are equivocal. See H.M. Kritzer, "Federal Judges and their Political Environments: The Influence of Public Opinion" (1979) 23 *Am. J. of Pol. Sci.* 194; J.H. Kuklinski & J.E. Stanga, "Political Participation and Government Responsiveness: The Behaviour of California Superior Courts" (1979) 73 *Am. Pol. Sci. Rev.* 73 at 1090.

⁷ Thus, for example, Professor Ezzat Fattah cites the rising rates of incarceration in Canada and notes: "Despite this, the Canadian public is still asking for more." Fattah then proceeds to cite the survey results summarized in Table 1 of this report. E.A. Fattah, "Making the Punishment Fit the Crime: The Case of Imprisonment" (1982) 24 *Can. J. Crim.* 1.

value, the 1987 data⁸ suggest that four people out of five would favour a harsher sentencing policy towards convicted offenders.

Table 1

Public Opinion^a of Sentencing Severity in Canada (1969-1987)^b (%)

	Too Severe	About Right	Not Severe Enough	Don't Know	Total
1987	3	12	78	7	100
1986	1	28	61	10	100
1985	2	25	65	8	100
1983	1	17	80	2	100
1982	4	11	79	6	100
1981	4	18	72	6	100
1980	4	19	63	14	100
1977	4	12	75	9	100
1975	4	13	73	10	100
1974	6	16	66	12	100
1969	2	22	58	18	100

^a Source: The Canadian Gallup Poll Limited.

^b Question: "In general, would you say that sentences handed down by the courts are too severe, about right, or not severe enough?"

The result seems clear enough, but what these numbers fail to take into account is the very real discrepancy between what people think sentences to be and what, in fact, they are. Members of the public systematically underestimate the severity of some

⁸ Source: Canadian Gallup Poll Limited, "78% polled say courts too easy on criminals" *The [Ottawa] Citizen* (14 January 1987) 4.

current sentencing trends. Thus, part of the reason for public disenchantment with sentencing is public ignorance of actual sentences. This should not be surprising, as the current state of sentencing statistics in Canada makes it hard for even criminal justice professionals to ascertain sentencing patterns.⁹ In 1982 a representative sample of the Canadian public was asked to estimate the percentage of offenders imprisoned for three high-frequency offences: robbery, break and enter, and assault. Table 2 provides a breakdown of respondents' estimates.

Table 2

Public Estimates^a of Incarceration Rates^b (%)

Public Estimates	Offence		
	Assault	Break/Enter	Robbery
Accurate ^c	18	9	9
See system as more lenient than it is	60	81	91
See system as harsher than it is	22	10	—
Total ^d	100	100	100

^a Source: A.N. Doob & J.V. Roberts, *Crime and Official Response to Crime*, *supra*, note 3.

^b Questions:

- (1) "Of every 100 persons convicted of beating up another person, what percent do you think are sent to jail?"
- (2) "Of every 100 persons convicted of breaking into someone's home or business, what percent do you think are sent to jail?"
- (3) "Of every 100 persons convicted of robbing a grocery store or gas bar attendant, what percent do you think are sent to prison?"

^c Range considered accurate: assault, 36-41%; break/enter, 30-49%; robbery, 85-90%.

^d Excludes respondents choosing "don't know" (8% of sample).

⁹ For documentation and further discussion of the imperfections of our knowledge of current sentencing practice, see Commission, *supra*, note 2 at 442-49. The sentencing data presented in this article are the first reliable sentencing statistics available for some time.

Clearly, the respondents underestimated the severity of current sentencing practices. For example, while approximately 90 percent of offenders convicted of robbery were incarcerated, almost three-quarters of the polled public estimated the incarceration rate for robbery to be less than 60 percent. Over one-half of the respondents estimated that fewer than 40 percent of convicted robbers were sent to jail. Similar results emerged for break and enter and assault.¹⁰

III. PUBLIC KNOWLEDGE OF STATUTORY MAXIMA

Canadians also underestimate the severity of penalties prescribed in the *Criminal Code of Canada*.¹¹ When asked in 1986 to estimate the maximum penalty to which a judge could sentence an offender convicted of theft over \$200, 63 percent of respondents provided an estimate of between one and five years' imprisonment. The statutory maximum for this offence is ten years' imprisonment. A similar pattern of underestimation emerged for other offences. For example, 71 percent underestimated the maximum penalty for breaking and entering a business premise. These findings echo those derived from research in other countries.¹² Part of the dissatisfaction with sentencing trends expressed by some Canadians (or at least part of the pressure to legislate harsher penalties) might be allayed by providing the public with more accurate information about the potential severity of current maximum penalties, as well as the actual severity of current sentencing practices.

¹⁰ See Doob & Roberts, *Crime and Official Response to Crime*, *supra*, note 3.

¹¹ R.S.C. 1985, c. C-46.

¹² Research in the U.S. by Williams, Gibbs and Erickson also found widespread public ignorance of statutory maxima. See K.R. Williams, J.P. Gibbs & M.L. Erickson, "Public Knowledge of Statutory Penalties" (1980) 23 *Pacific Soc. Rev.* 105. These authors note: "The overwhelming majority of respondents were unaware of the statutory maximums for all penalties and all crimes." *Ibid.* at 115. See also California Assembly Committee on Criminal Procedure, *Deterrent Effect of Criminal Sanctions* (Sacramento: Assembly of the State of California, 1968). This finding raises important questions about the deterrent power of the criminal law: penalties can only deter if potential offenders are aware of them.

IV. PUBLIC KNOWLEDGE OF SENTENCING-RELATED STATISTICS

Most members of the public believe crime to be a more serious problem than it is. This is apparent from survey research¹³ which has found that the public overestimate the amount of crime involving violence. As can be seen from Table 3, an overwhelming majority of respondents overestimated the proportion of crimes in Canada involving violence.

Table 3

Public Estimates^a of the Percent of Crimes
that Involve Violence^b (%)

Correct ^c	4
Small overestimate of problem (10-29%)	16
Large overestimate of problem (30-100%)	80
Total	100 ^d

^a Source: A.N. Doob & J.V. Roberts, *Crime and Official Response to Crime*, *supra*, note 3.

^b Question: "In your opinion, of every 100 crimes committed in Canada, what percent involve violence – for example, where the victim was beaten up, raped, robbed at gunpoint, and so on?"

^c Correct estimate = 8% (Source: *Selected Trends in Canadian Criminal Justice* (Ottawa: Ministry of the Solicitor General, Canada, 1981).

^d Excludes respondents choosing "don't know" (7% of sample).

In a similar vein, responses to another question on the same poll reveal that the public have an unduly pessimistic view of the recidivism rates of offenders. Public estimates of the percentage of first-time offenders who commit further crimes are far in excess of

¹³ See Doob & Roberts, *Crime and Official Response to Crime*, *supra*, note 3.

the official rates.¹⁴ This is true for property offenders and offenders convicted of violent crimes.¹⁵ Similar results appear for offenders released on full parole, as the following data show. When asked to estimate the proportion of offenders released on parole who commit violent offences within three-years of release, most respondents estimated between 40 and 100 percent of those paroled (see Table 4). Official recidivism data show a far more optimistic picture: approximately 13 percent of paroled offenders committed a violent offence within the period.

In addition, the public perceives the parole authorities to be effecting a greater reduction in time served than is the case. Although only approximately one-third of the federal inmate population eligible for full parole are granted early release by the National Parole Board,¹⁶ the public have a different view. When asked to estimate the percentage of inmates that obtain release on full parole, most people estimated between 60 and 100 percent. Eradication of this and other myths through public education would encourage people to question, and perhaps revise, their unfavourable views of the courts.

The implication of these data is clear: the negative view of sentencing attributed to the public reflects, to a degree, ignorance of sentencing patterns, statutory maxima, and criminal justice statistics, rather than mere punitiveness. There is a need, then, for more public education in the area of sentencing. The extent to which the current degree of public alienation from the criminal justice system, particularly the sentencing process, can be alleviated by education is an empirical question, but the opportunities are clearly there. Any attempt to convey a more accurate view of sentencing to the public will have to take into account the role of the mass media. We shall now explore the image of sentencing that is currently transmitted by the news media in Canada.

¹⁴ *Ibid.* at 12-13. See also J.V. Roberts & N.R. White, "Public Estimates of Recidivism Rates: Consequences of a Criminal Stereotype" (1986) 28 Can. J. Crim. 229.

¹⁵ For example, while approximately 17% of first-time offenders are reconvicted of crimes of violence, the public estimates the recidivism rate (percentage reconvicted) to be almost 60%. Source: Law Reform Commission of Canada, *Studies on Imprisonment* (Ottawa: Supply and Services Canada, 1976).

¹⁶ Research and Statistics Group, *Selected Trends in Canadian Criminal Justice* (Ottawa: Solicitor General Canada, 1984).

Table 4

Public Estimates^a of the Percentage of Parolees Who Commit Violent Offences Within Three Years of Their Release^b (%)

Accurate (10-19%) ^c	8
Small overestimate of problem (20-39%)	21
Large overestimate of problem (40-100%)	68
Underestimate of problem (0-9%)	4
Total	100 ^d

^a Source: Doob & Roberts, *Crime and Official Response to Crime*, Table 4, *supra*, note 3.

^b Question: "Of every 100 persons released from prison on parole before their sentence is completely served, what percent do you think commit a crime involving violence – for example, murder, rape, or robbery, within the first three years after being released?"

^c Source: Solicitor General of Canada, *Solicitor General's Study of Conditional Release* (Ottawa: Ministry of the Solicitor General, Canada, 1981). The "correct" figure noted above involves only those released from federal penitentiaries and thus excludes those released from provincial prisons. Provincial data are not included because of problems of non-comparability of federal and provincial data. It is difficult to know how this estimate would change if provincial data were included although it is worth noting that for those serving short sentences, parole is often out of the question since it is often not possible to gather information for the parole board in time to make a decision.

^d Excludes respondents choosing "don't know" (8%); total exceeds 100% due to rounding.

V. COVERAGE OF SENTENCING BY THE NEWS MEDIA

When members of the public were asked where they obtain their information about sentencing, 95 percent of respondents cited one of the news media as their primary source.¹⁷ Although they play an important role in the dissemination of information, it is clear that, as with other criminal justice issues, the media convey a distorted picture of sentencing practice and policy. Systematic

¹⁷ See Commission, *supra*, note 2 at 25.

content analyses¹⁸ of newspapers in Canada reveal that sentencing stories are brief and provide the reader with little information about the case or the relevant sentencing provisions. A recent study found that no mention was made of any particular purpose of sentencing in 90 percent of the stories sampled. The relevant maximum penalty was provided in only 23 of almost 800 stories. Moreover, the emphasis was overwhelmingly upon offences against the person: this category accounted for over half the crimes for which sentences were reported. Lastly, by far the most frequently reported disposition was incarceration, handed down in 70 percent of the cases covered by the newspapers.

Alternatives to incarceration were almost never mentioned. Restitution, for example, was mentioned in fewer than 1 percent of the cases reported by newspapers. Fines, which in reality are the most common disposition, were handed down in fewer than 10 percent of the cases covered. This last fact may have far-reaching consequences. In the public's view, non-custodial sanctions such as community service orders have simply not gained currency as autonomous dispositions; the public know little about them. It is perhaps not surprising, then, that the average person equates sentencing with a period of imprisonment. When members of the public are provided with information about community-based sanctions, they are not slow to support them. Increased public awareness of such alternatives to imprisonment may lead to an increased willingness to employ such dispositions in place of custody. These findings demonstrate that the public are unlikely to learn much from the news media about the topic of sentencing. It is not surprising, then, that the public have distorted views of sentencing.

In 1983, as part of the activities of the *Criminal Law Review*, the Department of Justice, Canada, commissioned a series of studies on public views of sentencing.¹⁹ The general finding of those studies was that public dissatisfaction with sentencing, which manifests itself

¹⁸ For analyses of Canadian news media, see Commission, *supra*, note 2 at 95-98; J. Roberts, *Sentencing in the Media: A Content Analysis of English-Language Newspapers in Canada* (Ottawa: Department of Justice, Canada, 1988). For analyses involving U.S. news media, see D. Graber, *Crime News and the Public* (New York: Praeger, 1980).

¹⁹ See Doob & Roberts, *Sentencing: An Analysis of the Public's View of Sentencing*, *supra*, note 3.

in the poll results seen in Table 1, is largely due to inadequate news media coverage of crime and the sentencing process.

In one experiment in this series, we compared the reactions of persons who had been randomly assigned to read one of two versions of the same sentencing hearing. One group read the newspaper account of a sentencing decision; the other group read a summary of the sentencing hearing transcript. Both versions were approximately the same length (about 1,700 words) and both contained the offender's criminal history, as well as details of the incident giving rise to the conviction. After reading the newspaper story (or transcript summary), participants were asked their opinion of the sentence, the judge, the offence, and the offender. The version read had a dramatic effect upon the subjects' reactions. Sixty-three percent of the group who read the newspaper account felt the sentence was too lenient; only 19 percent of the group who read the summary of the actual sentencing hearing endorsed that view. The effect was not limited to public perceptions of the appropriateness of the sentence; substantial differences emerged on responses to other questions as well. People assigned to read the newspaper version had significantly more negative views of the offender and the judge, and viewed the offence as being more serious than did their counterparts in the court documents group.

Other experiments,²⁰ as well as subsequent research, have confirmed the importance of the news media in shaping public attitudes towards crime, criminals, and the sentencing process. For present purposes, however, the lesson to be drawn from the research is clear: public reactions to actual sentencing decisions are not as uniformly negative as one might expect, given the data discussed above. In fact, there was evidence that in some cases the public may be less, not more, punitive than judges. For example, in the study just described, over half of the subjects who read the court documents summary tended to view the sentence (twenty-one months for assault causing bodily harm) as being *too harsh*.

²⁰ *Ibid.*

VI. WHERE DOES THE RESPONSIBILITY FOR REDUCING CRIME LIE?

The notion that members of the public are not necessarily as punitive as might be thought finds additional support in the responses to questions posed by the Canadian Sentencing Commission. Respondents were asked to state where they thought primary responsibility for reducing crime lay. Over half of the sample expressed the view that responsibility lay "with society generally," while only 15 percent chose the courts (see Table 5). Clearly most members of the public do not blame the courts for the prevalence of crime.

An interesting finding also emerges when responses to this question are cross-tabulated with responses to the question measuring satisfaction with sentencing trends (see Table 6). Those who view sentences as being too lenient are much more likely to view the courts as being primarily responsible for crime control. Increased satisfaction with the sentencing decisions of Canadian judges might well come about if these members of the public were to adopt the more community-oriented approach to crime control held by the majority of Canadians. Evidence of the public's reluctance to invoke imprisonment as a solution to the problem of crime control comes from another related question. Respondents were asked to choose from among a list of alternatives the single most effective way to control crime. Only 28 percent chose the option of making sentences harsher. The most popular solution (43 percent) was to reduce the level of unemployment. Increasing the number of social programs was favoured by a further 11 percent. The responses can be seen in Table 7 on page 504.

Table 5

Public Views^a of Who is Responsible for Controlling Crime^b (%)

Society generally	53
Courts	16
Employment/Community programs	15
Police	8
Corrections	6
Other	2
Total	100 ^c

^a Source: Canadian Sentencing Commission, *Report of the Canadian Sentencing Commission*, *supra*, note 2, Appendix C, Table 13.

^b Question: "Although reducing crime is a responsibility shared by many, where do you think the main responsibility lies?"

^c Excludes respondents choosing "don't know" (3%).

Table 6

Cross-Tabulation of Public Perceptions of Sentencing Severity and Responsibility for Crime Control^a (%)

Sentences are: ^b	Too Lenient	Too Severe
Who is responsible for crime control? ^c		
Courts	31	10
Police	8	20
Prison and parole	5	10
Community programs	8	20
Society generally	48	40
Total	100	100

^a Source: *Report of the Canadian Sentencing Commission*, *supra*, note 2.

^b Question: See Table 1.

^c Question: "Although reducing crime is a responsibility shared by many, where do you think the main responsibility lies?"

Table 7

**Public Opinion^a Concerning the Most Effective
Way to Control Crime^b (%)**

Most effective way to control crime	%
Reduce level of unemployment	43
Make sentences harsher	28
Increase use of alternatives to incarceration	14
Increase number of social programs	11
Increase number of police	4
Other	2
Total	100^c

^a Source: Report of the Canadian Sentencing Commission, *supra*, note 2.

^b Question: "Which of the ways listed would in your view be the single most effective way to control crime?"

^c Excludes respondents choosing "don't know" (4%); exceeds 100% due to rounding.

Another question asked members of the public to choose between two crime-control strategies: spending money on constructing prisons or on developing alternatives to incarceration. Fully 70 percent chose the alternative to prison construction; only 23 percent favoured building more prisons. Thus, although the public appear to know little about alternatives to incarceration (due to the news media's reluctance to report and discuss such alternatives), they strongly favour the concept.

These findings appear to be paradoxical. The public endorse restraint in the use of imprisonment, and yet this same public

laments the abolition of capital punishment²¹ and decries current sentencing practices as being insufficiently harsh. The paradox exists only to the degree that we accept single-question polls ("Are sentences too harsh?" or "Are you in favour of, or opposed, to the death penalty?") as an appropriate measure of public attitudes. The model of sentencing held by members of the public is no more monolithic or unidimensional than that endorsed by sentencing judges. The public may favour harsher penalties for certain offenders but less severe dispositions for others. A more refined and sensitive measure of attitudes is needed. Simply asking whether sentences are harsh enough is not adequate. Before turning to some recent data, we shall deal with the critical question of the sentencing purpose favoured by the Canadian public.

VII. PUBLIC VIEWS OF THE AIMS OF SENTENCING

If members of the Canadian public subscribe to a uniform, punishment-oriented sentencing philosophy, support for punishment/retribution should exceed the other, largely utilitarian, aims.

Where, then, do members of the public stand with regard to the most appropriate aim of sentencing? Pollsters have frequently presented the public with a list of sentencing purposes, asking them to endorse the one they feel is most apt. Under these conditions the results have been inconsistent. Waller and Okihiro²² found that the majority of respondents (57 percent) supported rehabilitation; only 9 percent supported general deterrence. More recently, Brillon, Louis-Gu erin, and Lamarche²³ uncovered greater support (31 percent) for general deterrence. The option closest to rehabilitation ("to enable criminals to return to a normal life") was endorsed by only 15 percent of the sample.

²¹ Results of the most recent opinion poll reveal that almost three-quarters (73 percent) of the Canadian public support the return of the death penalty. Source: *The Reid Report*, Vol.2, No. 4, April 1987.

²² I. Waller & N. Okihiro, *Burglary: The Victim and The Public* (Toronto: University of Toronto Press, 1978).

²³ See Brillon, Louis-Gu erin & Lamarche, *supra*, note 4.

The difficulty with this approach is clear: a single question invites — and may actually compel — respondents to endorse a single purpose when they might favour a multiplicity of aims. Different principles may be seen as relevant for different crimes. For minor offences, rehabilitation of the offender may seem paramount; for serious crimes, incapacitation of the offender may be the overriding consideration. Similarly, rehabilitation may seem appropriate only for first offenders, not multiple recidivists, whatever the crime. There is no scope in single-question opinion polls for this type of "interactive" sentencing, where the purpose selected interacts with the nature of the offence and the offender. We need to know, then, whether the public would apply the same sentencing model to offenders convicted of minor as opposed to major crimes. Ideally, we would want to know in much greater detail how the public would apply various principles to sentencing cases differing on many dimensions.

What happens when the questions posed to the public allow for greater flexibility? The results demonstrate that members of the public have a sentencing model more complex than that traditionally ascribed to them. In 1986, the Canadian Sentencing Commission asked respondents to state whether certain purposes were or were not relevant to sentencing. Respondents were first asked to consider offenders convicted of minor crimes such as shoplifting and then to consider offenders convicted of serious offences such as robbery. The results of these two questions can be compared in Table 8. It is apparent that the public consider the importance attached to each sentencing purpose to vary with the seriousness of the offence. Individual deterrence was the most popular option for offenders convicted of minor offences (endorsed by 34 percent of respondents), while incapacitation was seen as most appropriate for offenders convicted of serious crimes.

One final point is worth making before turning to the data comparing public opinion and judicial practice. The assumption is often made by commentators referring to the polls summarized in Table 1 (sentencing severity) that the public simply want harsher sentences. This implies an across-the-board increase in the severity of sentences for all offenders. Once again the single question precludes a comprehensive answer. This is apparent in the responses to a further question. In a 1983 poll, respondents were

Table 8**Public Opinion^a Concerning the Relevant Aims of Sentencing (%)**

Sentencing Purpose	Type of Offender	
	Minor ^b	Major ^c
To discourage the offender from committing further crimes (Individual Deterrence)	34	11
To provide a punishment that reflects only the seriousness of the offence (Just Deserts)	18	27
To rehabilitate the offender (Rehabilitation)	16	7
To discourage others from committing crimes (General Deterrence)	13	5
To show society's disapproval of the crime (Denunciation)	7	5
To prevent the offender from committing further crimes by imprisoning him or her (Incapacitation)	5	39
To provide restitution to the victim where this is possible (Restitution)	6	2
Don't Know	2	4
Total	100	100

^a Source: *Report of the Canadian Sentencing Commission, supra*, note 2.

^b Question: "Please say whether or not you consider each purpose (definition provided) relevant to sentencing an offender convicted of relatively minor crimes such as shoplifting or causing a disturbance."

^c Question: "Now turning to more serious crimes such as sexual assault or robbery, please say whether or not each is relevant."

asked to state the kind of offender they had in mind when giving their views of sentencing. Fewer than one-third chose "all offenders" as the response. Fully 38 percent were thinking of violent criminals; only 3 percent were thinking of people convicted of minor offences

involving property. Bearing in mind that violent offences constitute only approximately 5 percent of all reported offences,²⁴ it is clear that the majority of the public desire harsher sentences for a very small fraction of the total offender population.

VIII. COMPARISON BETWEEN JUDICIAL PRACTICE AND PUBLIC OPINION

A formal test of the hypothesis that the public are more punitive than judges requires both an index of punitiveness and data from a representative sample of the Canadian public. The measure of punitiveness employed here is the percentage of offenders incarcerated. A representative nation-wide sample of Canadians was asked to state what percentage of offenders who were convicted of, for example, arson, should be incarcerated. The average percentage was then compared to the proportion of convictions for this offence which resulted in terms of custody (federal or provincial). The dearth of reliable, national sentencing data in Canada makes such comparisons difficult. As noted by the Canadian Sentencing Commission in its report, national statistics on sentencing trends have not been routinely collected for over a decade. Accordingly, the criminal justice community has had to rely upon one-time special studies such as those commissioned by the Department of Justice, Canada in 1983²⁵ and 1987.²⁶ The data presented in Table 9 derive from a special study conducted by the Canadian Centre for Justice Statistics on behalf of the Canadian Sentencing Commission and the

²⁴ Solicitor General of Canada, *Selected Trends in Canadian Criminal Justice* (Ottawa: Solicitor General of Canada, 1984). These are occurrence statistics; the actual percentage of total crimes committed represented by crimes of violence is much smaller, as offences against property are far less likely to be reported to the police. (See, for example, Solicitor General of Canada, *Canadian Urban Victimization Survey, Reported and Unreported Crimes*, Bulletin 2 (Ottawa: Solicitor General of Canada, 1980).)

²⁵ Department of Justice, Canada, *Sentencing Practices and Trends in Canada: A Summary of Statistical Information* (Ottawa: Department of Justice, Canada, 1983).

²⁶ R. Hann & F. Kopelman, *Custodial and Probation Sentences (1984/85): Overview Report, (A Report of the Correctional Sentences Project)* (Ottawa: Department of Justice, Canada, 1987).

Department of Justice, Canada.²⁷ Asking the public to state the percentage of offenders who should be imprisoned also generates a measure of punitiveness from which a hierarchy of seriousness can be derived. As will become clear, it is necessary to compare the public and the judiciary in two ways: Firstly, in terms of overall punitiveness: do the public favour the use of custody to a greater degree than judges impose? Secondly, are the hierarchies of severity similar? Are the offences which actually attracted the highest rates of incarceration also the ones for which the public desire the harshest treatment?

IX. OVERALL PUNITIVENESS

The responses of the public and the practice of the courts are compared in Table 9. Statistical comparison of the incarceration rates derived from the two groups reveals no significant difference. The mean incarceration rates were: public — 66 percent; courts — 67 percent. Comparing average incarceration rates, then, fails to support received opinion concerning the views of the public — they are *not* significantly harsher than the courts. The difficulty with simply comparing incarceration rates is that the offences vary greatly in the number of offenders implicated. An alternative, more sensitive measure of punitiveness incorporates the actual number of offenders involved. We can compare the number of offenders who would be incarcerated in say, a two-year period, for these ten offences as a function of whether the views of the public or the actual incarceration rates were followed. Using this measure, the public are in fact *less* punitive than the courts. Following the rates derived from the public would result in the incarceration of 81,863 offenders.

²⁷ These data were drawn from the Fingerprint System of the R.C.M.P. The Canadian Sentencing Commission examined the database in detail and cross-checked the sentencing patterns against other data such as the ones alluded to above. For the offences presented in Table 9, no significant differences emerged, implying that these percentages provide a valid picture of recent sentencing trends. For a further description of this data base, see Commission, *supra*, note 2 and a recent publication of the Department of Justice: R. Hann & B. Harman, *Initial Assessment of Potential Applications of FPS/CPIC Data Base to Meet Statistical Requirements of the Department of Justice, Canada* (Ottawa: Department of Justice, Canada, 1986).

Table 9

Comparison Between Public Views and Actual Incarceration Rates (%)

Offence	Public		Courts	
	Rate ^c	Rank	Rate ^c	Rank
Kidnapping	89	1.0	89	2.5
Arson	81	2.0	62	5.0
Assaulting Police Officer ^d	71	3.0	46	10.0
Forgery	70	4.0	53	9.0
Robbery	64	5.5	92	1.0
Theft Over \$1,000	64	5.5	55	8.0
Fraud Over \$1,000	63	7.0	58	6.5
Possession Dangerous Weapons	57	8.0	58	6.5
Perjury	50	9.0	89	2.5
Break and Enter ^e	49	10.0	65	4.0
Average Incarceration Rate	66	—	67	—

^a Almost all the public opinion data derive from two surveys conducted by the Canadian Sentencing Commission (Canadian Sentencing Commission, *Sentencing and Public Opinion (Research Numbers 2 and 3)* (Ottawa: The Canadian Sentencing Commission, 1986)). The polls were conducted by the Canadian Gallup Poll Limited in 1986. The responses are drawn from interviews with a standard sample of over 1,000 respondents. A typical question is the following: "There are a number of different sentences an offender can be given other than a term of imprisonment. These include a fine, community service order, restitution or probation. What percentage of those convicted of perjury (e.g. giving false evidence in court) should be sent to jail?" For further details on the surveys, and the methodology, see the Commission's report, Chapter 4 and Appendix C. In addition, data relating to two offences (robbery and break and enter) have been included from an earlier poll conducted by the same polling company, with the same number of respondents. These data were collected in 1983. For further information, see A.N. Doob & J.V. Roberts, *Sentencing: An Analysis of the Public's View*, *supra*, note 3.

^b The source of the court data is a project conducted by the Canadian Sentencing Commission in conjunction with the Department of Justice, Canada. Information on current sentencing practice was collected from fingerprint files of the R.C.M.P. For a more complete description of this data-base, see the report of the Canadian Sentencing Commission, Appendix F.

^c That is, percentage the public would wish to see incarcerated, and the percentage that actually were incarcerated.

^d For this offence, the data represent both indictable and summary conviction cases.

^e Since the court data represent both offences involving private dwellings and business premises, the data from both questions posed to the public have been averaged.

In fact, 92,415 offenders were sent to prison for one of these ten²⁸ offences in the period covered by these data. Thus, when we compare public opinion to sentencing practice, we find evidence that the public are *less*, not *more* punitive than the courts.

The public, it would appear, do not favour a greater use of imprisonment than current practice entails. The responses of this representative sample of Canadians are quite close to the sentencing practices of judges. However, if the public are no more punitive in the extent to which they resort to the most onerous sanction, do they favour imprisonment for the same types of offences as do the courts? To answer this question we need to perform different analyses. It is necessary to compare not mere incarceration rates, but rather the hierarchies of offences (in terms of severity) derived from the two groups.

X. RANK-ORDERING OF OFFENCES

Table 9 also permits comparison of the rank-orderings of the ten offences. If the offences punished most heavily by the courts are also the ones viewed by the public as being most serious, the two rankings will be quite similar. They are not. Even a cursory glance at the two rankings will reveal discrepancies. For example, while robbery ranked number one in terms of the proportion of offenders actually incarcerated during this period (92 percent), it was relatively low in the public ranking (joint fifth, along with theft over \$1,000). Perjury has a high actual rate of incarceration (89 percent) yet is ranked only ninth by the general public. Not all are discrepant: kidnapping received close rankings (and incarceration

²⁸ Readers familiar with the report of the Canadian Sentencing Commission will note that Appendix C (Public Opinion Research) contains data on four offences not included in Table 9 of this paper. For example, assault was not included in the analyses reported here. These offences were deleted because it was felt that they provided an inappropriate comparison between the practice of the courts and the opinions of members of the public. The data on sentencing practices for hybrid offences are likely to present an inaccurate view of sentencing trends, skewed in the direction of severity. Although they have been excluded, their inclusion would not have changed the outcome of the analyses. Thus, a comparison between public views and judicial practice involving all fourteen offences instead of ten still yields no difference in terms of overall severity. Mean incarceration rates are: 64 percent (public) and 60 percent (courts). This difference is not statistically significant ($t(13) = .51; p > .05$).

rates) from both sources. However, when the two rankings are compared statistically, the results show no significant relationship between the two.²⁹ It is clear, then, that while the public favour the use of imprisonment to approximately the same degree as the courts, they would utilize this sanction for offenders other than those currently being incarcerated by the courts.

XI. DO THESE DATA OVERESTIMATE PUBLIC PUNITIVENESS?

There are several reasons to believe that the data presented in Table 9 *overestimate* the punitiveness of the Canadian public. First, when members of the public are asked about the average case of robbery, for example, they tend to think of cases that are far more serious than the average instance of robbery that confronts a judge. The only access most people have to episodes of criminality is through the mass media. As already noted, the news media in Canada and elsewhere tend to report serious offences, and only the more serious instances of those offences. Thus, when the public are asked to "sentence" the average case of robbery, they are in all probability recommending a sentence for a more serious than average case.

Second, earlier public opinion research has shown that when the public think of the term "criminal" or "offender," the majority response is to think of a person who employs violence or the threat of violence.³⁰ The word "criminal" connotes to most people a violent offender with a history of previous convictions for similar offences. To more properly equate the views of the public with the

²⁹ The appropriate statistical test to compare rankings of this nature is the Spearman Rank Order Correlation (RHO). The resulting RHO in this case was +.16, which could easily have occurred by chance (that is, it is not statistically reliable). Source: J.L. Bruning & B.L. Kintz, *Computational Handbook of Statistics* (Glenview, Ill.: Scott Foresman and Co., 1986).

³⁰ See Doob & Roberts, *Sentencing: An Analysis of the Public's View of Sentencing*, *supra*, note 3 at 15. See also Brillon, Louis-Guérin & Lamarche, *supra*, note 4 at 191.

practice of the courts, one would need to correct these misperceptions.³¹

Third, the sample of crimes examined in Table 9 includes most of the offences that would receive high rankings in terms of incarceration rates suggested by members of the public. It does not include a number of offences which in all probability the public would not wish to see punished by incarceration.

Lastly, these data consist of incarceration rates, not sentence lengths. Although the latter would also appear to be a useful index of comparison between public opinion and court practice, at present there are more disadvantages than advantages attached to them.

Comparing sentence lengths assumes approximately comparable knowledge of sentencing mechanisms, including early release on full parole. We have already noted the tendency of the public to assume that more inmates obtain early release than is, in fact, the case. In all probability, the public would "over-sentence" in order to take into account the possibility of release on full parole. Evidence from several sources suggests that many judges in Canada increment the sentences they hand down in order to take into account the possibility of release on parole.³² In all likelihood, the public would do the same, although they would "enhance" their sentences to a greater degree since they overestimate the extent to which full parole reduces time served in prison. Two-thirds of the public responding to a recent survey³³ believed parole boards had become more lenient over the past five years when, in reality, there

³¹ This problem could be circumvented by providing respondents with a description of a particular set of circumstances. In this way respondents are not required to rely on naive conceptions of the average case of, for example, robbery. However, this approach also has its deficiencies, for it requires the researcher to devise a set of facts corresponding to the average case appearing before the courts. This is an almost impossible task and also runs the risk of generating results which merely reflect the researcher's conceptions of criminal acts.

³² One study (J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971)) reports that two-thirds of judges surveyed admitted they adjusted their sentences in this way. The survey of judges conducted by the Canadian Sentencing Commission found a similar pattern: only 35 percent of respondents stated they *never* took the likelihood of full parole release into account when sentencing. See Commission, *supra*, note 2 at 242.

³³ See Commission, *supra*, note 2 at 92.

has been no appreciable change in release rates.³⁴ (Over half the respondents overestimated the percentage of inmates being released on full parole.) The inference from the data is clear: if the public had more realistic views of parole release rates, their "sentences" would be shorter than these data would suggest.

XII. SUMMARY AND CONCLUSION

For the past twenty years public opinion surveys, which have employed a single question approach, have generated results that appear to support the view that the public are more punitive than the courts. This interpretation fails to take into account the extent to which the public are misinformed about sentencing practices, statutory maxima, criminal recidivism rates, parole release rates, and crime rates. Moreover, when more sophisticated survey questions are posed, the results indicate both greater leniency towards offenders and greater flexibility in terms of the purposes of sentencing. Recent data comparing the public's views concerning the use of imprisonment with actual incarceration rates also contradict the view that the public are more punitive than the courts. When incarceration rates were compared, no significant difference emerged between the courts and the public. Moreover, when taking into account the actual number of offenders sent to prison, following the views of the public would, for many offences, result in fewer, not more, admissions to custody. However, there were substantial differences in terms of the rankings of seriousness derived from incarceration rates.³⁵

³⁴ Parole release rates (for federal inmates) in fact show a slight decline: 1983-84 = 31.5 percent; 1982-83 = 33.2 percent; 1981-82 = 33.8 percent. Source: Appendix C, Correctional Service of Canada, Policy, Planning and Systems Branch, *Offender Population Forecasts 1984-84* (Ottawa: Correctional Service of Canada, 1984).

³⁵ Of course, demonstrating that the public and judges disagree over the relative seriousness of different crimes does not explain *why* these differences exist. Limitations upon space have prevented us from exploring this issue in further detail. The two groups may differ in the way they define harm. The public appear to focus upon offences containing some possibility of individual victimization. Demographic differences between the two populations may also explain divergences in seriousness rankings.

It was not the purpose of this paper to establish definitively the appropriate (in the eyes of the public) incarceration rate for various offences. Respondents in these surveys were asked to make an immediate judgement based upon a brief description of offences. As we have argued here and elsewhere,³⁶ public views can be affected by the nature and quantity of information provided by the news media. These comparative data do, however, provide information relevant to the question of whether the public actually desire harsher penalties than those currently being imposed.

Clearly, the public desire for greater punitiveness — inflamed by inadequate media reports of sentencing hearings — has been overstated. A casual reading of newspaper editorials, letters to the editor, simplistic opinion polls and other imperfect measures of public sentiment would suggest that the public favour more severe sentences for all types of offenders. A uniform inflation of sentences would not, however, do justice to the complexity of public views. Systematic research using a representative sample of Canadians demonstrates that the public favour the use of incarceration to no greater degree than the courts currently impose. Sentencing reform initiatives aimed at reducing the extent to which the justice system employs incarceration should not, therefore, be inhibited by concern with a backlash of public opinion. In fact, members of the public would probably support the use of greater restraint concerning this sanction. Where the public and judges do differ, however, is upon the type of offenders sent to prison. Such differences may reflect disagreements about the relative harm inflicted by various offences. This topic warrants further research. In the meantime, interpreting opinion polls to mean the public are greatly dissatisfied with the severity of current sentencing practice is, in Shakespeare's words, to take "false shadows for true substances."³⁷

³⁶ Doob & Roberts, *Sentencing: An Analysis of the Public's View of Sentencing*, *supra*, note 3.

³⁷ Titus Andronicus, III, 2, 80.

