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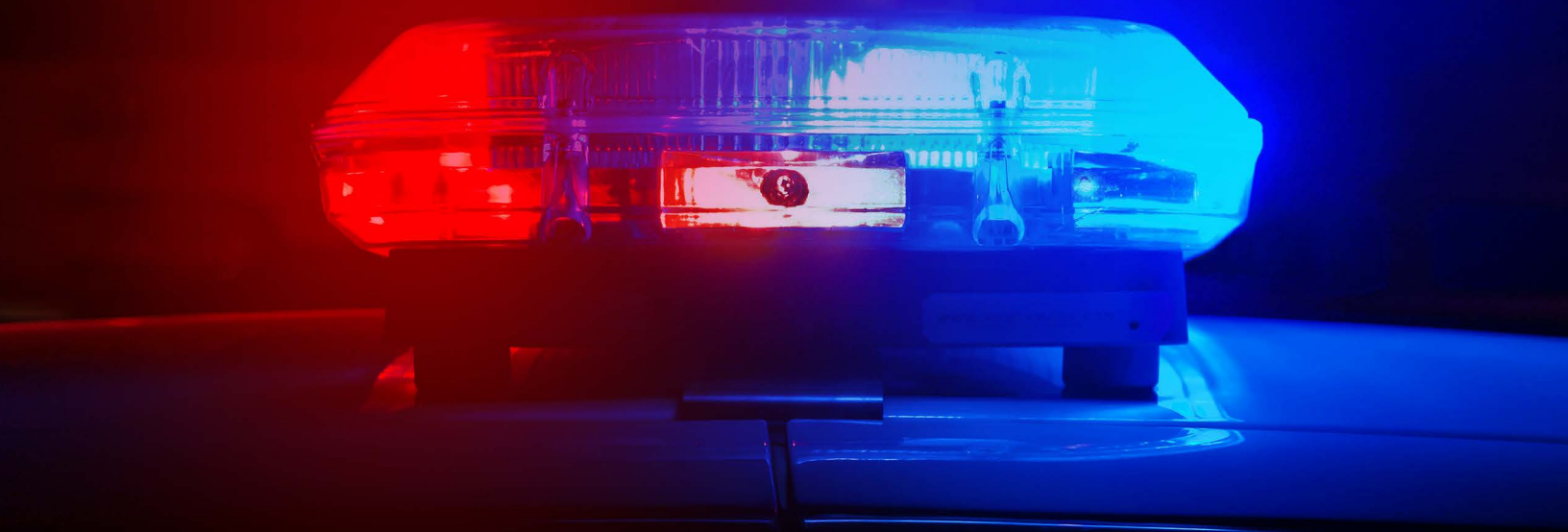
Troy Riddell
Dennis Baker

CONSERVATIVE CRIMINAL JUSTICE POLICY

New directions and alternatives



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TRUE NORTH
IN CANADIAN PUBLIC POLICY

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Aiming to fill a void in the national conversation, this paper lays out the key planks of a credible, principled, 'small-C' conservative approach to criminal justice.

However, our use of the term 'conservative' should not be conflated with partisan punditry. Our approach eschews simplistic 'tough on crime' rhetoric in favour of an approach that has four pillars: the common good of allowing people to live freely without fear of crime; respecting human dignity (for offenders and victims) and instilling responsibility for moral choices; preparing for re-entry as a moral, social, and political duty; and generating legitimacy through accountability. Our proposals are also attentive to empirical evidence about criminal justice; for example, the policy we lay out takes account of the real-world evidence that suggests the limited benefit of harsher sentences on improving deterrence and public safety. But it also recognizes the value of punishment as a legitimate goal of the criminal justice system and prioritizes the well-being of victims and the community. At times our policy emphasizes individual liberty and a limited state, and in other places recognizes the need for state actors to wield their resources to secure the wellbeing of communities and victims.

The paper is structured as a series of proposals addressing the stages of criminal justice administration: police investigation, pre-trial and bail, the trial and sentencing.

Regarding police investigations, Canada needs a codified set of police powers to help make policing more effective and accountable. This would provide guidance for law-enforcement on contested issues, while also ensuring avenues of police oversight and accountability. We discuss the success of the Police and Criminal Evidence (PACE) rules in England and Wales as a valuable model.

Canada should also adopt an approach that better streams offenders into three possible pathways: one in which diversion is employed, emphasizing responsibility, restitution, and rehabilitation/treatment; another focused on incapacitation, punishment, and treatment; and a third stream directing individuals into mental health services. This would allow the justice system to incorporate the salutary processes of restorative justice where appropriate, while also better serving communities by retaining violent and repeat offenders.

Canada's sentencing regime needs to be overhauled with a series of guidelines to better structure decision-making but without eliminating discretion when necessary. Cur-

rently, a lot of leeway is left to judges to hand down individualized sentences. Critics argue that this imperils the "similar sentence" provision in s.718.2(b) of the Criminal Code. The regime in England and Wales, which requires judges to go through a step-by-step analysis in sentencing, is once again a valuable model. The provisions of mitigation in place for marginalized communities should also be revised. A better system would list possible mitigating factors in the sentencing guidelines and make them available to all individuals. This could also help redress the disproportionate incarceration rates of Indigenous and other disadvantaged groups.

The core principle of Canada's corrections regime should be the gradual release of most offenders, facilitating self-improvement for offenders while in custody. Nevertheless, Government has a moral responsibility to incapacitate the small population of unrepentant, violent, and repeat offenders. Respect for human dignity requires acknowledging people can reform and be worthy of forgiveness, but it is also affirmed by treating some heinous choices as warranting separation – for life if needed – from the rest of Canadian society. **MLI**

Ce document a l'ambition de combler une lacune *du débat national : il présente les principaux éléments d'une justice pénale qui soit, par son approche, crédible, méthodique et modérément conservatrice.*

Cependant, notre utilisation du terme « conservatrice » ne saurait être assimilée à la partisanerie. Nous rejetons le discours réducteur de la « ligne dure contre le crime *» au profit d'une approche à quatre piliers : le bien commun engendré par une vie libre sans crainte du crime; le respect de la dignité humaine (pour les délinquants et les victimes) et la responsabilisation morale; la réinsertion en tant que devoir moral, social et politique; et une légitimité fondée sur la responsabilité. Nos propositions tiennent également compte des preuves empiriques en matière de justice pénale. À titre d'exemple, la politique que nous définissons s'appuie sur des données probantes quant à l'avantage limité de la sévérité des peines sur la dissuasion et la sécurité publique. Toutefois, cette politique valorise du même coup les sanctions comme objectif légitime du système de justice pénale et met l'accent sur le bien-être des victimes et de la collectivité. Si elle renforce la liberté individuelle et la notion d'un État restreint par moments, elle reconnaît, à d'autres, la nécessité pour les acteurs étatiques d'axer leurs ressources sur le bien-être des collectivités et des victimes.*

Ce document revêt la forme d'une série de propositions sur les différentes étapes de l'administration pénale : l'enquête policière, l'instruction et la mise en liberté sous caution, le procès et la condamnation.

En ce qui a trait aux enquêtes, le Canada a besoin d'un ensemble codifié de pouvoirs policiers pour améliorer l'efficacité et la responsabilisation de la police. Cet ensemble pourrait offrir des orientations pour l'application de la loi en présence d'enjeux contestés, en plus de garantir la surveillance et la responsabilisation de la police. Les règles PACE

*(*Police and Criminal Evidence*) en Angleterre et au pays de Galles sont considérées, compte tenu de leur succès, comme un modèle précieux.*

Le Canada devrait également adopter une approche qui améliore le cheminement des délinquants à travers trois voies possibles : celle de la réorientation, qui met l'accent sur la responsabilisation, la réparation et la réhabilitation ou réadaptation; la voie centrée sur la neutralisation, la peine et la rééducation; et la voie vers les services de santé mentale. Cela permettrait au système d'intégrer les salutaires processus de justice réparatrice lorsque c'est approprié, tout en servant mieux les collectivités grâce à l'incarcération des délinquants violents et des récidivistes.

Le régime de sanctions canadien doit être remanié en intégrant une série de lignes directrices visant à mieux structurer la prise de décision, sans pour autant supprimer le pouvoir discrétionnaire lorsqu'il s'avère nécessaire. À l'heure actuelle, les juges disposent d'une grande marge de manœuvre pour prononcer des peines individuelles. Les critiques allèguent que cela met en péril la disposition relative à la « peine similaire » à l'alinéa 718.2 b) du Code criminel*. Le régime en vigueur en Angleterre et au pays de Galles, qui exige des juges qu'ils procèdent à une analyse point par point pour déterminer une peine, offre une fois de plus un modèle précieux. Les dispositions actuelles sur les facteurs atténuants applicables aux communautés marginalisées devraient également être revues. Dans un système efficace, une liste de facteurs possibles, connus de tous, serait intégrée dans les lignes directrices relatives à la détermination des peines. Cela permettrait de remédier aux taux d'incarcération disproportionnés des Autochtones et d'autres groupes défavorisés.*

Le système correctionnel canadien devrait retenir comme principe fondamental la libération progressive de la plupart des délinquants : une incitation au développement personnel pendant la détention. En revanche, le gouvernement a le devoir moral de réprimer la petite population de délinquants impénitents, violents ou récidivistes. Le respect de la dignité humaine exige de reconnaître que les gens peuvent se réformer et mériter le pardon, mais ce respect est également confirmé en reconnaissant que certains choix odieux justifient une réclusion – à vie si nécessaire. **MLI**

Introduction

Following the killing of Constable Greg Pierzchala by an individual on bail, Conservative Party leader Pierre Poilievre called the Liberals and NDP coalition "soft on crime" on Facebook and in media interviews indicated that reforms needed to be made to Canada's "catch and release" bail system (Gilmore 2023). Criminologists and legal commentators responded to such calls for more punitive policies by arguing that they tend to further disadvantage society's most vulnerable, and that sending more people to prison for longer does not improve public safety, because jail sentences do not fix underlying reasons for offending (and may in fact contribute to more offending), nor do they tend to act as a deterrent (Gilmore 2023). During this and other exchanges we noted that, to our knowledge, there was not a systematic and credible small-C conservative approach to criminal justice available as an alternative to the dominant narrative amongst academic and legal commentators – one that may appeal to not only Conservative partisans, but individuals across the political spectrum who may have concerns about approaches that are overly focused on the offender's circumstances and well-being, fail to recognize the value of punishment as a legitimate goal of the criminal justice system, and downplay the adverse effects of criminal actions on victims and the community. Here we aim to begin to fill that void.

In doing so, we argue that a compelling conservative approach to criminal justice would have to address real-world evidence (such as the limited impact of harsher sentences on deterrence), and offer proposals that are likely to actually enhance public safety while also respecting civil liberties. Although our proposals are aimed at the federal-level, we recognize that provincial-federal cooperation will be required and that better implementation (funding, training, personnel, and data collection) is often as important as any formal change to the law.[1]

At the outset, we note that defining a "small-C conservative" approach is difficult given the various strands of what people consider (rightly or wrongly) to be conservative. We see promise in building a conservative criminal justice agenda around these four pillars: the common good of allowing people to live freely without fear of crime; respecting human dignity and instilling responsibility for moral choices; preparing for re-entry as a moral, social, and political duty; and generating legitimacy through accountability (Rizer, 2023). Too often, such moral dimensions of criminal justice are downplayed in favour of technocratic legalism or consequentialist reasoning favouring offenders; conservatives should not be shy about the values embedded in a truly just system of criminal law. In his discussion of human dignity (2023), Professor Rizer captures the philosophical underpinnings of what a conservative criminal justice program should entail:

> *...a dignity focused criminal justice system makes space for both the perpetrator and the victim, punishing crime appropriately (but not excessively) while not dehumanizing the criminal by assuming that the lives of criminal offenders lack human potential. It provides both necessary and appropriate incapacitation while also accepting the social responsibility that comes with the power to incapacitate: to help prepare offenders for their return to society, ready to reclaim their due place as part of our body politic free of continuing criminal sanction. Fundamentally, such a program sees the criminal justice system as a moral enterprise, with concurrent duties that run to the public, to victims, and to perpetrators"(Rizer 2023, 76).*

In our view, a dignity-centred approach to "punishing crime appropriately (but not excessively)" requires recognition that there is always some degree of choice to engage in criminality and that one's human dignity is respected by taking that choice seriously and punishing its wrongfulness, rather than pretending that there was no element of choice or that no choice can be considered wrongful. At the same time, a dignity-centred approach requires understanding that such choices are made within social contexts and in light of personal experiences. Below, we set out proposals that incorporate human dignity as well as commitment to re-entry, public safety, and accountability.

In attempting to translate these values into specific policy proposals, we utilize different conservative perspectives on the role of the state – at times emphasizing individual liberty (and a limited state) and in other places recognizing the need for state actors to have enough resources and authority (with appropriate accountability mechanisms) to maintain an environment in which individuals can live freely without fear of crime.

Conservatives are rightly skeptical of state power and of those that see more intrusive government as the solution to all societal ills, but the state's criminal justice authority is critical to preserve the social fabric and to promote the common good cherished by most conservatives.[2] Notwithstanding these and other tensions within conservativism, broadly speaking our proposals differ from more liberal or progressive understandings of criminal justice in a number of ways.

Our approach places more emphasis on public safety and the interests of victims, understanding that the rights of the accused should not be considered in isolation. We are less receptive to initiatives – such as easier bail release, the exclusion of evidence, and reduced sentences – that may undermine the truth-seeking, public safety, and punishment goals of criminal justice in the name of "social justice", while not addressing the underlying social problems that contribute to offending. We argue that judges should not have unfettered discretion to create "individualized" sentences for offenders and, rather than de-fund police, we should provide more structured rules around investigations and provide for greater police accountability. Finally, while we share a belief with more liberal commentators that there should be greater emphasis on diversion and restorative justice, the underlying rationales may differ somewhat. A broad range of conservatives should support diversion and restorative justice in appropriate contexts since they can reflect a number of broadly conservative values: cost-effectiveness; suspicion of state overreach; personal and community responsibility; and the importance of human dignity for both victims and offenders.

Our discussion is organized around highlighting potential reforms at various stages of the criminal justice system: police investigations; pre-trial processes (including bail); the trial stage, and sentencing.[3] A number of specific recommendations are made below, but the essence of our recommendations is: 1) to pass a codified set of police powers to help make policing more effective and accountable; 2) to better stream offenders into any of three

appropriate pathways – generally speaking, one in which diversion is employed emphasizing responsibility, restitution, and rehabilitation/treatment; another focused on incapacitation, punishment, and treatment; and a third stream of directing individuals into mental health services; 3) to overhaul Canada's sentencing regime with a series of guidelines that better structure decision-making while allowing for discretion when necessary; and 4) to support the above recommendations with federal initiatives and funding to provinces for data collection, training, and the development of community resources.

A. Investigating crime

The first part of the criminal justice process is the investigatory stage. Currently, the rules around how police investigate crime are primarily determined by courts, particularly the Supreme Court, in decisions involving the *Charter of Rights* as well as common law rules. These rules are further complicated by divided federal jurisdiction over policing, with some police procedure and administration being the responsibility of provincial legislatures, while the federal government holds legislative power over "criminal procedure". Furthermore, the RCMP takes on both a national and 'contracting' form with provinces other than Quebec and Ontario. Still, there is an obvious and considerable federal legislative and regulatory role for prescribing police behaviour. The federal *Criminal Code* contains rules around the powers of arrest, and various procedures for getting production orders and search warrants and the Supreme Court has shielded police powers related to criminal procedure from provincial laws.[4] In totality, the Canadian rules concerning policing are a confusing morass of common law precedents, federal and provincial statutes, and constitutional restraints; a mess which prominent law professor Kent Roach described as being difficult for even law professors to follow (2022: 52).

To the extent that it falls within its constitutional authority, Parliament should pass a codified set of police powers and associated Codes of Practice, similar to the Police and Criminal Evidence (PACE) rules in England and Wales. Even for policing matters beyond the limits of federal authority, it

would be fruitful to model this codification to encourage its emulation by the provinces. Compared to our current piecemeal system (largely created by courts), rules around police investigations would be simpler, more coherent, and the product of greater democratic legitimacy.[5] Initiating such a change would allow for Parliament to address gaps in the existing rules, such as the lack of guidance around policing protests, and clarify some others such as what constitutes a detention, and streamlining the warrant and production order regime. The institutional capacity of Parliament to conduct research on these issues and hear diverse opinions, rather than having them arise sporadically in legal cases in courts, would allow for more systematic policy-making. We anticipate that some of the codified rules would be similar to the extant ones, but in other situations we see virtue in a limited expansion or contraction of police authority.

For instance, the rules could give police better defined discretion to briefly stop and question individuals that is explicitly dependent on recognized contextual factors, such as location, time of day, and suspicious behaviour (for example, a pair of individuals in a business area in the middle of the night trying to hide something, versus in a residential neighbourhood during the day) (e.g. PACE A 2023 s2.6B). Consistent with PACE, these rules should emphasize that "police officers must recognise that searches are more likely to be effective, legitimate and secure public confidence when their reasonable grounds for suspicion are based on a range of objective factors," and emphasize that the use of such powers must be carefully monitored and open to scrutiny by communities (PACE A 2023 p10 and s5).

In other instances, we would argue for greater limits on police power, which would have the salutary effects of both improving policing and enhancing civil liberties and perceptions of fairness in the conduct of policing. Here we suggest that police interview techniques must be conducted in such a way as to keep an open mind and to generate the most reliable information (Miller, Redlich, and Kelly, 2018; Manishen, 2017; Cowan, 2020). We suggest a codification of rules against using racial profiling as a basis to form a suspicion of criminal behaviour. Such profiling, as Justice Miller of the Ontario Court of Appeal points out, is "rooted in a failure of practical reasoning" – we would argue that the codified guidelines adopt his approach for the judicial determination of profiling (in contrast to his colleagues in *R. v. Sitladeen* [2021], which Justice Miller found amounted to a *de facto* rebuttable presumption of profiling).

Courts would still undertake judicial review of this police powers legislation. It would be up to elected parliamentarians to determine whether a *Charter of Rights* ruling that overturns part of the code of police powers should itself then be subject to a reversal using the s.33 notwithstanding clause. Cases in which the Court is divided over the issue of rights and police power, which are not uncommon, would be one indicator to suggest that a reconsideration of the majority's position may be warranted. In individual cases, courts could also continue to exclude evidence under s.24(2) of the Charter. However, we would suggest that Parliament signal a preferred approach to the exclusion of evidence – one that prioritizes the inclusion of reliable evidence – in the bill of codified police powers.[6] While this may not be binding on the courts, we hope it may have some influence over how the s.24(2) test for excluding evidence evolves and is applied by the courts. Excluding evidence has a limited influence on police misconduct[7], and the repute of the administration of justice suffers when reliable evidence is excluded (except in cases where it is obtained in circumstances of police misconduct such that it would truly shock the community).[8]

Although we believe a codified set of police powers would be beneficial, continuing improvements would also need to be made to recruitment, training, feedback – and the ability of outside bodies, such as civilian complaints commissions, to provide oversight and accountability. Accountability and limits on police power are critical to restricting and making accountable the power of the state (Rizer 2023; Puddister and McNabb 2021). Many of these areas are currently administered by provincial governments. We suggest that the federal government enact model rules requiring police to record data and make it public (particularly around race and search and stops), but also provide leadership by funding systems for the better collection of data. A national police college might also be a way for the federal government to help encourage the professionalization of policing, especially in the face of calls to open the field to less credentialled applicants. The federal government could also make reforms to the RCMP that would enhance its national policing function and, if retained, improve its local service in contracting provinces (Roach 2022; Leuprecht, 2017; Mass Casualty Commission, 2020). All told, we argue that police power should be recalibrated and made clearer by a democratic process of legislative codification while also ensuring that there are multiple and robust avenues of police oversight and accountability.

B. Pre-trial

Once police have reasonable grounds to believe that an individual has committed a criminal offence, there are various possibilities as to what may happen prior to a trial taking place. Broadly speaking, individuals may be diverted (pre- or post-charge) from the criminal justice system conditional upon fulfilling certain commitments (particularly admitting responsibility), or they may be required to attend court for a trial. Some of the latter are held for a bail hearing to determine if they should be held or released prior to a trial. We have four general recommendations for this important pre-trial phase: 1) provide clearer guidance and leadership surrounding diversion, restorative justice, and problem-solving courts to divert offenders out of the regular criminal justice system, including greater use of mental health courts; 2) amend the bail provisions of the *Criminal Code* to better facilitate holding repeat and violent offenders, while still honouring the principle of innocence until proven guilty and the need for the least restrictive conditions needed for release; 3) invest resources to support these initiatives, including supports for mental health treatment, social supports for successful bail, and better capacity to monitor compliance with key bail conditions related to community safety; and 4) invest resources, change processes, and encourage culture change to speed up both bail hearings and the time it takes to get to trial generally. We discuss each of these ideas briefly in turn, referring to more in-depth studies for readers interested in more detail.

Diversion and restorative justice

The *Criminal Code* allows for diversion of offenders outside of the mainstream criminal justice system (while the *Youth Criminal Justice Act* more actively encourages diversion where appropriate). However, the Code provides relatively little guidance on how and under what circumstances diversion or restorative practices should be used (see s.717). Some of this reflects wide variability in the nature and availability of programming in each provincial jurisdiction. Federal and provincial ministers responsible for public safety released a general set of principles for restorative justice in 2018 (Canadian Intergovernmental Conference Secretariat, 2018). Yet specific on-the-ground policies around diversion and restorative justice – who is eligible, what are the criteria for access

and discharge, etc. – are found in various places ranging from Crown policy manuals to locally developed rules in drug treatment and other specialized courts. Diversion and restorative approaches should be more formally incorporated into federal law with associated policy guidelines that are made publicly available. (The federal government would have to work in concert with the provinces – and provide sufficient funding – to ensure that the *Criminal Code* did not establish programming that was formally but not practically available). We would suggest a focus on the role of victims, restitution (financial or community service), and rehabilitation with realistic supports to allow for the communal integration of offenders as they take responsibility for their actions. The guidelines, in our view, should not restrict the possibility of a restorative process to only minor crimes (Public Safety Canada, 2005). For example, some victims of sexual violence have found restorative processes to be preferable to the traditional criminal justice system (on the flipside, it is crucial that victims retain a veto over such approaches and that they always be responsive to victim concerns, so that they are not compelled to participate) (Wemmers, 2021; Gallant, 2023; Acorn, 2004). It may be that, for certain crimes, offenders would perhaps still be sentenced to a period of incarceration even after undertaking a restorative process, but the expectation would be that rates of incarceration decline overall.

> *Generally, federal legal, policy, and funding initiatives should be used to promote diversion and restorative options.*

Generally, federal legal, policy, and funding initiatives should be used to promote diversion and restorative options and should provide more structure for implementation and evaluation, while still allowing for local flexibility. Although diversion and restorative-justice programs are not panaceas for the complex needs of victims, the community, offenders and other actors, best practices have been shown to improve victims' assessment of the process, reduce overall costs, and help to reduce recidivism (Eggleton and Saint-Germaine, 2018; Shapland et al., 2008). It also requires offenders to hear

about the impact of their actions on victims – something that only happens in the relatively rare cases that are currently diverted or that go to trial (with the most robust opportunity to participate reserved for sentencing) (Lanni, 2021). Offenders can find it very difficult to hear from victims, often prompting a hard decision to take responsibility, to engage in restitution and rehabilitation, and to exhibit more pro-social behaviours than if they were sitting in a jail. The same can apply to other diversion-type processes. In specialized courts, for instance, it has been suggested that accountability measures, and fear of disappointing the judge, is more effective than other approaches in trying to reduce offending (Butler and LePard, 2022, 70). Publicly articulating one's bad choices and acknowledging their impact on others can itself be a modest form of punishment, and it might have a better chance at having a transformative effect on the offender than their passive confinement in prison. Restorative justice, therefore, should not be quickly and dismissively characterized as an easy way out for offenders. As such, we see restorative justice incorporating an element of punishment (consistent with human dignity),[9] while also promoting important values such as victim participation, community-building, and personal accountability and growth.

Mental health

Given the overrepresentation of individuals with mental health conditions amongst the offender population, part of the initiative of bolstering the use of specialized courts would be to better fund mental health courts (Schneider, 2015). These courts, along with Crown prosecutors and defence counsel, work with mental health professionals and community-based organizations to help address an offender's underlying mental health issues.[10] Successful completion of the program results in a range of possibilities from a stay of the charge to a reduction in the sentence. Research has found that such courts have a statistically significant impact on lowering rates of recidivism (Dunford and Haag, 2020; Fox, Miley, Kortright, and Wetsman, 2021).

In addition to greater use of diversion and specialized courts for mentally ill offenders, the federal government should pass legislation similar to that in England and Wales allowing for "hospital orders" for "restricted patients" to fill the gap between the civil mental health regime (as found in provincial mental health legislation) and the forensic system (involving the criminal justice

system) (Butler and LePard 2022, 138). Like Canada, England and Wales have provisions for the hospitalization and treatment of mentally ill individuals who are found "unfit to stand" for trial or "not criminally responsible" for an offence in lieu of a conviction; however, the English/Wales system also allows for greater flexibility in authorizing hospitalization and treatment orders for mentally ill offenders compared to Canada's current system (Public Safety, 2023).

For instance, individuals who have been convicted of an offence meriting a prison term but do not meet the high standard for being "not criminally responsible" for an offence can be subject to a hospitalization order and individuals who are in the prison system can be transferred to a mental health facility (HM Prison and Probation Service, 2017; MoJ UK, 2021). The BC Report on Repeat Offenders argued that the restricted patient system was worth serious consideration, but also noted that considerable funding would be needed to build facilities to treat individuals (Butler and LePard 2022, 138). Our current mental health facilities are both overburdened and ill-suited for the special needs of those who would be otherwise imprisoned.

That same report also discussed the possible relationship between mental illness and unprovoked stranger attacks, noting that a meta-analysis "found that the violence risk among people with substance use disorder and psychosis was similar to that for people with substance use *without* psychosis" (emphasis in original) (Butler and LePard 2022, 120). On that basis, the report noted the potential benefit of preventing/treating substance abuse in reducing violence. We would advocate increased funding and support of drug treatment courts as one method of directing offenders to receive treatment for substance abuse issues (Weinrath, et al., 2019).[11]

Bail (judicial interim release)

The decision to detain an accused before trial is vitally important, as decision-makers are challenged to balance the presumption of innocence against protecting public safety, while also ensuring an accused appears in court, and protecting the reputation of the administration of justice. The current legal regime constitutes a reasonable attempt to balance those priorities. Efforts to ensure that undue restrictions are not placed on individuals before trial should be applauded by those who favour a more limited state and who believe in the importance of individuals trying to maintain family contacts and employment.

Recent events, however, have also suggested that legal reforms and implementation changes need to be made to the bail regime to protect communities from violent repeat offenders. We offer several legislative and policy suggestions to address this issue.

First, the requirement added in Bill C-75 of decision-makers to give "particular attention" to the circumstances of Indigenous and other accused, "who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part" (s.493.2), should be repealed. While care should be taken in extrapolating from one incident, it is clear that Justice Arrell had doubts about releasing Randall McKenzie, who later went on to be charged with killing OPP Constable Pierzchala, but thought that he should grant release owing to s.493.2 (Fine, 2023c). It does not help vulnerable communities to allow violent individuals from those communities to be released if a justice thinks there is a serious risk of a violent offense. Individuals who have low socio-economic status, addiction issues, and problems finding permanent shelter – a disproportionate number of whom belong to vulnerable groups – are further disadvantaged by a bail system that favours individuals who have a place to stay, a surety, and other supports. However, rather than push decision-makers to take a chance on releasing the small subset who are evidentially dangerous back into the community, the better policy response is to provide greater funding for community bail supervision beds and related services to allow disadvantaged accused who would not pose a risk to public safety a fairer chance to remain in the community, pending the resolution of their charges.

Second, the *Criminal Code* should be amended to more explicitly encourage the pre-trial detention of repeat violent offenders and repeat offenders with weapons charges. Although we agree with commentators who point out that it is difficult to predict who may offend before trial, individuals who already have a record of violent or weapons offences should lose some benefit of the doubt during the deliberation process. A reverse-onus law asking these accused to demonstrate why they should be released would help signal to decision-makers that there is a presumption against release for these individuals. The Liberal government recently passed reforms that move in the right direction.[12]

Third, the *Criminal Code* should be amended to require that an accused's criminal history and any outstanding warrants are actually presented and considered by the court. Although this should be done as a matter of course, stories like that of Moses Lewin suggest a formal directive may reinforce the

importance of such information. Lewin was accused of a Toronto subway stabbing shortly after his release on bail despite an outstanding bench warrant, failures to appear, and a history of criminal charges, including with a weapon (Woodward, 2023). A legal mandate to ensure all actors are aware of the criminal history must be reinforced by a communication system that compels the sharing of such information, and perhaps a formal sign-off by decision-makers that they have received and considered it.

> *"The federal government should work with provinces to help enhance safety and provide better outcomes for victims, communities, and accused.*

Finally, in the context of bail process, the federal government should work with provinces to help enhance safety and provide better outcomes for victims, communities, and accused (MacDiarmid, Yule, and Ponkshe, 2023). As suggested above, help is required to provide alternatives for individuals who may not have the stable supports needed for bail. Also, provinces and local communities need to be better able to monitor those out on bail and apprehend those who breach their conditions in serious ways. Recall that an arrest warrant was issued for Randall McKenzie for breaching his bail provisions prior to shooting Constable Pierchzala. From the perspective of victims, recommendations by the Ombudsperson for Victims of Crime need to be enshrined in the bail process, such as facilitating greater victim input into the bail process and notifying victims about the release of violent offenders. Resources, though, need to be provided so that victims' rights do not increase the time it takes to complete the bail process. Bail hearings are already taking too long to conclude (Webster, Doob, and Myers, 2009). The causes of this appear to be an amalgam of such factors as too many adjournments, not enough sitting time for bail hearings, and lack of adequate use of technology. Federal leadership and funding are needed for community supports, monitoring those on bail, supporting information sharing systems, expediting bail hearings, and improving victims' rights.

Trial delay

Delay in bail hearings is one of the factors that contributes to the broader problem of delay in getting to trial. Delays adversely affect victims, communities, and accused. Denying bail also becomes more problematic with lengthy delays in getting to trial. Various actions have been identified that could help reduce delay, including more resources, changes to culture, better data to track timeliness (or lack thereof), improved case management and leadership (Standing Senate Committee, 2017; Totino and Riddell, 2019). Former Supreme Court of Canada Justice Moldaver has also suggested more cases need to be diverted out of the regular criminal justice system as part of a needed "major overhaul," which is in keeping with our proposal (and the recommendations of a Senate Standing Committee that investigated pre-trial delay) for more individuals to be streamed out of the main criminal justice system into diversion or mental health programs (Cohen, 2023).

Before his appointment to the Supreme Court, Justice Moldaver argued that part of the delay in getting to trial was caused by defence counsel making too many frivolous Charter claims that had to be adjudicated before the actual trial began (2006). Likewise, there has been speculation that the 2-1 credit previously offered for pre-trial detention prior to conviction also contributed to pre-trial delay through adjournments in early stages, such as in bail hearings (Webster, Doob, and Myers 2009). (The degree to which this is still happening now that the credit is 1.5 to 1 is an open question). As noted above, and as Justice Moldaver also made clear, the reasons for delay are complex and certainly cannot all be attributed to defence counsel. Even some of that delay may be a result of legitimately trying to secure defence counsel or to craft responses to Crown demands that are broad and not well-tailored to each accused (Myers, 2023). Nevertheless, it seems odd that a factually guilty accused can receive a discount for delaying the process while an accused ultimately found legally innocent has no redress for similar delays. The Supreme Court's *Jordan* ruling attempted to enforce a more efficient process, but its remedy is simply the unpalatable dropping of otherwise valid charges when the time limit passes. Instead, we would favour more resources, changing culture and practices, and incentives for actors in the system to ensure speedy trials. In any event, it is time for governments at all levels and of all political stripes to take trial delay (both before and during the trial) seriously and not simply leave the issue for the courts to manage.

C. Sentencing

One of the last steps in the process of criminal justice (not counting corrections policy) is the sentencing of individuals who plead guilty or are found guilty following a trial. The *Criminal Code* provides some specific guidance for sentencing, usually in the form of maximum penalties. Some mandatory minimums remain but a number have been struck down by the Supreme Court (Fine, 2023b). There are also a few aggravating factors listed in the Code, such as abuse against a person under eighteen. More generally, the Code outlines the various purposes of sentencing – denunciation, deterrence, incapacitation, rehabilitation, reparations and developing a sense of responsibility – and its fundamental principle: the sentence must reflect "the gravity of the offence and the degree of responsibility of the offender" (s.718.1). The Code also indicates that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (s.718.2(b)), and that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders" (s.718.2(e)).

Overall, Canada's sentencing regime leaves a large amount of discretion to judges, with sentencing intended to be a very individualized process. In defending this approach, Professor Berger has applauded the Supreme Court for going beyond assessing the offence and the blameworthiness of the offender in the sentencing process, to a deeper qualitative assessment of the "lived experiences" of punishment.[13] Critics of the individualized approach, though, point to the sentencing disparities that can arise in such a system, so that the "similar sentence" provision in s.718.2(b) is imperilled.

The prospect of unfair disparities in sentencing can be addressed by blunt measures like mandatory minimums or, as we favour, the enactment of sentencing guidelines. This has been a long standing and obvious reform – a chief recommendation of the Canadian Sentencing Commission in 1987 – that is well past due.[14] Rather than a US-style grid system, which can be overly rigid and download too much decision-making authority to prosecutors, a more attractive model for Canada would be England and Wales', which promotes a consistency of approach by requiring judges to go through a step-by-step

analysis in sentencing. Such guidelines would help to better structure judicial discretion, while allowing for some individual contextualization to avoid injustices that might occur with mandatory minimum sentences or rigid grids. Judges would be required to explain how they applied the guidelines, including explicitly analyzing the impact of aggravating or mitigating factors and justifying any deviations from the guidelines. Studies in the UK have shown that the guidelines are helping to achieve their purpose of greater consistency in decision-making, even if there is still room for additional reforms (Piña-Sanchez, Smith, and Li, 2020).

A permanent Sentencing Commission – composed of lay members and members of the legal and broader justice communities – would act as a non-partisan body, supported by staff, to collect sentencing data, and make recommendations for guidelines. The substance of these guidelines would be subject to proposals and discussion. Here, though, we offer some observations on principles that would reflect conservative values and contribute to overall effectiveness.

> *One issue would be if and how sentencing should incorporate remedial consideration for social injustices.*

One issue would be if and how sentencing should incorporate remedial consideration for social injustices. For instance, would the new guidelines retain the directive currently in s.718.2I of the Code which instructs judges to consider alternatives to incarceration paying "particular attention to the circumstances of Aboriginal offenders"? Since its enactment in 1995, with the intention of addressing Indigenous carceral overrepresentation, that problem has only gotten worse, an outcome normally taken as evidence of a failed public policy.[15] Despite the Supreme Court's repeated reiteration of the provision in leading cases such as *Gladue* and *Ipelee*, there are still disagreements in its application and normative connotations.[16] The *Globe and Mail*, for example,

noted debates amongst appellate courts as to whether there should be stronger sentences for Indigenous men when they commit crimes against Indigenous women, or whether Indigenous people who had been disconnected from their heritage should possibly have their sentence reduced under the Gladue framework. The Alberta court of appeal expressed concern that the latter approach (as articulated in an Ontario Court of Appeal ruling) reduced sentencing "almost to a level of pure ethnicity"[17] (*R v Laboucane*, [2016] para 67, commenting on *R v Kreko*, [2016]).

Some law professors have advocated that the Gladue framework should be extended to Black offenders (Sealy-Harrington and Rennie, 2016). The Nova Scotia Court of Appeal seemingly endorsed such a proposition in *Anderson* [2021], while the Ontario Court of Appeal rejected it in *Morris* [2021]. The courts also exhibited other points of divergence. Although both courts recognized the prevalence of anti-black racism, the Ontario Court indicated that some connection (though not a causal one) needed to be made between such racism and "the circumstances or events that are said to explain or mitigate the criminal conduct in issue" (at para 97). While the decision encouraged judges to consider how racism may have influenced the offender's degree of responsibility, the Ontario court also noted that this does not impact the gravity of the offence: "if society's complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun crimes, will receive shorter jail sentences than other similarly situated non-Black offenders" (at para 84). The Ontario Court of Appeal noted that Black Canadians "are also the victims, both direct and indirect, of the harm caused by gun-related crimes in their communities" and asked "[a]re these law-abiding members of the community to be told that the message of denunciation and deterrence, which applies to gun crimes committed in other communities, is to be muted in gun crimes committed against them in their community so the court can acknowledge the reality of anti-Black racism, a reality that those members of the community know only too well?" (at para 85).

The Ontario Court of Appeal has returned to this issue in its recent decision in *R. v. Morris* [2023] (a different offender named Morris than the earlier case). The new case illustrates the subtleties that arise between a race-based discount and a sentence reduction for reasons of anti-Black racism. In this case, there is a direct connection between experienced racism and Morris's

gun crime conviction: at the age of 18, Morris had "negative experiences with the police" when he was shot in the leg and alleged that the police "denied him medical attention until he disclosed how he got the injuries and accused him of shooting himself" (para 56); Morris attributed his ownership of the non-functional gun he was caught with as part of his belief that "he did not trust [the police] to protect him or the Black community" (para 56). The decision recounts Morris's background in considerable detail, including a number of factors that may be more prevalent in the Black community (paras 50-53, 57-58, 60), but it seems to us would also be mitigating factors for non-Black offenders. Justice Feldman's decision goes further in attributing anti-Black racism as "contribut[ing] to distorted decision-making" (para 62), a step that we believe is too nebulous and cannot properly guide the sentencing analysis. The sentencing judge in Morris's case had virtually no knowledge of his background at all (basically only that he was a repeat offender), so the Enhanced Pre-Sentence Report (EPSR) was allowed as new evidence on the appeal (para 65). The EPSR is clearly a valuable tool and making it more available to all disadvantaged offenders – regardless of race – would help to ensure more just and equitable sentencing.

Moreover, we favour the Ontario Court of Appeal's perspective when it recognizes racism suffered by the offender that is connected in some way to the offender's culpability (and, once established, a legitimate factor in mitigating a sentence) while eschewing the more identity-based approach to sentencing favoured by the Nova Scotia court and elements of the most recent Morris decision.[18] We remain skeptical of evidence that seeks to use societal disadvantages impacting identifiable groups as a reason alone to treat a culpable individual leniently. More generally, we concur with the critique by Professor Thomas Grosse-Wilde that "[s]entencing law comes much too late to tackle the problems of an unjust world or society, so it seems to me a category mistake to try to fight distributive problems of social justice by means of criminal law and sentencing…" (Grosse-Wilde, 2020: 296-297).

Nevertheless, we acknowledge that for a number of individuals their ability to make pro-social and moral decisions is diminished by various factors ranging from a history of abuse, neglect, and trauma, to mental health issues and medical conditions such as fetal alcohol syndrome.[19] Our preference would be to list such items as possible mitigating factors in the guidelines and make them available to all individuals. This proposal – in concert with allowing the

use of evidence of subjection to racism as a mitigating factor when connected to the culpability of an offender; and the greater use of restorative practices, additional mental health provisions, and more social support for bail – would help ameliorate the problems of the incarceration rates of Indigenous and other disadvantaged groups.

It follows that we would advocate for an approach that focuses on the seriousness of the offence and the degree of culpability of the offender while constraining, but not eliminating, the individualization that characterizes Canadian sentencing practices. This would preclude extensive forays into the "lived experiences of punishment" and limit overly contextualized assessments of an offender's life course and future prospects, in order to produce greater consistency in sentencing approaches. Other mitigating factors, however, may be contemplated such as participation in restorative justice and making a guilty plea.

> *"The guidelines should contemplate providing Indigenous communities the flexibility to incorporate some of their historical practices in the sentencing process.*

Despite our reservations about incorporating differential principles for identifiable groups, we argue that the guidelines should contemplate providing Indigenous communities the flexibility to incorporate some of their historical practices in the sentencing process. As Professor Milward points out, restorative practices in some Indigenous communities also stood alongside more punitive practices ranging from shaming, to excommunication and corporal punishment. The degree to which Indigenous communities might practice these traditions within the broader criminal justice framework under the *Charter of Rights* is worthy of further discussion (Milward, 2013).

Another important question that will arise involves the range of penalties within the guidelines. The Sentencing Commission would be tasked with developing specific guidelines. In terms of general principles, however, we

would discourage conservative politicians and commentators from relying on deterrence rationales while advocating for longer sentences. The available evidence indicates that longer sentences tend not to deter criminal behaviour – suggesting otherwise will not enhance public safety and will only increase cynicism (Tonry, 2020; Gabor and Crutcher, 2002). Moreover, conservatives should be uncomfortable with the idea that restrictions on an individual's liberty can be imposed solely to send a message to others. Longer sentences can be justified, however, by other values such as denunciation (including a consideration of previous behaviour), greater opportunities for treatment, and – critically – retribution (Berns 1979). Sentencing, the Supreme Court notes, should be "imposed in a manner which positively instills the basic set of communal values shared by all Canadians" and includes "retribution" as "an accepted, and indeed important, principle of sentencing".[20] Given the ethical and practical concerns about sentencing for future behaviour, we favour an approach whereby repeat offending should be an aggravating factor in sentencing on the basis of condemnation of an offender's character rather than as a distinct sentencing principle (von Hirsch, 1984).[21] It is surprising to us that criminal history is currently not listed as an explicit aggravating factor in the *Criminal Code* (*R v Wright*, 2010)[22] – this can lead to inconsistency and under-utilization of past offending by judges in determining a sentence (Plecas, Cohen, and Mohaffy, 2012).[23]

Where there are concerns about an offender being dangerous to the public, in the future we would encourage the use of the more specialized and rigorous process for making dangerous offender or long-term offender designations outlined in the *Criminal Code* (though perhaps after a review for fairness and effectiveness) (Bonta, Carrière, Harris, and Zinger, 1996; Bonta, Zinger, Harris, and Carrière, 1998). [24]

The development of sentencing guidelines would also provide an opportunity to revisit some of the overall practices of sentencing that have developed slowly over time, and sometimes in a dysfunctional fashion. For example, there is a severe disconnect between sentences as they are served and as they are presented to the public. A criminal sentence in Canada is governed by thirds: the first third of a sentence is almost certain to be served by an offender in custody; the second third includes the possibility of parole, which usually proceeds in stages from day parole to supervised release; and the final third – called 'statutory release' – means release for all but a few inmates.[25] The

'rule of thirds' has the primary virtue of gradually reintroducing the offender back into the community, something that is much more desirable and proven to reduce recidivism than a regime where offenders are in custody one day and in the community the next. That said, there are two major concerns with this approach: 1) it is hard to imagine a policy that could diminish public confidence more than one where an offender is reported to have been "sentenced to six years" only to be seen by his neighbours in the community after two; 2) those dangerous individuals denied statutory release are themselves treated exactly the way the rule was meant to prevent – a binary of in custody one day, and in the community the next.

> *"Our recommendations would constitute a step forward in 'truth in sentencing', and would force judges to be clear about the effects of their sentence.*

The first concern might be dismissed as a 'public relations' problem, but it is one that is both pervasive and easily fixed. Judges might instead announce an actual "sentence of imprisonment" and then amendments to the *Criminal Code* and *Conditional Release Act* could establish a term of "conditional and coercive community reintegration". The sentencing judge could then recommend the maximum length of that period, rather than simply assuming it will be equivalent or in some ratio to the sentence of imprisonment. This would stand in contrast to the current model, which simply assumes without evidence or rationale that the period of reintegration takes a maximum of exactly twice the time served in prison (and, for most offenders, a maximum reintegration period equal to their time in prison). Our recommendations would constitute a step forward in 'truth in sentencing', and would force judges to be clear about the effects of their sentence. Even though the importance of gradual community reintegration cannot be understated, we currently entertain the pretense that judges are giving stiff sentences of imprisonment when it is really a number that they know is grossly inflated. Indeed, this is why it would be better to be

clear and forthcoming about the reintegration element, rather than disguising it within a larger global sentence.

The second concern is also animated by a recognition of the importance of gradual community reintegration. Currently, those held during the period of statutory release due to a likelihood to commit a serious violent or drug offence are allowed back into the community with no supports and little supervision, as long as they complete their entire sentence in prison. While this system has the merit of allowing offenders to say "I've served my time and now I'm free to go", it has some very perverse consequences. It has become routine for Canadians to be alerted by their local police that an offender, concluded by the state to have a "high risk to reoffend", will soon be their neighbour (Hooper 2019). If the state can reduce sentences of imprisonment for "good behaviour" and undertaking programming to better one's self (anger management, drug treatment) then, for those unwilling to engage in such programming and where the offender is highly likely to reoffend in a way that threatens public safety, we should conversely take greater advantage of peace bonds and post-warrant expiry date supervisory orders.[26] Given the extraordinary application of state power involved, it is appropriate to require an additional judicial hearing and determination. But the threshold for preventative measures to be placed on released offenders should be reviewed to ensure it is readily available in cases where community safety is placed at risk. In exceptional cases, it may even be appropriate to consider alternative measures that could include further detention beyond the warrant expiry date. It simply will not do for the state to admit it can foresee future violence and not take steps to prevent it.

A future conservative-oriented government might also act to restore the Harper Government's *Multiple Murders Act*, which was invalidated by the Supreme Court in *R v Bissonnette* [2022]. While the notwithstanding clause is available here, it is not the best immediate option (Baker, 2022). Instead, the Government might allow judges to extend parole ineligibility for multiple murderers beyond 25 years, but not restricted to the 25-year increments of the earlier *Act*. This, combined with perhaps a cap of 60-years parole ineligibility, would neutralize some of the *Bissonnette* Court's critiques and perhaps allow the revised law to pass constitutional muster. It may not be constitutionally possible to retroactively alter the ineligibility of multiple murderers that benefitted from the *Bissonnette* decision (Fine, 2023a). But future offenders, who shock Canadians with heinous multiple murders, can properly be denied

their periodic return to the media spotlight and the families of victims would be spared the emotional and practical burden of having to ensure that justice continues to be done.

The core philosophy of our corrections regime should be to gradually release the vast majority of offenders, and facilitate offenders to improve themselves while in state custody. Nevertheless, there is an onus to incapacitate the small population of unrepentant, violent, and repeat offenders. Respect for human dignity requires acknowledging people can reform and be worthy of forgiveness, but it is also affirmed by treating some heinous choices as warranting separation – for life if needed – from the rest of Canadian society.

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In pursuing the recommendations above, questions would have to be addressed related to the relationship between Parliament and the Sentencing Committee. We suggest that a process proposed earlier in New Zealand (as it contemplated guidelines) may provide a promising basis for moving forward. This would entail the Sentencing Commission developing guidelines, Parliament discussing the guidelines and providing feedback, and Parliament being able to exercise a veto over the final proposal, but only over the entire package and not specific provisions. Whatever the process, the guidelines should provide clear guidance on such difficult questions as the relative importance of various goals of sentencing, the weight to be placed on aggravating and mitigating factors, and the legal standard by which judges could depart from the guidelines (Young and King, 2013).

Conclusion

The best way to protect public safety and to lessen the burden on the criminal justice system is to enact policies that help to prevent offending, ranging from greater resources for mental health treatment to helping parents raise well-adjusted children. Continued emphasis on the relationship with Indigenous peoples is also needed. Nevertheless, the need for a criminal justice system will always continue to exist. Our current system (despite the best efforts of many dedicated individuals) suffers from being over-burdened, often ineffective, and providing too little guidance for actors within the system.

While we value the instincts of progressive commentators to highlight the social condition of offenders, particularly from disadvantaged communities, and their (correct) assertions that longer sentences do little to deter crime, perhaps even leading some individuals to engage in more crime, they in turn tend to downplay a number of important concerns conservatives should defend forthrightly. These include the effects of crime on victims and communities; the instrumental and normative benefits of greater punishment/incapacitation for a select number of individuals; and the potential problems involved in trying to address social injustice through such methods as excluding evidence or reducing sentences. We have proposed a number of policy innovations that recognize the human dignity of not only the offender, but of victims and members of the communities as well.

We have proposed a number of policy innovations that recognize the human dignity of not only the offender, but of victims and members of the communities as well.

We argue that our proposals – a code of police powers; changes to pre-trial processes, including greater use of diversion, changes to the bail regime, and mental health supports; sentencing guidelines and reforms; and federal support for greater training, monitoring and accountability in criminal justice

– would be more effective, and rest on a more solid normative foundation than alternative proposals. Although our proposals are written primarily for the federal level, we recognize that improvements to criminal justice policy and implementation will require communication and coordination between all levels of government. Grande Prairie's approach to local problems sounds promising, for example, with a notable emphasis on directing individuals to social services (including through the use of a drug treatment court) but also swift action against social nuisances, such as tent encampments (Kennedy-Glans, 2023). Local responses like Grand Prairie's could be aided by an improved federal criminal justice policy context – one that helps to better promote and fund diversion and treatment options, while also providing legislative tools and funding towards better enforcement for more serious and repeat offenders.

We believe that such a conservative agenda for criminal justice could be smart, effective, and in-line with a majority of reasonable people in the community. MLI

About the authors

Troy Riddell is Associate Professor and Chair of the Political Science Department at the University of Guelph. He also teaches in the Criminal Justice and Public Policy program at Guelph. His research and teaching focuses on judicial politics and criminal justice. He is a co-author of the book *Canadian Courts* and his work has appeared in such journals as *Canadian Journal of Criminology and Criminal Justice*, *Osgood Hall Law Journal*, *Canadian Journal of Political Science*, and *Law and Society Review*.

Dennis Baker is Associate Professor of Political Science and former Director of the Criminal Justice and Public Policy/Criminology and Criminal Justice Policy Programs at the University of Guelph. Professor Baker holds an LL.B. from the University of Toronto and a PhD from the University of Calgary.

His research focuses on the separation of powers, particularly the relationship between the courts and the representative branches. His book, *Not Quite Supreme*, considers the limits of the Supreme Court of Canada's power to settle political controversies and offers a spirited defense of a Parliament's role in constitutional interpretation.

Professor Baker has written on a number of constitutional controversies including the impact of federalism on criminal justice policy, the institutional politics behind the rules of evidence in sexual assault cases, and (with Troy Riddell) the implementation of judicial decisions by police. MLI

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Endnotes

1 For an analysis of the impact of extra-legal and institutional factors on the operation of Canadian criminal justice, particularly in the context of sentencing, see Puddister, 2021.

2 We thank the anonymous reviewer for encouraging us to think about, and articulate, the different views of the state within the paper more clearly, and for highlighting how – for some conservatives – the criminal law is "constitutive of the social fabric and the freedoms that all citizens enjoy."

3 In this paper we do not comment on possible changes to the very first stage of the criminal justice process – what conduct should be regulated through criminal law and to what degree (prostitution, medical assistance in dying, drug use, and so on). We do note, however, that the *Criminal Code* could be revised to make offences easier to understand and apply. Also, in specific places we talk about the possibility of our proposed reforms being challenged under the *Charter of Rights and Freedoms*. More generally, we understand that many of these proposals would be subject to Charter review. If a court strikes down a particular law, a conservative-oriented government should review the decision to assess whether there is a way to impose fewer limits on rights while not undermining achievement of the policy objective(s) – if not, the use of the s.33 notwithstanding clause would be warranted if the government can argue that the law carefully incorporates considerations about the nature of the rights at issue, the common good, the necessary policy framework to achieve optimal outcomes, and so on.

4 *Scowby v Glendinning,* [1986] found Saskatchewan's attempt to establish a tort against arbitrary detention *ultra vires*, because it infringed upon the federal power over criminal procedure.

5 The idea of a codified set of police powers was suggested in the 1970s by the Law Reform Commission. See Friedland, 1994. Codified rules around police investigations were to be part of an overall reform to Canadian

criminal law and procedure. Professor Roach offers PACE as a potential example for Canada to follow, see Roach (2022), 76-77. There have been complaints that the English model has become increasingly complicated over time – something the Canadian model should work to actively avoid, should a set of police powers be enacted.

6 In our view, for example, the dissent in *R. v. Le* [2019], which highlighted the repercussions for communities if reliable evidence of illegal guns and firearms is excluded, is a more powerful argument than the majority's.

7 See Penney (2003) for a review of the predominantly US literature. See also Gould and Mastrofski (2004) for discussion of police training on the Charter; for the possible impact of the exclusionary see Riddell and Baker (2018).

8 Two studies which have asked members of the public about scenarios surrounding the exclusion of evidence suggest that the public favours the use of reliable evidence at trial unless police misconduct is quite serious. See Wolfson (2016); and Bryant et al. (1990).

9 Professor Kathleen Daly argues that restorative justice practices are compatible with accused feeling that dimensions of the process are difficult or painful. For an overview of various definitions of restorative justice and perspectives on punishment and restorative justice see Daly (2013).

10 For an overview of how Canadian mental health courts work, see Dunford and Haag (2020). Also see Steering Committee on Justice Efficiencies (2021).

11 For a meta review of drug treatment courts in the US see Logan and Link (2019).

12 Suggestions by Conservative Leader Pierre Poilievre to "ensure" that individuals with a history of violence/weapons convictions do not get bail – which might imply not even offering a bail hearing – would likely run afoul of the Charter of Rights and the general principle of presumption of innocence.

13 Professor Berger provides three examples of what he dubs a proportional individualized approach by the Court that goes beyond the Code: assessing the harm inflicted by the police, considering the impact of punishment on the offender, and looking inward to the "affective dimensions of punishment" See Berger (2020) page 271.

14 Some appellate court judges have called for the courts to impose greater structure in sentencing in the absences of legislative guidance. For the debate in Alberta, see Silver (2019).

15 Professors Benjamin Ewing and Lisa Kerr argue that "[c]areful scrutiny of the data suggests that growth in such over-representation has been subtler in its magnitude and sources, and less uniform in its trajectory, than is typically supposed," but still acknowledge that over-representation of Indigenous peoples remains a significant problem since Gladue. See Ewing and Kerr (2023).

16 Professors Ewing and Kerr argue that the normative dimensions of Gladue need to be better theorized to better undergird the decision and rebut normative critiques that have been raised about it. According to Ewing and Kerr (2023), a central justification for Gladue's approach, including extending it to Black offenders, rests on the unjust treatment and lack of political empowerment by the state. We see this (and other elements of their argument) as problematic in that it expects perhaps too much of the criminal justice system and invites a broad political assessment of societal disadvantage that criminal justice actors are ill-suited to handle (much less resolve). Such expansive theorizing potentially opens up a pandora's box of implementation challenges arising from claims about legitimacy and political responsiveness of the state.

17 Joshua Sealy-Harrington and David Rennie note, though, that despite the Alberta Court of Appeal's criticism of the Ontario Court of Appeal's decision, the Alberta Court did accept that the *Kreko* Court was able to find "a measurable connection" between the offender and the systemic disadvantages. See Sealy-Harrington and Rennie (2016). In another case, the Alberta Court critiqued a trial judge's application of Gladue principles for seemingly demanding too much a causal connection between the offence and the offender's Indigenous background; the Court also argued that the trial judge erred in relying on his own experience with ten-years of hearing cases on reserves to suggest that Indigenous communities did not want lighter sentences for members of their community who committed serious offences (Matychuk, 2019).

18 We might part company with the Ontario Court, though, in its favourable commentary that a pre-sentence report could incorporate systemic racism factors to assess such things as education or employment trajectories, which in the Court's view reflects "the offender-specific approach to sentencing that has always held sway in Canadian courts."

19 The call in New York state to adopt broad "trauma-informed and realistic legal standards" is one that might be explored in Canada. See Komar et al. (2023).

20 *R v M (CA)*, [1996] paras 77 and 81.

21 We warn against policies like the "three strikes" laws in US states, since such policies create significant social and financial costs through over incarceration with diminishing returns on public safety.

22 The considerations raised by Justice Chartier in *Wright* [2010] are important and deserve further *statutory* guidance, in addition to contextualization by sentencing judges.

23 In addition to having a well-defined aggravating factor around repeat offending, other aggravating factors could be borrowed from the current Code and English general principles of sentencing, including committing an offence while on bail, the physical and psychological effects on the victim; use of a weapon, abuse of trust, targeting a victim based on race or sexual identity, and financial gain. S. 718.2 of the *Code* provides some guidance and includes some of these factors already, but an updated version of these principles could be usefully proposed by the Sentencing Commission.

24 It would be worth reviewing the provisions and their associated processes of risk assessment in order to ascertain whether tweaks could be made to enhance effectiveness and fairness. Bonta et al. (1996) counter the argument that dangerous offenders can be dealt with just as effectively under the ordinary sentencing provisions within the Criminal Code. More generally, as Moore et al. (1984) have pointed out, effectively dealing with dangerous, repeat offenders requires diligence at each phase of the criminal justice process from policing, to the collection and dissemination of data, to pre-trial processes (including bail) and then to sentencing and corrections. In a review of their book, Elizabeth Wear (1986) is very critical of their arguments and evidence for selective incapacitation; she argues that the most important part of their book is the recommendation to focus on the front-end of the criminal justice system in trying to reduce dangerous, repeat offending. We believe that our recommendations at each stage would help to address the vexing problems surrounding how to identify and manage dangerous, repeat offenders.

25 Statutory release can only be denied to those offenders whom the parole board has reasonable grounds to believe that the offender is likely to commit an offence causing death or serious harm or a sexual offence involving a child, or a serious drug offence may be denied statutory release.

26 As noted by the anonymous reviewer, as with our other proposed reforms, such as in bail, legislative changes may be required to implement our policy and modify the scope of some Supreme Court decisions, such as *R v Zora,* [2020].

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