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CRIMINAL JUSTICE POLICY IN CANADA AND THE UNITED STATES:
A COMPARATIVE ANALYSIS OF PAROLE DEBATES BETWEEN 1970 and 1988

by

DENNIS COOLEY, B.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts
Department of Sociology and Anthropology

Carleton University

Ottawa, Ontario

April 27, 1990

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submitted by Dennis Cooley, B.A.
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Thesis Supervisor

Chair, Department of Sociology and
Anthropology

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May 29, 1990

Abstract

Over the past decade there has been a 'rise of the right' in the United States. There has been considerable discussion on whether a similar pattern has occurred in Canada. This paper examines the question of the 'rise of the right' in Canada by analyzing and comparing legislative committee hearings on parole in Canada and the United States between 1970 and 1988. It is argued that a 'shift to the right' will be characterized by a rise in the number of Conservative justifications for parole. Between 1970 and 1988, there was an increase in the number of Conservative justifications for parole in the United States. During the same period there was not an increase in the number of Conservative justifications for parole in Canada, rather, Conservative justifications dominated parole debates during the early 1970s and during the mid-1980s. The data provided by this analysis are consistent with the claim that there was not, in Canada, a 'rise of the right' similar to that which occurred in the United States in the 1980s.

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CHAPTER 1

THEORETICAL DEBATE AND RESEARCH QUESTIONS

Throughout the 1970s there was a concerted effort in the United States to "educate" a new type of populace, an attempt to confer respectability on ideas that were in opposition to ideas that, a decade earlier, were firmly entrenched in American society. In this clash of ideals the two opposing camps coalesced around the ideas of the liberal establishment and those of the New Right or neoconservative challengers. The terrain of battle centered on such fundamental questions as human nature, the relationship between the individual, the state and society, and the role of social policy. The stakes were equally fundamental: the right to abort a fetus, the right to unionize and strike, the right to a decent standard of living and the right to various civil rights affecting the quality of life of United States citizens.

By the 1980s, the clash of ideas between the liberal establishment and the New Right challengers moved into the legislature and were converted into a clash over specific policy options. But by the 1980s, at the federal level in the United States, these roles were reversed: the New Right had gained power, at least in electoral terms, while the previously dominant liberal establishment was slowly

losing ground.

The ideas of the New Right, and the specific policy options that flow from these ideas, are qualitatively different from those of the liberal establishment. The ascendancy of New Right intellectuals, politicians and institutions, and the ideas, rhetoric and policy options they espouse, cannot be considered a linear continuation of the past. The 'rise of the right' connotes an abrupt turn in the political economy of the United States. The content of the 'received wisdom' has changed, and this change reflects the material interests and class fractions that have coalesced to give political voice to the New Right. Thus, underlying the battle of ideas in the 1970s and the battle of policy in the 1980s, were the material interests of different class fractions.

Over the past few years there has been a great deal of discussion concerning the rise of the New Right in Canada. On one hand, Ratner and McMullan have argued that, at the federal level, the Canadian state in the 1980s has been operating in the 'exceptional mode', with a reliance on the coercive apparatus of the state¹. For Ratner and McMullan,

¹R.S. Ratner and John L. McMullan, "Social Control and the Rise of the 'Exceptional State' in Britain, the United States and Canada," Crime and Social Justice 19 (1983): 31-43.

Canadian state has altered its course; new rhetorics, ideologies and policies similar in kind to those of the United States have gained acceptance in Canada. On the other hand, Taylor has argued that during the 1980s, there has been "little evidence of a serious decline in the ideological hegemony of either bourgeoisie power or capitalist economy"². Rather than an abrupt change in direction, says Taylor, the political economy of the Canadian state during the 1980s has been characterized by its continuity with the past.

This analysis will explore the Ratner and McMullan-Taylor debate. On a theoretical level, among the questions examined are the following:

Is there evidence of a shift to the right in Canada similar in kind to that witnessed in the United States?

If there is not evidence of a shift to the right in Canada similar in kind to that witnessed in the United States, then "What are some of the factors that may account for this difference?"

The strategy used will be to focus on one aspect - parole - of a specific policy field - criminal justice policy. This analysis will examine legislative committee hearings on parole in Canada and the United States between 1970 and 1988. Specifically, the justifications used by

²Ian Taylor, "Theorizing the Crisis," in State Control: Criminal Justice Politics in Canada, ed. R.S. Ratner and John L. McMullan, (Vancouver: University of British Columbia Press, 1987), 217.

sets of actors in the criminal justice system to support or not support parole will be examined. Thus, the specific research questions asked are:

What have been the philosophical justifications used by various sets of actors to support or oppose parole at the federal level in Canada and the United States at crucial points in time between 1970 and 1988?

How have these justifications changed over time?

The parole debates will be examined to provide evidence of a shift in philosophy in criminal justice policy. One would expect, at the federal level in the United States, that the parole debates have changed markedly from 1970 to 1988. One would expect that in 1970 debates regarding parole were dominated by the philosophy of the liberal establishment but in 1988 the philosophy of the New Right would head the debate. Similarly, if, as Ratner and McMullan believe, Canada has been subject to the ascendancy of the New Right, one would expect that the parole debates in Canada in the 1980s are similar to those voiced by the New Right in the United States. If, however, the philosophical justifications used to support or not support parole in Canada have either (1) remained constant over the time period, or (2) have changed but in ways different from that of the United States, then this would correspond to Taylor's assertion that the New Right has not manifested

itself in Canada as it has in the United States.

The aim of this analysis is to examine the parole debates in the United States and Canada and add to the development of "a truly Canadian sociology" As Myles notes, comparative analyses are indispensable in the development of "a truly Canadian sociology":

The study of Canadian society in isolation, no matter how scholarly and rigorous, is simply not up to the task. Our understanding of other societies and the general social, economic, and political processes that Canada shares with those societies...must be equally rigorous. In sum, Canadian sociology must always be comparative since a sociology of Canadian society is impossible otherwise³.

Examining parole debates in Canada and the United States will provide two useful sorts of information. First, this analysis will provide a comparative analysis of the differences and similarities in the criminal justice policies of the two countries. Second, although this information will not provide a definitive analysis of the political climates of both countries, it will, at least in the case of Canada, provide evidence that, when taken with analyses of other policy fields, add to the growing body of literature dealing with the political economy of Canada in the 1980s.

³John Myles, "Introduction: Understanding Canada: comparative political economy perspectives", Canadian Review of Sociology and Anthropology 26:1 (1989): 7.

Chapter 2 provides an examination of the economic crises of the 1970s in Canada and the United States and provides details on the 'rise of the right' in the United States and reviews the Ratner-McMullan/Taylor debate. Chapter 3 provides a brief description of the criminal justice systems in the two countries and a brief historical description of their conditional release systems. Chapter 4 describes the methodology used in this analysis. Chapters 5 and 6 provide the results of the analysis of the justifications utilized in the parole debates in the United States and Canada. Chapter 7 provides a comparative analysis of the results detailed in Chapter 6, and links these results to the 'rise of the right' in the two countries.

CHAPTER 2

THE 'RISE OF THE RIGHT' IN THE UNITED STATES AND CANADA

I. INTRODUCTION

During the 1980s, the New Right became a dominant social and political force in the United States. The 'rise of the right' in the United States was solidified by the election of Ronald Reagan to the office of president in 1980. The New Right can be characterized by an economic policy framework that stresses the orthodoxy of the free market and limited government intervention, and, a highly populist social policy agenda based on the themes of morality and 'permissiveness'. In the first section of this chapter, it will be shown that both of these characteristics were present in the American state during the early and mid-1980s. The second section of this chapter will review the debate on the 'rise of the right' in Canada.

II. THE 'RISE OF THE RIGHT' IN THE UNITED STATES

This section will review the 'rise of the right' in the United States. In order to understand the rightward shift in the political discourse of the United States it is necessary to understand the economics of the 1970s.

II(i). The Economic Downturn in the United States in the 1970s

The 1970s was a period economic difficulty for the United States. Between the beginning and the end of the decade the American economy bottomed out after almost thirty years of uninterrupted economic expansion. Inflation, unemployment and profit decline, combined with the OPEC energy embargo, created inflation-generating wage pressures resulting in serious stagflation. The traditional policy instruments used by the federal government no longer proved successful. A cursory examination of some economic indicators shows how deep the American economic crisis was.

In their analysis of the American political economy of the 1970s, Cohen and Rogers¹ compared the performance of the United States before and after 1973 - "the last good year" of the post-war period. Comparing 1948-73 and 1973-79, average annual gross national product growth dropped from 3.7 to 2.6 per cent; annual productivity growth fell from 2.2 to a dismal 0.4 per cent; real median family income doubled between 1948 and 1973 but dropped 6 per cent

¹Joshua Cohen and Joel Rogers, "'Reaganism' After Reagan", in The Socialist Register, ed. R. Milliband, L. Panitch and J. Saville, (London: Merlin Press, 1988), 387-424.

between 1973 and 1979; average real gross weekly earnings for private non-agricultural workers peaked in 1972 but by 1979 dropped 13 per cent, back to their lowest level since 1962. As real wages declined, prices soared. The cost of basic necessities rose 110 per cent between 1970 and 1980 as inflation reached double digits. Official unemployment rose sharply throughout the 1970s; between 1965 and 1969 the unemployment rate was 3.8 per cent, between 1970 and 1974 it rose to 5.4 per cent, and between 1975 and 1979 it rose to 7 per cent².

II(ii). The New Right Economics

The problems of the American economy during the 1970s, according to members of the New Right, were the result of excessive demands placed on the government. During the preceding two decades, the government had become too large, too cumbersome and was sapping all entrepreneurial energy from private citizens. Milton Friedman made the following analysis of the economic crisis of the 1970s:

Deficits are bad primarily because they foster excessive government spending - the chief culprit, in my opinion, in both inflation and slow economic growth. By reducing private incentives to work, save, and engage in productive ventures, and by crowding out private investment, high government spending inhibits economic

²T. Ferguson and J. Rogers, Right Turn: The Decline of the Democrats and the Future of American Politics, (New York: Hill and Wang, 1986).

growth³.

Friedman also wrote:

Irresponsible fiscal policy - excessive spending, burdensome and inevitable taxes, and massive deficits - does account for the sharp downturn in economic growth in the past decade⁴.

According to Friedman, the marketplace is an information system. The more the government intervened, the more distorted became the message between prices, costs and incomes. Government intervention distorts the value of labour. The more distorted the message the less incentive people have to work. Why should an unemployed person look for work when unemployment insurance is available at a level above market wage levels⁵?

The economics of the New Right, therefore, was geared towards reducing the scope and magnitude of government in certain social policy fields and loosening up the constraints and eliminating regulations faced by entrepreneurs. The goal of these economic policies was to

³Newsweek, February, 23, 1981, 70; quoted in Elton Rayack, Not so Free to Choose: The Political Economy of Milton Friedman and Ronald Reagan, (New York: Praeger, 1987), 79.

⁴Newsweek, August 23, 1982, 59; quoted in Elton Rayack, Not so Free to Choose: The Political Economy of Milton Friedman and Ronald Reagan, (New York: Praeger, 1987), 79.

⁵Milton Friedman and Rose Friedman, Tyranny of the Status Quo, (New York: Harcourt, Brace Jovanivich, 1984), 110.

open the lines of communication between producers and consumers.

The New Right economics is best exemplified by the Reagan administration's economic policy in the 1980s. What drove the Reagan administration's economic policy throughout most of Reagan's tenure in office was the need to let loose private enterprise by reducing the magnitude of government (except in areas of defence and crime control) and thereby restoring the sanctity of the free market. There are three strands to this argument: (1) government provision of social welfare produces disincentives to invest, (2) government social provisions produce disincentives to work, and, (3) welfare state expenditures are a luxury that cannot be afforded during times of high federal deficits⁶.

The Reagan administration's 1981 Economic Report indicated the principles driving the administration's desire to reduce the role of government and reshape the American economy:

⁶Fred Block, "Rethinking the Political Economy of the Welfare State," in The Mean Season: The Attack on the Welfare State, ed. F. Block, R.A. Cloward, B. Ehrenreich and F. Fox Piven, (New York: Pantheon Books, 1987), 113.

For several decades, an even-larger role for the Federal Government and, more recently, inflation have sapped the economic vitality of the Nation....The combination of these two factors...have played a major part in the fundamental deterioration in the performance of our economy....⁷

The Reagan administration had several strategies to reduce the role of government. First, in Reagan's first budget personal income taxes were reduced up to fifteen percent and the top tax bracket was lowered from 70 percent to 50 percent. In subsequent budgets Reagan was less successful in reducing or holding the line on taxes, however, the Reagan administration's tax record after four years is quite revealing. Reviewing after-tax income changes between 1980 and 1984, originally published by the non-partisan Urban Institute, Davis concluded that "20.2 million poor households - earning under \$10,000 - lost an average of \$400 each in benefit cuts, while 1.4 million wealthy families - \$80,000+ - received an average of \$8,400 in tax cuts"⁸.

Second, Reagan sought to reduce the amount of government spending on social programs. Between fiscal year 1984 and fiscal year 1985 social security expenditures were reduced by 4.6%, unemployment insurance by 17.4%, aid to

⁷Economic Report of the President, February 1982, (Washington, D.C.: Government Printing Office, 1982), 3,4; quoted in Rayack, Not so Free to Choose, 79.

⁸Mike Davis, Prisoners of the American Dream, (London: Verso, 1986), 234.

families with dependent children by 14.3%, child nutrition by 28.0%, food stamps by 13.8%, Medicaid by 2.8% and Medicare by 6.8%.

Although reducing the scope of government intervention was the justification for cuts in social spending, this justification did not penetrate expenditures on the military. Defence spending increased dramatically during the Reagan years. In 1981 defence expenditures were \$158 billion, in 1985 they were \$253 billion. During this period defence spending increased by 60 percent as compared to a 40 percent increase in total government expenditures. Reagan used the rhetoric of 'big government' to legitimate cuts in person years in the federal non-defense civil service by 71,000, but between 1980 and 1985 the number of persons employed in the military establishment increased by 147,000 or 15%.

The material base supporting the Reagan administration was in the south-western United States. The administration's strategy for economic restructuring was one of favouring new money over old, sunrise over sunset industry, open over closed shops, primary and tertiary industry over manufacturing, and, above all, privileging

defence spending⁹. Reagan aligned himself (or was aligned) with a cadre of south-western single-family controlled entrepreneurs operating in labour intensive industries that were regionally based and free of entanglement from the Eastern Establishment¹⁰. These south-western entrepreneurs were largely anti-union and anti-welfare which complemented Reagan's economic policy. They also benefited from the administration's increased defense contracting and from the administration's personal and corporate tax cuts. Additionally, Reagan's early attempts with supply-side economics, with its "reflationary (sic) implications", led to "huge speculative boondoggles" in the south and west¹¹.

II(iii). The New Right Ideology and Social Policy

The New Right economic policy, which included cuts in social policy expenditures, was inextricably linked to the New Right ideology. The New Right ideology was highly populist and focussed on 'morality' and 'permissiveness' issues such as abortion, sexual relations and crime. This ideology was crucial to the electoral success of the New Right, as key New Right political strategist Richard Viguerie noted:

⁹Davis, Prisoners of the American Dream, 157-181.

¹⁰Davis, Prisoners of the American Dream, 172.

¹¹Davis, Prisoners of the American Dream, 173.

It was the social issues that got us this far, and that's what will take us into the future. We never really won until we began stressing issues like busing, abortion, school prayer and gun control. We talked about the sanctity of free enterprise, about the Communist onslaught until we were blue in the face. But we didn't start winning majorities in elections until we got down to gut level issues¹².

The New Right's views on social policy must be distinguished from the traditional conservative view. It was not only the economic cost of social programs that led the Reagan administration to cut social spending, although this was a factor. The New Right attack on social programs was a reaction against the permissive attitudes that the programs produced in persons utilizing them - the sense of disorder and lack of discipline, immediate gratification and permissiveness - and a reaction against the New Class, or liberal intelligentsia responsible for creating and administering the programs.

[I]n the worldview of the New Right, social welfare is no longer a public expenditure whose costs and benefits can be subjected to rational analysis and debate. Rather, it has become the subject of a cautionary tale illustrating the schemes of the new class, the debasement of its victims, and the stolid resistance of the ordinary 'middle Americans' to whom the right's populist appeal is pitched¹³.

¹²Davis, Prisoners of the American Dream, 171.

¹³Barbara Ehrenreich, "The New Right Attack on Social Welfare," in The Mean Season: The Attack on the Welfare State, ed. F. Block, R.A. Cloward, B. Ehrenreich and F. Fox Piven, (New York: Pantheon Books, 1987), 165.

It was liberal intellectuals who were responsible for the permissiveness of modern American society. The New Right attack was a reaction against the hegemonic influence of the liberal intellectual establishment, or, as they called it the 'New Class'.

The term 'New Class', in the sense that it is used here, was first developed in 1972 by Daniel Moynihan.

Writing in The Public Interest, Moynihan said:

The social legislation of the middle third of the century created 'social space' for a new class whose privilege (or obligation) it is to dispense services to populations that are in various ways wards of the state¹⁴.

The New Class was the group of men and women who were charged with administering the various social welfare programs created during the 1950s and 1960s. Daniel Bell noted¹⁵, the label 'New Class' is a mixture of two concepts: (1) it represented the emergence of a new social stratum, and, (2) it stands for a general cultural attitude.

As a new social stratum, the New Class included the following occupations:

¹⁴B. Bruce-Briggs, "An Introduction to the Idea of the New Class," in The New Class?, ed. B. Bruce-Briggs, (New Brunswick: Transaction Books, 1979), 2.

¹⁵Daniel Bell, "The New Class: A Muddled Concept," in The New Class?, ed. B. Bruce-Briggs, (New Brunswick: Transaction Books, 1979), 169-190.

the upper echelons of (in no particular order of importance) academia, journalism, publishing, and the vast network of foundations, institutes, and research centers that has been woven into partnership with government during the last thirty years¹⁶.

What made this new social stratum a threat was not its political power per se, but the ability of its members to influence the political agenda. The New Class was responsible for creating and perpetuating the liberal hegemony that dominated American political and cultural life between the 1940s and the 1970s. Charles Murray, in Losing Ground, clearly articulated the hegemonic power of the New Class throughout this period:

the salient feature of the [liberal] intelligentsia is not that it holds power...but that at any given moment it is the custodian of received wisdom. It originates most of the ideas in the dialogue about policy, writes about them, publishes them, puts them on television and in magazines and in memoranda for presidential assistants. Most of all, it confers respectability on ideas¹⁷.

What motivated the New Class, said members of the New Right, was not an upward pressure from the constituency they were purporting to help - the poor, the unemployed, minorities. Rather, the New Class was motivated by an internal drive to increase their own power. Jeane Kirkpatrick sardonically referred to the actions of the New Class as the "revolutionary dictatorship of a coercive

¹⁶Charles Murray, Losing Ground: American Social Policy, 1950-1980, (New York: Basic Books, 1984), 42.

¹⁷Murray, Losing Ground, 42.

elite" that "by virtue of its superior wisdom...is best able to judge the interests of everyone - since almost all are too blinded by 'false consciousness' to know what they need or even what they 'really' want"¹⁸.

The second meaning of 'New Class' relates to a general attitude. In their efforts to increase their own power, prestige and status the New Class was contributing to the downfall of American society by impregnating the lower-class working and unemployed members of society with 'permissive' attitudes. By doing so, the New Class was systematically destroying the very fabric of American life: rugged individualism, deference to authority, sexual morality. In the 1970s, permissiveness took on a broad meaning; it came to symbolize social disorder in general: sexual promiscuity, drugs, the breakdown in the family and crime.

These hedonistic lifestyles, values and ideals cannot be simply discarded by the old [liberal] elite; they represent the logical outgrowth of its structural interests: large, social engineering governments in alliance with corporations, universities and foundations, the mass media, unions, and other

¹⁸Jeanne J. Kirkpatrick, "The Politics of the New Class," in The New Class?, ed. B. Bruce-Briggs, (New Brunswick: Transaction Books, 1979), 47.

bureaucracies¹⁹.

These new attitudes were the direct result of the liberal intelligentsia's attempts at large-scale social engineering.

The link between the 'permissive' social policy of the New Class and the economic downfall of the United States can be seen in Charles Murray's analysis of the rise in crime rates during the 1970s. Murray linked changes in the structure of the economy to changes in crime rates in the following manner:

None of the individual links is nearly as important as the aggregate change between the world in which a poor youngster grew up in the 1950s and the one in which he or she grew up in the 1970s. All the changes in the incentives pointed in the same direction. It was easier [in the 1970s] to get along without a job. It was easier for a man to have a baby without being responsible for it, for a woman to have a baby without having a husband. It was easier to get away with crime. Because it was easier for other to get away with crime, it was easier to obtain drugs. Because it was easier to get away with crime, it was easier to support a drug habit. Because it was easier to get along without a job, it was easier to ignore education²⁰.

Changes in the incentive structure in education, employment and crime have caused people, mainly the poor, to be "seduced into long-term disaster by the most human of

¹⁹Samuel T. Francis, "The Message from MARS: The Social Politics of the New Right," in The New Right Papers, ed. Robert A. Whitaker, (New York: St. Martin's Press, 1982), 81.

²⁰Murray, Losing Ground, 175.

impulses, the pursuit of one's short-term best interest"²¹.

In an effort to increase their own power, the New Class was contributing to the downfall of American society. The cure, said members of the New Right, was to reduce government spending on social welfare programs, not only for the cost savings, but, more importantly, to restore in Americans the virtues of hard work, delayed gratification and morality and, thus, bring to American society the order and discipline it was lacking.

The New Right campaign against the 'permissiveness' and 'immorality' that was encouraged by the social policy of the New Class was an effort to redefine the lived experiences of Americans. The New Right sought to justify cuts in social spending by directing criticism away from the state and towards the members of the liberal intelligentsia and individual criminals, welfare recipients, single parents and others most affected by the cuts in social spending.

In the area of criminal justice policy, the New Right was in direct opposition to the liberal intelligentsia's analysis of the crime problem. Throughout the 1950s and

²¹Murray, Losing Ground, 176.

early 1960s, the Positivist school of criminology dominated the liberal intelligentsia. For Positivists, crime and anti-social behaviour were the product of social or psychological causes. The key to reducing crime, therefore, was to intervene in, and adjust the causal element through direct intervention or by altering government policy.

The Positivist conception of the causes of crime dominated criminal justice policy debates throughout the middle half of this century. For example, Ramsey Clarke, the attorney general in Lyndon Johnson's administration, provided the following analysis of the crime problem in the United States:

The basic solution for most crime is economic - homes, health, education, employment and beauty. If the law is to be enforced - and rights fulfilled for the poor - we must end poverty. Until we do, there will be no equal protection of the laws. To permit conditions that breed antisocial conduct is our greatest crime²².

Commenting on the widespread looting that occurred during the New York blackout of 1977 President Jimmy Carter said:

Obviously the number one contributing factor to crime of all kinds...is high unemployment among young people, particularly those who are black or Spanish-speaking or in a minority age group where they have such a difficult time getting jobs in times of economic problems²³.

²²Charles Colson, "Crime and Restitution: An Alternative to Lock-them-Up Liberalism," Policy Review, 43 (winter, 1988): 14.

²³Colson, "Crime and Restitution," 14.

For President Carter, the problem of crime was structural; forces extraneous to the individual facilitated, or created the necessary conditions for, the commission of crime. The crime problem was first and foremost a problem of society and secondly a problem of the individual. This view of crime held by President Carter and former Attorney General Ramsey Clarke correspond to the Positivist model of criminology (see Chapter 4).

New Right analysts and social commentators did not share President Carter's view that crime was the product of social forces and, in order to reduce the magnitude of crime, the social conditions that produced crime must be ameliorated. Rather, the views of the New Right analysts on crime corresponded to the Conservative model of criminology: crime was a problem of individual morality and discipline (see Chapter 4). President Reagan, for example, made the following analysis of the growth of crime:

Controlling crime in American society is not simply a question of more money, more police, more courts, more prosecutors...It is ultimately a moral dilemma - one that calls for a moral or spiritual solution. The war on crime will only be won when an attitude of mind and a change of heart takes place in America - when certain truths take hold again and plant their roots deep into our national consciousness. Truths like: right and wrong matters; individuals are responsible for their actions; retribution should be swift and sure for those who prey upon the innocent....The solution to the crime problem will not be found in the social worker's files, the psychologists notes, or the bureaucrats budget...It

is a problem of the human heart, and it is there that we must look for answers²⁴.

Because crime was a problem of individual morality and discipline government intervention directed towards ameliorating the social or psychological 'roots' of crime would not produce positive results, in fact, just the opposite may occur. James Q. Wilson made the following analysis regarding the causes of crime:

I have yet to see a root cause or encounter a government program that has successfully attacked it, at least with respect to those social problems that arise out of human volition rather than technological malfunction. But more importantly, the demand for causal solutions is, whether intended or not, a way of deferring any action and criticizing any policy. It is a cast of mind that inevitably detracts attention away from the few things that government can do reasonably well and draws attention toward those many things it cannot do at all²⁵.

In a similar vein, Ernest van den Haag, writing about the problems of spouse abuse, robbery and other violent crimes, said:

The courts can try to protect society from the effects of these problems, but I see no way of avoiding or solving them by means available to the criminal justice system - or even to society as a whole. The most one can hope for is to minimize offenses. In this the

²⁴R.S. Ratner and John L. McMullan, "Social Control and the Rise of the 'Exceptional State' in Britain, The United States, and Canada," Crime and Social Justice, 19, (1982): 37 citing 2, Justice Assistance News, 9, (November, 1981).

²⁵James Q. Wilson, Thinking About Crime, (New York: Random House), 1975, p. xv; quoted in Elliot Currie, "Crime and the Conservatives: How Their Analyses Miss the Problem", Dissent, (Fall, 1985) 427.

courts, despite obvious limits, play an indispensable part²⁶.

For President Reagan, James Q. Wilson, Ernest van den Haag and other New Right commentators the etiology of crime would not be found in the social structure of the American society; crime was an individual problem, a moral issue, a matter of the 'heart'. Government interventions cannot 'cure' the problem, and, equally important, the government should not become involved in such projects. The criminal justice system must use the threat of criminal punishments to deter potential offenders and, failing this, incapacitate persistent offenders.

The ideas of the New Right, and the specific policy options (inside and outside of the field of criminal justice policy) that flow from these ideas, are qualitatively different from those of the liberal establishment. The rise of the New Right in the various arms of the state, and the ideas, rhetoric and policy options they espouse, fundamentally altered the political discourse of the American state. In the criminal justice policy field, the New right analysis was in direct opposition to the liberal intelligentsia's analysis of the causes and cures of crime. This examination of selected

²⁶Ernest van den Haag, Punishing Criminals: Concerning the Very Old and Painful Question, (New York: Basic Books, 1975), 149.

debates on parole between 1970 and 1988, will assess the degree to which the emergence of the New Right in the 1980s corresponds with an increase in the demand for 'get-tough-on-crime' policies - was there a groundswell of support for the types of policies offered by New right commentators such as President Reagan, Ernest van den Haag and James Q. Wilson?

III. THE 'RISE OF THE RIGHT' IN CANADA?

In the United States the 'rise of the right' was characterized by an economic policy framework that stressed a 'return' to the orthodoxy of the free market with limited government intervention, and, a highly populist social policy agenda based on the themes of morality and permissiveness. Both of these characteristics were evidenced in the political agenda of the Reagan administration in the early and mid-1980s. Currently, there is a debate among social policy analysts as to whether there has been a similar 'rise of the right' in Canada. This section will examine the economic crises of the 1970s in Canada. Additionally, key pieces of the Canadian 'rise of the right' literature will be reviewed.

III(i). The Economic Downturn in Canada in the 1970s

The economics of staples exportation and branch plant industry combined with energy crises took their toll on the Canadian economy during the 1970s. Productivity rates declined at a annual rate of 2.3% between 1967 and 1973 and between 1974 and 1981 they were virtually zero. By 1981, manufacturing accounted for only 20% of the total labour force, a 10% drop from the post-war peak. By 1982, growth in the real Gross National Product was negative 4.4%²⁷. The official unemployment rate rose from 6.9% in 1975 to 13% in 1982, and the unofficial (or real) unemployment rate was estimated at double the figure. Moreover, the unemployment rate was skewed by age and region, the youngest and the eastern provinces having disproportionately higher rates²⁸.

It was within this economic context that the debate over the rise of the right in Canada was situated. Taylor argues that there has not been a shift to the right in

²⁷Janine Brodie and Jane Jenson, Crisis, Challenge and Change: Party and Class in Canada Revisited, (Ottawa: Carleton University Press, 1988), 294-299.

²⁸Ian Taylor, "Theorizing the Crisis," in State Control: Criminal Justice Politics in Canada, ed R.S. Ratner and John L. McMullan, (Vancouver: University of British Columbia Press, 1987), 200.

Canada²⁹. Ratner and McMullan claim that, like the United States and the United Kingdom, there has been in Canada a rise of the right and a move towards an 'exceptional state' characterized by a reliance on the coercion rather than consent. This debate is reviewed in the next section.

III(ii). The 'Rise of the Right' in Canada

Ratner and McMullan examined the 'rise of the right' in the United States, the United Kingdom and Canada. They began their analysis by locating these countries within the global economic crisis of the 1970s. Rather than adopting expansionary demand management strategies, the Reagan, Thatcher and Trudeau regimes responded to this crisis with supply-side monetaristic economics. The authors claimed that this new "reverse Keynesianism" was being pursued within a new socio-political program of the Right. They claimed that in these three countries there existed in the early 1980s an "exceptional state" characterized by austerity capitalism, new forms of labour discipline, new class alliances, exclusionary policies towards minorities and the non-working poor, a new moral discourse and an expanding repressive apparatus.

²⁹Taylor, "Theorizing the Crisis", 200.

In their analysis of the United Kingdom, the authors argue that the emergence of Thatcherism was something "qualitatively new"; they said that Thatcherism had a philosophy that "stamps its intervention with a universal character" and that the strength of Thatcherism will likely remain considerable because "the general crisis of the state" was "of hegemonic proportions". They continued to say that the dominant ideology that "integrated the social order and protected capital" had been "undercut". Thus, the New Right in the United Kingdom carved out a new "seige mentality".

In the United States, Ratner and McMullan said that the election of Ronald Reagan as president "significantly altered the terrain of political discourse". They claimed that the "essence" of the New Right political agenda was "predominantly social - the conservative reconstruction of everyday life, popular consciousness and social institutions". Efforts by the New Right in the military, the Central Intelligence Agency, the Federal Bureau of Investigation, capital punishment, penal discipline, and criminal sanctions had the effect of "bolstering its coercive institutions" and the New Right's efforts in social spending and taxation "mirror the policies of Thatcher".

For Ratner and McMullan, the emergence of Thatcherism and Reaganism signalled a qualitatively new course in the political economies of these countries. The two regimes redefined the boundaries and duties between state and citizen. It was not their new economic agenda that set the United States and the United Kingdom on their new course, it was the right-populist discourse in which the new economics was situated that signalled the fundamental shift.

Ratner and McMullan next examined the political economy of Canada at the turn of the 1980s. They said that the 1979 federal election was "marked by a recognizable resurgence of right-wing populist themes" but these themes were expressed only locally. Nevertheless, the authors argue that there was a hegemonic crisis in Canada, differing only in degree from that which occurred in the United States and the United Kingdom:

In Britain and the United States where the effects of the global crisis of capitalism were most pronounced, the ideological hegemony of consensus was challenged and fundamentally altered; in Canada, the sense of ruling class failure amounting to a crisis of production and reproduction has been far less acute, owing to its relatively subordinate status within the international marketplace³⁰.

Thus, only the degree of the crisis differed in the three countries.

³⁰Ratner and McMullan, "Social Control", 34.

The response to the crises by these three states, said Ratner and McMullan, was an increase in the use of repressive state apparatus, the emergence of the 'exceptional state'. They argue that in the United States and the United Kingdom the 'law and order' problem was incorporated into the right-populist ideologies to diffuse public anxieties about economic conditions and buttress increasing state-sponsored repression. In Canada, the 'law and order' issue (and the right-populist ideology) has largely been absent. The Canadian state, operating in an 'exceptional' mode, has exercised social control through the administrative structures of the state. For example, the Trudeau Liberals sought wider legitimation through the repatriation of the constitution and the introduction of a constitutionally-based document of rights. Additionally, the state maintained and increased control over civil society through the federal government's power to control spending via transfer payments and cost-sharing agreements with the provinces. Finally, the state redefined the boundaries of legitimate political discussion and opposition by increasing the powers of the federal police force and introducing a civilian security organization. According to Ratner and McMullan these examples of state power "represent a magnification of the state in response to protracted economic crisis and fading legitimation".

They continue:

It is the modus operandi of the exceptional state in Canada, one which depends on its formation not on the marshalling and cultivation of popular sentiments (as in England and the United States), but on brazen executive fiat. It is, indeed, an Order-in-Council State which produces moral panics by decree, and afterwards bids for legitimation from the established civic institutions³¹.

Ratner and McMullan concluded their analysis by saying that, if the trends evidenced in the early 1980s continue, the future of Canadian politics will likely be "characterized by the same stridency and cynical manipulation of populist sentiments as have occurred in Thatcher's and Reagan's rise to power".

For Ratner and McMullan, the crisis in hegemony was less acute in Canada than was the case in the United States and the United Kingdom, and rather than relying on populist appeals, the 'exceptional state' in Canada has been realized bureaucratically. Nevertheless, the United States, the United Kingdom and Canada have shown

movement away from the form of consensus in which social democracy has been a principle tendency towards harshly politicized milieu in which authoritarian views are expounded under the cover of nominally democratic institutions³².

³¹Ratner and McMullan, "Social Control", 40.

³²Ratner and McMullan, "Social Control", 40.

Taylor challenged Ratner and McMullan's analysis of the 'crisis' in the Canadian state³³. Taylor argued that the collapse of the Canadian labour market in the early 1980s did not result "in any serious challenge in any part of the country to familiar bourgeois politics"; on the contrary, said Taylor, "it may even have been accompanied by a generalized strengthening of these forms of politics".

In order to support his claim, Taylor argued that the development of the Canadian social formation was unlike the development of some European nations. Unlike some European nations, there has been an active labour movement in particular regions of Canada but "this does not amount to evidence of a national working-class set of institutions and a body of culture actively at odds with the institutions and culture of the bourgeoisie"³⁴. The lack of a national counter-hegemonic movement in Canada is evidenced by the fact that both major political parties are bourgeois parties, and the New Democratic Party has failed to move beyond "mild, consensual social-democratic moorings".

³³Taylor, "Theorizing the Crisis", 198-224.

³⁴Taylor, "Theorizing the Crisis", 210.

The lack of a sustained national popular movement against either of the bourgeois parties has resulted in a distinctive social formation in Canada:

what emerges in Canada is not a social democracy, where the state is directly involved at the behest of labour in the intimate organization of both the economy and civil society, but a liberal democracy within a bourgeois social order with a longstanding conservative political culture. This 'liberal democracy' certainly demands that the state engage in some general management of the social conditions on which the activity of capitalist economy depends, but it does not require that the state intervene directly or routinely in the everyday management of that economy. And Conservatives in Canada certainly demand that the key institutions of the liberal democratic state in this country, like the law, do not shrink from their proper role in the guardianship and reproduction of moral order³⁵.

Taylor then moved on to examine 'what kind of crisis' occurred in Canada. He argued that in the late 1970s an "essentially political" crisis dominated public debate, first focussing on the Quebec independence question, then on the federal-Alberta dispute over national energy policy, and, finally, the repatriation of the constitution. By the early 1980s, social crises began to mount as a series of racial incidents received national media attention and opinion polls indicated that racial unrest in Canada was on the increase. The political and social crises were "underpinned" by the sudden increase in the unemployment rate between 1981 and 1983.

³⁵Taylor, "Theorizing the Crisis", 212.

The political, social and economic crises of the early 1980s, argues Taylor, resulted in "very considerable anxiety in 1981-83 over the viability of familiar social and political institutions". However, even though these crises generated tremendous anxiety there was "little evidence of a serious decline in the ideological hegemony of either bourgeois power or capitalist economy". Taylor went on to say

There is also no real crisis in the overall form of dominant ideological relations in Canada. To speak of a fundamental crisis is to imply that the existing ideological relations are indeed 'social-democratic' in the European sense - a corporatist settlement arrived at between warring social classes - and that, as a necessary response to the undoubted decline of the economic possibilities in Canada, there is to be a massive retreat by the state from such welfarist commitments. There is no such full-scale social democratic settlement in Canada. Retreats by governments from expenditure commitments on health and welfare could therefore occur without involving a fundamental and visible reconstruction of the state's declared relationship to civil society (of the kind being attempted via Thatcherism in the U.K.)³⁶.

For Taylor, crises have surfaced in Canada but these crises have not penetrated the essentially bourgeois character of Canadian social relations, thus, there has not been a general crisis of the state as Ratner and McMullan have argued.

This analysis will examine the question of the 'rise of the right' in Canada. Specifically, it will examine the

³⁶Taylor, "Theorizing the Crisis", 217.

relationship between the state and civil society by examining criminal justice policy debates. The decision to use parole as the specific policy field to examine, and from which to draw inferences about broader theoretical questions was not an arbitrary one. In many ways criminal justice policy is the consummate policy field one can use to examine broader questions of the structure of a society. Within every criminal justice policy there are explicit or implicit assumptions regarding human nature, the relationship between the state, the individual and society, and the role of social policy. Criminal justice policy affects, and is effected by common sense notions of the way individuals conceptualize their world: everyone has a 'theory of crime' that more or less reflects their lived experiences. These common sense notions of crime and crime control often times assume a 'taken for grantedness' quality and become part of the world view that characterizes a society at a particular historical conjuncture.

Common sense notions of crime and crime control are important for several reasons. First, as are all thoughts and actions, common sense notions of crime are rooted in the material conditions of a society. Second, if common sense notions acquire a 'taken for grantedness' quality, this reflects some type of consent to, or at least tacit

acceptance of, the social order and the material interests that are dominant at that time. Third, if there is movement in these common sense notions, changes that, in a liberal democracy, can be evidenced through political discussion and policy changes, it can be argued that the old, taken for granted notions no longer correspond to the lived experiences of citizens. Abrupt changes in criminal justice policy should signal the astute observer that new material interests have gained credibility and have been able to "confer respectability on ideas" that correspond to their material interests. Thus, analyses of criminal justice policy allow one to focus on uncovering links between changes in policy and the broader political economy of a society, to uncover the connections between ideas, policy and material interests.

This analysis will examine parole debates in Canada and the United States between 1970 and 1988. The evidence obtained from the analysis of the parole debates will be linked to the broader question of the 'rise of the right' in Canada and the United States. It should be noted that this analysis is not intended to uncover either the "causes" of the New Right or the "causes" of changes in justifications for parole. Because this analysis focuses on one aspect of a specific policy field, it is difficult to generalize the results. This analysis will, however,

provide a piece of evidence which, together with evidence gained from analyses of other policy fields, will add to a body of literature that may provide a degree of support for either Ratner and McMullan's argument or Taylor's argument.

CHAPTER 3
THE CONDITIONAL RELEASE SYSTEMS IN
THE UNITED STATES AND CANADA

I. INTRODUCTION

This chapter provides operational definitions for the various forms of conditional release available in Canada and the United States. Additionally, this chapter provides an outline of the criminal justice systems in Canada and the United States, and a brief history of the conditional release systems in these countries.

In this analysis, 'conditional release' refers to any state-sanctioned procedure that releases an inmate from a penitentiary before the inmate's warrant expiry date. In Canada and the United States there are three generic types of conditional release: (1) temporary absences, (2) parole, and (3) remission-based release.

'Temporary absence' refers to the release of an inmate for a short period of time - a day, a week - for a specific reason such as visiting a relative, or participating in a psychological or medical treatment program. This form of release is temporary as the inmate must return, at some point, to the institution.

'Remission-based release' refers to the procedure whereby an inmate's sentence is reduced by penitentiary staff as a reward for favourable conduct while the inmate is in custody. For example, inmates may receive 'good time' credits if they follow the rules of the institution and are not involved in incidents requiring disciplinary action.

'Parole' refers to the discretionary release of an inmate, by an independent agency or organization, before the inmate has completed his/her sentence. The difference between remission-based release and parole lies in the body authorized to release the inmate. This analysis focusses specifically on parole, however, remission-based release systems will enter into the discussion, particularly in regard to Canada.

Excluded from these operational definitions are value-laden terms such as 'rehabilitation', 'supervision' or 'sentence equalization'. These terms have been used to justify parole in Canada and the United States and the point of this analysis is to determine what justifications have been used at various points in time in Canada and the United States to support or not support parole.

II. THE STRUCTURE OF THE FEDERAL PENITENTIARY SYSTEM IN THE UNITED STATES

In the United States, the federal government and state governments create and enforce separate criminal law¹. Each jurisdiction has its own criminal law enforcement machinery, court structure, prosecuting attorneys, penitentiaries and parole systems.

The distinction between federal crimes and state crimes relates to jurisdiction. The limit of a state's criminal authority is geographic; state criminal law is only enforceable within the geographic limits of the enacting state. The federal jurisdiction is limited by the constitution; Congress may pass criminal legislation that deals with matters allocated by the constitution to the federal government. The federal government, therefore, has criminal jurisdiction throughout the United States as long as the criminal activity relates to a federal power².

The federal government plays a significant role in the enforcement of the substantive criminal law. Nevertheless,

¹Hazel B. Kerper, Introduction to the Criminal Justice System, (2nd Ed.), as revised by Jerold H. Israel, (St. Paul, Minnesota: West Publishing Co., 1979), 73-74.

²Kerper, Introduction to the Criminal Justice System, 40.

for most types of criminal activity, especially acts commonly thought of as 'criminal' such as assault, robbery and break and enter, federal prosecutions account for approximately ten percent of the total number of prosecutions in the country.

The Federal Bureau of Prisons is responsible for housing all offenders incarcerated for a federal crime. As of December 31, 1986 there were 44,408 inmates in federal penitentiaries. The United States Parole Commission is attached to the United States Department of Justice. In December of 1986 there were 17,064 federal parolees.

III. A BRIEF HISTORY OF CONDITIONAL RELEASE IN THE UNITED STATES

The United States Board of Parole was created in 1930. From 1910 to 1930 each federal prisons had its own parole board comprised of senior staff members. The attorney general had authority to make parole release decisions. These decisions were based on the recommendations of individual parole boards.

In December of 1929 the Committee of the Judiciary of the United States House of Representatives held hearings to discuss the "prison problem". Six bills were under

discussion, one of these bill concerned the reorganization and centralization of the parole board. One of the products of these hearings was the creation of the United States Board of Parole.

The United States Board of Parole was an autonomous organization linked to the attorney general for administrative purposes only. The parole board consisted of eight members appointed by the president on the advice of the Senate.

The United States Board of Parole had the authority to release federal inmates on parole, set parole conditions and revoke parole. The criteria for release on parole were as follows³:

- (1) that release on parole not be incompatible with the welfare of society,
- (2) that the inmate observed substantially the rules of the institution, and,
- (3) that there is reasonable probability that the inmate will not violate the law while on parole.

The official release criteria did not stipulate that rehabilitation or reformation of the inmate must be considered when a release decision was made.

Inmates serving a definite (i.e. fixed term) sentence

³Fredrick Hussey and David E. Duffee, Probation, Parole and Community Field Service: Policy, Structure and Process, (New York: Harper & Row, 1980).

were eligible for parole after the expiry of one-third of their sentence expired. Inmates serving a life sentence or a sentence of over thirty years, were eligible for parole after serving ten years. Inmates sentenced to a minimum and maximum term were eligible for parole after serving the minimum portion of the sentence.

In 1974, the United States Board of Parole reorganized itself. For the most part, this reorganization was codified in the Parole Commission Reorganization Act of 1976⁴ (PCRA). The reorganization of the parole board into the United States Parole Commission was, in large part, a reaction against heavy criticism the federal parole system received in the late 1960s and early 1970s. Much of this criticism concerned the parole decision-making process. The PCRA altered the parole decision-making process in an effort to structure, and make more equitable, the exercise of discretion. The criticism surrounding the parole system in the early 1970s and the resulting changes are examined in Chapter 5.

In 1984 the Sentencing Reform Act⁵ (SRA) was passed. The SRA abolished parole release. Under the terms of the

⁴P.L. 94-233, 94th Congress, H.R.5727.

⁵P.L. 98-473, Chapter II.

SRA inmates are to be incarcerated the entire length of their sentence, less "credit towards the service of [their] sentence...of fifty-four days at the end of each year of his term of imprisonment"⁶. The hearings leading up to the passage of the SRA are examined in Chapter 5.

IV. THE STRUCTURE OF THE FEDERAL PENITENTIARY SYSTEM IN CANADA

The Constitution Act, 1867⁷ sets out the framework for the operation of the criminal justice system in Canada. The federal government has the power to make all criminal laws. The enforcement of the criminal law is a provincial matter, as is the responsibility for the administration of the criminal court system. The federal government is responsible for the custody of all criminal offenders sentenced to a period of incarceration of two years or more, offenders sentenced to a period of incarceration of less than two years fall under provincial jurisdiction.

The Ministry of the Solicitor General has the mandate to operate the federal penitentiary system and the parole

⁶P.L. 98-473, Chapter II, S. 3624(b).

⁷1867 (U.K.), c.3.

system. Up to 1978, the Canadian Penitentiary Service (CPS) was the operational arm of the Ministry charged with managing manage the federal penal system. In 1978, the Ministry was re-organized and the CPS was renamed the Correctional Service of Canada (CSC). The federal penitentiary system is governed primarily by the Penitentiary Act⁸. As of March 31, 1986 there were 12,765 inmates in federal penitentiaries.

The National Parole Board (NPB), created in 1958, has the absolute authority to grant, deny or revoke full parole and day parole to federal inmates, and provincial inmates in provinces that do not have their own parole boards. This authority is found in the Parole Act⁹. Up to 1986, the NPB would not restrict the release of inmates on remission-based programs. Changes to the Parole Act in 1986 enlarged the role of the NPB and allowed the organization to intervene in the remission-based release of certain serious criminal offenders. As of March 31, there were 3657 inmates on full parole.

A brief history of the conditional release system in Canada is provided in the next section.

⁸R.S.C. 1970. c. P-21.

⁹S.C. 1958, c. C-46.

V. A BRIEF HISTORY OF CONDITIONAL RELEASE IN CANADA

Prior to 1899 in Canada, the Royal Prerogative of Mercy was used as a method of releasing inmates from institutions before their warrant expiry date. The Governor General, acting on behalf of the Queen and with advice from the Privy Council, granted pardons to persons convicted of criminal offences, and, commuted punishments imposed by the courts. Additionally, as of 1868, inmates were eligible for early release from institutions if they earned credits for co-operative behaviour and industrious work habits.

In 1899, An Act to Provide for the Conditional Liberation of Penitentiary Convicts¹⁰, which became known as the Ticket to Leave Act, was passed by Parliament. Prime Minister Laurier introduced the legislation in Parliament with the following words:

Here is a convict, a young man of good character, who may have committed a crime in a moment of passion, or, perhaps, have fallen victim to bad example or the influence of unworthy friends. There is a good report of him while in confinement, and it is supposed that if he were given another chance, he would be a good citizen. Under the Bill, power is given to the Governor

¹⁰S.C. 1899, 63-64 Vic., c.49.

General to order his liberation - of course, under certain rules to be established in the framing of which we shall be guided by the precedents of England¹¹.

The Ticket to Leave Act formed the basis of the conditional release system for the first half of the 1900s. The Act was administered by the Remission Service of the Department of Justice. The Salvation Army, the John Howard Society and the Elizabeth Fry Society played a substantial role in providing supervision to offenders.

In 1956, the Committee Appointed to Inquire into the Principles and Procedures Followed by the Remission Service of the Department of Justice of Canada (Fauteux Committee) released its report. The Fauteux Committee defined parole in the following manner:

Parole is a procedure whereby an inmate of an institution may be released, before the expiration of his sentence, so that he may serve the balance of his sentence at large in society, but under appropriate social restraints designed to ensure, as far as possible, that he will live a law-abiding life in society. It is a transitional step between close confinement in an institution and absolute freedom in society¹².

¹¹Canada, Department of Justice, Advisory Committee on the Principles and Procedures Followed by the Remission Service of the Department of Justice of Canada (Fauteux Committee), Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, (Ottawa: Queen's Printer, 1956), 55.

¹²Fauteux Committee, Report to Parliament, 51.

The Fauteux Committee wrote that the parole system must ensure "the safety of the community as well as the welfare of the individual prisoner" and that these two considerations are "inseparably linked, because the safety of the community depends on the reformation of the offender"¹³. Thus, the dual purposes of parole were protection of the public and the reformation or rehabilitation of the inmate.

In 1958, Parliament passed the Parole Act. The Parole Act created the National Parole Board which had authority to exercise statutory and regulatory powers to grant and set conditions for the release of persons in federal penitentiaries, and to be responsible for conditional release of inmates in provincial and territorial institutions. The power to release inmates before the expiration of their sentences is found in Section 10(1)(a) of the Parole Act:

The NPB may

- (a) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that
 - (i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment.
 - (ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and

¹³Fauteux Committee, Report to Parliament, 52.

- (iii) the release of the inmate on parole would not constitute an undue risk to society.

Under the terms of the Parole Act, parole eligibility was set at one-third of an inmate's sentence, except in the case of a life sentence or a commuted death sentence. In the latter case, parole eligibility was set at seven years after the sentence commenced. The National Parole Service was created to provide case preparation services and supervision to parolees, and to co-ordinate voluntary organizations involved in parole supervision.

In 1961, the Penitentiary Act was revised and earned remission was introduced. Previous to these changes, federal inmates were eligible for statutory release. Statutory release reduced, by statute, up to one-quarter of an inmate's sentence subject to any loss that may occur as a result of an inmate's misbehaviour during confinement. The changes to the Penitentiary Act introduced earned remission. Earned remission became available, at a rate of three days per month, to inmates who applied themselves industriously while incarcerated. Once granted, earned remission could not be taken away. During the 1960s, inmates released on earned or statutory remission were released unconditionally.

In 1969 the Canadian Committee on Corrections (Ouimet Committee) conducted an extensive examination of the criminal justice system. In its report, the Ouimet Committee said that parole was "a treatment-oriented correctional measure" designed to "test the [offender's] self-control and ability to get along with the community". The Ouimet Committee continued to say that parole offers society "immediate protection through a degree of control over the offender's behaviour"¹⁴. Like the Fauteux Committee, the Ouimet Committee justified parole as a protection and rehabilitation measure.

The Ouimet Committee recommended several changes to the Parole Act including a recommendation to create "statutory conditional release". At the time, inmates were eligible for statutory and earned remission, and, if released under these mechanisms, were released without supervision. The Ouimet Committee recommended that inmates released under statutory and earned remission be subject to community supervision rather than being released directly to the community.

¹⁴Canada, Canadian Committee on Corrections, Towards Unity: Criminal Justice and Corrections, (Ottawa: Queen's Printer, 1969), 330.

In 1970, following the recommendations of the Ouimet Committee, Parliament amended the Parole Act to provide that all inmates released under earned or statutory remission of more than sixty days would be subject to supervision by the National Parole Board. This form of release was called mandatory supervision.

Further amendments to the Parole Act were made in 1976 when Bill C-84, the "peace and security legislation", was enacted. Under Bill C-84 capital punishment was abolished and the parole eligibility date for first degree murderers was set at twenty-five years, and between ten and twenty-five years for second degree murderers. Statutory remission was abolished and an amendment was made to provide for inmates to receive up to fifteen days remission for every month of their sentence served (or one-third of an inmate's sentence). Inmates released under this provision would remain subject to mandatory supervision.

In July of 1986 Bill C-67 was passed and further amendments were made to the Parole Act. Bill C-67 provided the National Parole Board with the authority to detain an inmate in an institution past his/her mandatory supervision date if, in the opinion of the NPB, the inmate poses a serious risk to society. Additionally, if the NPB decides to release a potentially dangerous inmate, the NPB has the

authority to impose special conditions on the inmate. Finally, offenders referred to the NPB under the provisions of C-67 but not determined to be a serious threat to the public safety will not be entitled to a second mandatory supervision release if, for any reason, their first mandatory supervision release is revoked.

At present, other than day parole and temporary absences, there are two forms of early release from institutions: full parole and mandatory supervision. Inmates become eligible for full parole after one-third of their sentence has been served. The National Parole Board has complete discretion to grant or deny parole based on its own decision-making criteria. These criteria are examined in Chapter 6. For non-violent offenders, mandatory supervision release is available after at least two-thirds of their sentence has been served. The amount of time an inmate serves on mandatory supervision depends upon the number of day credits awarded to the inmate during his/her confinement. Under the provisions of Bill C-67, the National Parole Board may detain potentially violent offenders even though these offenders have received mandatory supervision credits. The decision to invoke the provisions of Bill C-67 can be made only after a NPB hearing to determine the risk the inmate poses to society.

CHAPTER 4

RESEARCH METHOD

I. INTRODUCTION

The second section of this chapter discusses the specific research method used in this analysis. The third section discusses the data universe and sample selection for the Canadian and United States data. The fourth section provides a description of the models used to categorize the documents. The fifth section of this chapter discusses possible limitations of this analysis and steps taken to overcome these limitations.

II. RESEARCH METHOD

The aim of this analysis is to uncover the justifications used by various sets of actors in Canada and the United States to support or not support parole, and then compare these justifications across time and across countries. Thus, this analysis is both historical and comparative. The research method utilized was content analysis.

Content analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of messages¹.

This method allows a researcher to examine, in a systematic and objective manner, a sample of documents randomly selected from a defined universe in order to make informed inferences about a body of text. This type of analysis is well suited for examining policy questions. Policy debates are inherently political matters. Analyses of content allow analysts to reduce the text of these political debates into quantifiable terms which facilitates examinations aimed at assessing continuity or change.

This analysis examined a sample of witnesses appearing before legislative committees in the United States and Canada. The oral and written testimony of each witness in the sample was analyzed. Based on this analysis of content, each witness was assigned one of the following categories: Positivist, Classicist, Conservative or 'other'. These models are discussed in section IV of this chapter. After the witnesses for a particular inquiry were classified, the number of witnesses in each category was summed to provide

¹O.R. Holsti, Content Analysis for the Social Sciences and Humanities, (Reading, Mass.: Addison-Wesley, 1969); quoted in Content Analysis: A Technique for Systematic Inferences from Communications, T.F. Carney, (Winnipeg: University of Manitoba, 1972), 159.

a quantitative assessment of the dominant justification(s) utilized in particular parole debates. This procedure allowed a cross-time and cross-country comparison of the dominant justifications used to support or not support parole.

The documents were categorized according to their "theme":

By 'theme' is meant a conceptual entity: an incident, thoughtprocess (sic), or viewpoint which can be seen as a coherent whole².

In this analysis, "themes" are represented by the three models of criminological thought listed above. The themes, or classification scheme, used in this analysis follow closely to that used by Young³. The classification scheme provided the standard against which the data was assessed. The three categories represent the three dominant paradigms in North American criminology. Each paradigm is based on a distinct set of assumptions about human nature and the social order. Based on these assumptions, criminologists and social analysts from each paradigm develop particular research protocols and policy statements. Thus, how one views human nature or the social order, what one considers

²Carney, Content Analysis, 159.

³Jock Young, "Thinking Seriously About Crime: Some Models of Criminology," in Crime and Society: Readings in History and Theory, ed. M. Fitzgerald, G. McLennan and J. Pawson, (London: Routledge & Kegan Paul, 1986), 248-309.

an appropriate unit of analysis and an appropriate criminal justice policy focus, and what one considers the most effective policy goal are indicators of the three models of criminological thought.

The documents were not categorized according to the stand witnesses took on parole (abolish versus retain). Rather, the documents were categorized according to the justification each witness used to support parole or call for its abolition. Thus, one witness may opt to abolish parole because parole diluted the deterrent effects of a sentence, while another witness opted to retain parole as a mechanism to release from institutions inmates considered not to be dangerous to society. In the case of the former witness, a deterrent argument was made; in the case of the latter, a selective incapacitation argument was made. Both witnesses, therefore, utilized Conservative justifications, and would be categorized as 'Conservative', even though they differed on the retention-abolition question.

The data included only the written and oral testimony offered by each witness. Many witnesses published material in the academic and popular press. Only if this material appeared in direct quotations in a witness' written or oral testimony, or unless this material was appended to a witnesses testimony, was it included in the data. Thus,

witnesses were categorized solely based on their testimony.

III. DATA SELECTION

The sample of data used in this analysis was randomly selected from specified legislative committee hearings on parole in Canada and the United States. In the context of this analysis, legislative committee hearings are useful because they bring together persons and groups to discuss specific issues in a structured context. Because participants in this process are discussing a common issue, a great deal of insight can be gained by comparing the positions of various witnesses - Are there common themes among all participants? Is there a divergence of opinion?

Similarly, comparing legislative committee hearings across time allows one to assess the extent of continuity or change in thought - Are there shifts in the debate? Do some issues lose importance while others gain importance? In addition, comparing legislative committee hearings across countries enriches one's analysis by providing a comparative perspective.

III(i). The United States Data

The United States data universe included all United States Congress legislative committee hearings on parole or

matters directly related to parole between 1970 and 1988. This data set was defined by searching the Congressional Indexing System Cumulative Indexes for the specified time period. This examination revealed that the term 'parole' clustered around three legislative initiatives:

- the Parole Commission Reorganization Act of 1976 (PCRA)
- the Sentencing Reform Act of 1984 (SRA)
- the Criminal Sentencing Procedures Revision Act of 1987

Additionally, there were yearly references to parole board appropriations hearings.

Each legislative initiative involved a series of hearings during which witnesses provided oral and written testimony and answered questions from committee members. The witness testimony provided the raw data for the analysis.

It was decided to eliminate from the data set the parole board appropriations hearings. These hearings were not included in the data set because they dealt primarily with funding issues and, therefore, would not provide useful information on broader principles. The hearings leading up to the passage of the Criminal Sentencing Procedures Revision Act of 1987 were also excluded from the data set. A cursory examination of this act, and the hearings leading up to the passage of the act, revealed that only minor,

technical modifications to the sentencing structure were legislated, therefore, extensive analysis of these hearings would add little to the overall analysis.

The data set included the legislative committee hearings leading up to the PCRA and the SRA. Both the House of Representatives and the Senate held legislative committee hearings on the PCRA; a total of 52 witnesses appeared before the House of Representatives Subcommittee on the Courts, Civil Liberties and the Administration of Justice, and the Senate Subcommittee on National Penitentiaries. Eighty-four witnesses appeared before the House and Senate Subcommittees on the Judiciary hearings leading up to the passage of the SRA.

The data sample included 40 percent of the witnesses from each legislative initiative. The sample was stratified by the affiliation of the witness. Five affiliations were used: (1) practitioner, (2) politician, (3) individual, (4) academic, and (5) representative from a non-governmental organization. The number of witnesses from each group was proportional to the group's representation in the entire sample. The sample was stratified by affiliation only to ensure a representative sample, thus, no attempt was made to compare the positions of witnesses across affiliations.

There were 21 witnesses in the sample for the PCRA hearings.

The sample selection process for the SRA hearings was more complex. The SRA was part of a larger omnibus criminal code reform package. Throughout the 1970s there were continuous hearings on omnibus criminal code reform legislation. In 1977 the House and Senate began hearings on the second incarnation of the omnibus criminal code reform bill. In 1979 and 1980, the Senate and the House reported bills but no further legislative action was taken. The 1979/80 criminal code reform bills served as the basis for the 1984 criminal code reform bill; the SRA appeared as a chapter in this omnibus bill. Thus, the SRA has a legislative history that dates back to the 1970s.

A decision was made to consider the hearings leading up to the 1979/80 criminal code reform proposals as a discrete legislative initiative. Between 1977 and 1979, 49 witnesses testified before the House and Senate Subcommittees on the Judiciary, thus the sample for the criminal code reform act (CCRA) hearings totalled 19 witnesses. Between 1980 and 1984, another series of legislative hearings were undertaken. These hearings led to the passage of the SRA. A total of 32 witnesses testified before the House Subcommittee on the Judiciary, thus the sample for the SRA

included 13 witnesses.

Table 1 shows the sample drawn from the three sets of legislative hearings in the United States:

Table 1.- Legislative Committee Hearings on Parole
in the United States

Hearing	Time Period	Total Witnesses	Sample Size
<u>PCRA</u>	1972 to 1976	52	21
<u>CCRA</u>	1977 to 1980	49	19
<u>SRA</u>	1980 to 1984	32	13

III(ii) The Canadian Data

The Canadian data universe was defined by referencing Chapter Nine ("Recent History of Conditional Release Reform in Canada") of Taking Responsibility⁴, the report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections (Daubney Committee). This chapter outlined the major legislative inquiries into parole and related matters between 1969 and 1988. The following

⁴Canada, Parliament, House of Commons, Standing Committee on Legal and Constitutional Affairs, Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections, (Ottawa: Minister of Supply and Services, 1988).

Parliamentary committee hearings were highlighted:

- the Standing Senate Committee on Legal and Constitutional Affairs inquiry into the parole system (Goldenberg Committee) commencing in 1972, and,
- the inquiry of the Sub-Committee on the Penitentiary System (MacGuigan Committee) of the House of Commons Standing Committee on Justice and Legal Affairs commencing in 1976.

Additionally, the Daubney Committee hearings constituted a major legislative initiative in the area of parole. These three sets of hearings were included in the data universe. The universe of Canadian data consisted of these three hearings. The sample of witnesses used in this analysis was randomly selected from these hearings.

The Goldenberg Committee hearings focussed exclusively on parole. Twenty-four witnesses appeared before the Committee. All twenty-four witnesses spoke on parole. From this data set a stratified random sample of witnesses was selected. This sample included 40 percent, or ten, witnesses.

During the MacGuigan Hearings, the bulk of the discussion concerned living conditions within Federal penitentiaries. Only eight witnesses talked at length on the purposes and principles of parole. Rather than take a 40 percent random sample, the decision was made to include all eight witness in the sample.

Over 180 individuals and groups appeared before the Daubney Committee. Thirty-seven of these witnesses testified at length on parole. The sample for the Daubney Committee consisted of 40 percent, or 15, of these witnesses.

Table 2 shows the sample drawn from Canadian legislative hearings:

Table 2.--Legislative Committee Hearings on Parole in Canada

Hearing	Time Period	Total Witnesses	Sample Size
Goldenberg	1972	24	10
MacGuigan	1977	8	8
Daubney	1980	37	15

IV. THE MODELS

An analysis of the content of a sample of the documents drawn from the hearings listed above was conducted. Each witness was categorized according to the dominant philosophy that informs it. The models outlined below represent three criminal justice philosophies that are dominant in the North American criminological literature. Each document was classified into one of the models. A document that could not be classified into one of the three models was labelled

'other'. The three models are described below.

IV(i). The Positivist Model

Positivism was dominant in the field of criminal justice from the late 1800s to the early 1970s. During this period, Positivist criminology manifested itself ideologically and programmatically. As an ideology, Positivism shaped the discourse of criminal justice practitioners, it helped fashion a world view based on the principles of Positivist social science. In sharp contrast to classical notions of free-will and self-determinacy (discussed below), Positivists sought to provide scientific laws of human behaviour. Armed with the scientific method, Positivist social scientists embarked on attempts to uncover the laws of human behaviour. Quantification, determinacy, objectivity and natural differences replaced 'pre-scientific' concepts such as meta-physics, subjectivity, free-will and philosophy⁵.

For Positivists, all behaviour is determined by biological, psychological or social circumstances. Criminal behaviour occurs because an individual is biologically deficient, psychologically abnormal, and/or under

⁵Jock Young, "Thinking Seriously About Crime", 267.

socialized. Because behaviour is determined by these antecedent variables, criminality can be cured if the defective element is isolated and scientifically treated. Human nature, then, is infinitely malleable, alterations to one's antecedent variables will produce behavioural change.

Throughout the late 1800s and 1900s, Positivist criminologists looked to biology, psychology and the social milieu for the causes of crime. Arguing the biology-crime link, Cortes concluded that

Delinquents and possibly criminals differ from non-delinquents and noncriminals in being physically more mesomorphic, more energetic and potentially aggressive temperamentally, and in showing higher need for achievement and power motivationally⁶.

Yochelson and Samenow looked to the personality of offenders for the causes of criminal behaviour. They argued that criminals had "different thinking" patterns than noncriminals. "Thinking patterns" of criminals are characterized by suspiciousness, impulsiveness, compulsive lying, and excitement-sensationalism. They concluded that in order to reduce crime, it is necessary to change the "thinking patterns" of criminals. Still others looked to the relationship between the individual, the community and criminality. Shaw and Mackay thought crime was the result

⁶Juan B. Cortes, Delinquency and Crime, (New York: Seminar Press, 1972), 14; quoted in George B. Vold and Thomas J. Bernard, Theoretical Criminology (3rd ed.), (New York: Oxford University Press, 1986), 64.

of the breakdown in the "symoiotic relationships" that bind communities⁷. This breakdown was the result of successive waves of immigrants moving in and out of urban centres. Hirschi said that crime occurs when individuals lose their attachment and commitment to, and involvement with the community and the communities legal code⁸.

Regardless of the source of the determination, Positivists regard crime as the product of an offender's circumstances antecedent to the criminal act. If crime is to be controlled, or even better, reduced, the criminogenic antecedent variable(s) must be treated with the technologies of science.

Positivists believe that there are certain fundamental values and core beliefs that are essential (functional) for society and that these fundamental values and core beliefs are agreed upon by freely contracting individuals. In addition, Positivists claim that individuals, although substantially different in biological, psychological and/or social circumstances, have formal equality in the eyes of society and its institutions, including the criminal justice

⁷Vold and Bernard, Theoretical Criminology, 164-183.

⁸Vold and Bernard, Theoretical Criminology, 241-245.

system⁹. These ideas are captured in the following quotation from Positivist criminologist Hans Eysenck:

It is said that all men are born equal and it is deduced from this that indeed all men have the same innate ability, the same good or bad degree of personality, the same propensity to crime, and so on. This, of course, is a misinterpretation of the old saying. What it means is simply that all men are equal before the law...It does not say anything whatsoever about their strength, their health, or other features in which they may differ from each other, and in which, as we know perfectly well, they do in fact differ¹⁰.

Thus, Positivists accept the liberal-pluralist propositions of state neutrality and formal equality, which are bound by fundamental values and core beliefs common to a majority of a population. Positive criminology is directed toward treating the offender; the content and administration of the law are deemed to be political matters and, therefore, beyond the scope of Positivists' scientific expertise.

Beginning in the early 1900s in the United States and the mid-1900s in Canada, the criminal justice system was restructured to meet the requirements of the new Positivist criminologists; 'treatment' replaced punishment as the stated justification for criminal sanctions. As a justification for penal sanctions, treatment was forward

⁹Young, "Thinking Seriously About Crime", 268-269.

¹⁰Hans Eysenck, Crime and Personality, (London: Paladin, 1977), 75; quoted in Jock Young, "Thinking Seriously About Crime: Some Models of Criminology", in Crime and Society: Readings in History and Theory, ed. M. Fitzgerald, G. McLennan and J. Pawson, 248-309, (London: Routledge & Kegan Paul, 1986), 268.

looking. Rather than sentencing an offender for what (s)he did, the specific crime, within Positivism sentences were meted out on a prognostic basis. Since prognosis is an individual matter, imbued with all the complexities of individual differences in social circumstances, biological endowment or psychological make-up - in short, antecedent variables - indeterminate sentencing schemes were legislated. Indeterminate sentences allowed treatment personnel ample time to treat offenders and to release offenders from prison only when they were sufficiently rehabilitated. If offenders were wholly unable to be rehabilitated they could be confined indefinitely.

Predictive restraint - confining offenders on the basis of a prediction of recidivism - for particularly incorrigible offenders was the logical response of a criminal justice system that utilized rehabilitation as a criterion for freedom. In addition to indeterminate sentences, alternatives to incarceration were introduced. Half-way houses, after-care agencies, temporary absences and parole were created to provide offenders with a gradual, calibrated integration into society. In the name of treatment, behavioural scientists were given extraordinary power over the lives of offenders. Clinicians decided how long and under what conditions an offender was to be confined, and what treatments offenders were to undergo.

The emergence of Positivism at the turn of the century was the result of the birth of the human sciences, and particularly the growth of psychiatry and psychology. The scientific method was enthusiastically adopted by criminologists. If human behaviour, criminal and non-criminal behaviour, was determined by scientific laws, and if these laws could be objectively uncovered, then experts in the behavioural sciences could intervene in, and change the circumstances that produce unwanted criminal behaviour. In the United States, the behavioural sciences held out the promise of a progressive society, a society perhaps not entirely free of crime but one that had marked reductions in criminal behaviour. It was in this ideological climate that the Positivist criminology was born.

IV(ii). Summary

Positivists claim that human nature is neither good nor bad, rather, all behaviour - criminal and non-criminal - is the product of constitutional, psychological or social variables antecedent to the behaviour. The function of the criminal justice system is to isolate the criminogenic antecedent variable(s) that caused an individual to commit a criminal act, and, through the application of scientific

treatment modalities, rehabilitate the offender. Thus, the comments by President Carter and former Attorney General Ramsey Clarke (see Chapter 2) viewed the structure of the American society as the "causes" of crime and, therefore, advocated policies aimed at ameliorating these conditions. Parole is seen by Positivists as a rehabilitative tool; early release from an institution allows behavioural scientists to subject inmates to treatment techniques in the community.

IV(iii). The Classical Model

Classical criminologists accept some and reject other Positivist notions. They accept the Positivist belief that there exists in society certain fundamental values and core beliefs that the majority of the population has agreed upon. Classical theorists also share with Positivists the belief in the idea of formal equality. Legal justice, therefore, can be separated out from social justice; the former is a juridical concern, the latter a political concern. The legal and political are linked only inasmuch as they exist in some type of functional independence, each affecting the other only tangentially. However, Classicists reject the Positivist notion of behavioural determinacy, and it is this difference, and the assumptions that flow from this

difference, that distinguishes Classicism from Positivism.

Classical thinkers reject the determinism evident in the Positivist view of human nature. Classicists maintain that humans are endowed with free-will and rationality and are the authors of their own actions. Reason guides all behaviour.

Working from this assumption, Classicists cannot accept the Positivist conceptions of rehabilitation and treatment. Classicists are concerned with punishing offenders, not treating them. They are concerned with the administration of the law, or as von Hirsch says with the question "What should be done with the offender after conviction?"¹¹.

Given this orientation, Classicists argued against the treatment efforts of Positivists. They claimed that treatment programs do not and cannot achieve the desired end of 'curing' criminality. In their attack on rehabilitation, Classicists often quoted the 'Martinson review' of treatment programs. After reviewing a vast array of treatment modalities, Martinson said that "with few and isolated exceptions, the rehabilitative efforts that have been

¹¹Andrew von Hirsch, Doing Justice: The Choice of Punishments, (New York: Hill and Wang, 1976), 3.

reviewed have had no appreciable effect on recidivism"¹².

Martinson went on to make the following conclusion regarding the efficacy of treatment:

Personal characteristics of offenders - first offender status, or age, or type of offence - were more important than the form of treatment in determining future recidivism. An offender with a 'favourable' prognosis will do better than one without, it seems, no matter how you distribute 'good' or 'bad,' 'enlightened' or 'regressive' treatments among them¹³.

Classical theorists were certainly aware of the implications of the Martinson review; if treatment did not work, then there is no sense treating offenders, and furthermore, treatment becomes a faulty justification for punishment.

But the criticism of the Classicists cut much deeper than the efficacy of treatment. Theirs was a criticism of the philosophy of rehabilitation as a justification for punishment. Andrew von Hirsch makes this clear:

In those special instances where it might be possible to find treatment that works, the more difficult question has to be confronted: Aside from effectiveness, what other limitations should there be on the rehabilitative disposition? Is it just, for example, to impose dissimilar sentences for treatment purposes upon offenders convicted of similar crimes? We shall argue that there are limitations of justice on the rehabilitative disposition, even if the treatment were known to be effective¹⁴.

¹²Robert Martinson, "What Works? Questions and Answers about Prison Reform," The Public Interest, 35 (Spring 1977): 25.

¹³Martinson, "What Works?", 42.

¹⁴von Hirsch, Doing Justice, 18.

The Positivist model was unjust because it unduly violated the rights of individuals. For Classicists, the rights of individuals, most importantly the right to liberty, are paramount. The state exists to protect the rights of individuals. Stemming from their "basic mistrust of the power of the state", Classicists were, above all, against any criminal justice policy that "might cloak discrimination and arbitrariness"¹⁵.

Other Classicists voiced concerns similar to those of von Hirsch. For Fogel, the abuse of discretion was also the fundamental flaw of the Positivist model. It permeated all aspects of the criminal justice system and each successive abuse of discretion compounded injustice. On sentencing Fogel wrote:

Like others, judges have strong attitudes about sex, mugging, narcotics and other crimes. The difference in the case of judges is that their attitudes, translated into largely unbridled discretion, produce the longest prison terms in the western world¹⁶.

On parole boards he wrote:

Parole board decisions are...unreviewable and are not hammered out in an adversary clash; rather they are five to fifteen minute sessions with members frequently using a combination of whim, caprice, and arbitrariness¹⁷.

¹⁵von Hirsch, Doing Justice, xxxii.

¹⁶David Fogel, We Are Living Proof: The Justice Model for Corrections, (Anderson Publishing Company, 1975), :94.

¹⁷Fogel, We are Living Proof, 197.

Conrad argued that the principles of Positivism were never operationalized and existed only in the rhetoric of criminal justice practitioners. That is, in the day-to-day operations of the criminal justice system, the discourse of rehabilitation was used only to rationalize decision-making. In practice many decisions were arrived at based on factors extraneous to the 'resocialization' of offenders. As Conrad (1981) notes:

the parole board for which I worked and those that I have since observed pay little attention to claims made for a convict's progress toward rehabilitation. Decisions define the true policy under which any public body functions. What has always counted more in decision making is the severity of the convict's crime and previous record, and the decision maker's opinion about the risk of the offender returning to a life of crime¹⁸.

For Conrad the 'true policy' of parole boards was that of sentence equalization. Parole boards act as sentencing courts, equalizing the judicial sentencing disparity. This 'true policy' function, a function that is neither legislatively decreed nor bound by the principles of fundamental justice, was, for Conrad, a gross abuse of discretion.

Unfettered discretion, arbitrary decision-making protocols and the absence of standards - elements inherent

¹⁸John P. Conrad, "Where There's Hope There's Life," in Justice as Fairness: Perspectives on the Justice Model, ed. David Fogel and Joe Hudson, (Anderson Publishing Co., 1981), 13.

in the rehabilitation model of corrections - created a fundamentally unjust system because the rights of individuals were unduly ~~deprived~~. For Conrad, Fogel, von Hirsch and other Classicists, it was the model on which criminal justice policy was founded that was unjust and not society proper, therefore, legal justice could be achieved by constructing a new model for the criminal justice system; a model which eliminated as much as possible the discretion embodied in the Positivist model and created decision-making protocols that were formal and legalistic.

In Doing Justice, the classic modern statement of Classicism, Andrew von Hirsch set out the requirements for a just sentencing policy. In a broad sense the project von Hirsch sets for himself is clearly the administration of the law and not the legitimacy of the law itself nor the causes of criminal behaviour (and certainly not the treatment of criminal behaviour). Specifically von Hirsch is concerned with developing a rationale for the disposition of offenders based on "certain moral premises." The first assumption from which von Hirsch works is that "the liberty of each individual...is to be protected so long as it is consistent with the liberty of others"¹⁹. Although 'liberty' is never defined, (it is assumed as unproblematic), it appears that

¹⁹von Hirsch, Doing Justice, 5.

liberty means freedom to act, a freedom that can only be circumscribed by legal authority. Von Hirsch's second assumption is that of parsimony. It is the burden of the state to justify any restriction of individual liberty. Parsimony also compels the state to use the least onerous method of intervention. His final assumption is that the "requirements of justice ought to constrain the pursuit of crime prevention"²⁰. Here, von Hirsch is arguing against a strict utilitarian conception of sentencing. In a contest between the rights of individuals and the need for social order or the correction of individual behaviour, the rights of individuals must prevail. For obvious reasons, these assumptions preclude as a sentencing rationale the discretionary, utilitarian Positivist model or Conservative deterrent theory.

The rationale for the allocation of punishment that von Hirsch provides rests on the notion of commensurate deserts. The severity of a punishment should be commensurate with the seriousness of the transgression, where seriousness is measured by the harm done and the culpability of the offender. Von Hirsch proposed that punishments for offences be ranked so that the "relative painfulness corresponds with

²⁰von Hirsch, Doing Justice, 15.

the comparative seriousness of offenses"²¹. The liberty of offenders is protected because (unlike the situation under the Positivist or Conservative model) specific sentences for specific crimes are legislated. There is very little leeway for judges to invoke discretion. In addition, parsimony is maintained. Punishment is meted out according to offence not offender. Finally, commensurate desert embodies the notion of the primacy of individual liberty. The 'amount' of liberty lost shall be equal to the amount of harm done. Commensurate deserts also places the rights of individuals ahead of the social order by ensuring that one's liberty is not restricted solely for social utility.

IV(iv). Summary

Classicists maintain that humans are free-willed and the authors of their own actions, therefore, the Positivist model was based on the faulty assumption of determinism. Classicists believe in the absolute predominance of individual rights and individual liberty. When depriving the liberty of the individual, the onus is on the state to justify the restriction and to assure that, in all aspects of the criminal justice system, procedural due process is guaranteed, discretion is tempered, arbitrariness is

²¹von Hirsch, Doing Justice, 90.

eliminated and equality is assured.

The concern of Classicists is not with the causes of criminal behaviour, but with the administration of a just, fair and equitable criminal justice system. The state exists to protect the rights of all individuals - criminals and non-criminals - therefore, stemming from their basic mistrust of excessive state power, Classicists argue against any policy that involves discriminatory or arbitrary practices that unduly infringe on the liberty of individuals. In terms of parole, Classicists voice two policy options: (1) parole should be retained to guard against unfair and arbitrary judicial sentencing disparity (parole as a "sentence equalization" measure), or, (2) parole should be abolished in conjunction with a determinate or fixed sentencing scheme based on the principles of 'just deserts'.

IV(v). The Conservative Model

For Conservative criminologists there exists in all humans a tension between 'the good' and 'the bad'. This tension is generally expressed in dichotomous language. At the level of the individual, these dichotomies often take the following form: self-restraint (good)/self-expression (bad); sacrifice (good)/greed (bad); deference to authority

(good)/self-interest (bad). On a societal level, these dichotomies are collapsible into a single order/disorder division. When 'the bad' is not controlled, when it is not restrained internally by individuals or sufficiently disciplined by the social control mechanisms of society, disorder will ensue. Crime, then, is the product of "a weakening of controls over what is solemnly regarded as an obdurate and fundamentally wicked human nature"²²; or as Conservative criminologist Ernest van den Haag wrote: "Our inborn impulses permit us to do what society cannot tolerate and what laws must forbid"²³.

The underlying assumption of Conservative criminology is that controls, restraints and discipline are necessary to suppress 'the bad' and maintain order in society; when controls restraints and disciplines are withdrawn or relaxed crime and social disorder will result.

The imminent collapse of the social order resulting from an overly permissive society is the paramount concern of Conservative criminologists. Their concern is that the institutional fabric of society has been weakened by an

²²Elliot Currie, "Crime and the Conservatives: How Their Analyses Miss the Problem", Dissent, (Fall 1985): 432.

²³Ernest van den Haag, Punishing Criminals: Concerning the Very Old and Painful Question, (New York: Basic Books, 1975), 42.

"excess of democracy"²⁴. Throughout the 1960s and 1970s western governments was overloaded with demands. In the United States, this overload created a crisis of authority: state and federal government institutions were unable to govern (restrain, discipline, control) with authority and, consequently, the stability of society was threatened.

To regain authority, say Conservatives, the state should engage only in programs that are (1) likely to succeed ("when nothing works the market has the advantage of not providing the citizen with anyone to blame"²⁵); and/or (2) reproduce values suitable for the preservation of order. Stated negatively, the latter types of programs are those that do not promote permissiveness. Thus, Conservatives call for the withdrawal of the government in some social policy fields - the market place and labour relations, to name only two - and a strengthening in others - defence and crime control are the most obvious. 'Small state, strong state' captures this Conservative mood.

The 'crime problem' represents the convergence of the two strategies for regaining governmental authority and

²⁴Patricia Marchack, The New Right and the New Economic Reality, (Kingston: Queen's University Press, 1985), 6.

²⁵Peter Steinfels, The Neoconservatives: The Men Who are Changing America, (New York: Simon and Schuster, 1979), 64.

social stability. Conservative criminologists attacked large-scale social engineering programs that sought to cure criminal behaviour by attacking its "root cause". The Conservative crime control strategy is not to rehabilitate criminals (the Positivist's goal) nor to ensure that, above all, they are afforded procedural safeguards to ensure their liberty (the Classicists' goal). The Conservative crime control strategy is to restore in individuals the internal controls necessary to restrain their criminal activity, and failing to achieve this, to remove recalcitrant offenders from society for an extended period of time. Deterrence and incapacitation are the specific policy options of Conservatives.

Using an 'economic model' of crime, van den Haag has argued that in order to reduce the amount of crime, the costs of crime should be increased to deter potential offenders. The costs of crime - the punishments meted out to potential offenders - should be high enough to restrain, control or discipline 'the bad' that lurks in all humans. Van den Haag wrote that

If the costs of offenses to offenders - the punishments - go up, crime is reduced. Price increases do not eliminate purchases, but they do reduce them. Increases in the costs of crime (the price charged by society) reduce it - but not to zero²⁶.

²⁶van den Haag, Punishing Criminals, 113.

Thus, van den Haag proposed a criminal law sentencing policy that stressed certainty and severity: "being certain of punishment deters from crime only if the punishment is sizable"²⁷. Similarly, Wilson and Herrnstein claim that delinquent behaviour changed when

assaultive spouses were arrested instead of merely counselled, when Chicago delinquents were placed in more rather than less restrictive institutions, and when the penalties for carrying guns or drinking while drunk were made either more certain or more severe²⁸.

Unlike van den Haag, Wilson and Herrnstein extended their deterrent argument beyond sentencing, to stricter surveillance and enforcement of the law.

Other Conservative writers on crime have broadened their economic analysis of crime to include other aspects of social life, aspects that act as incentives, or negatives deterrents, to crime (such as education, social welfare, and permissive attitudes). By eliminating these aspects, they say, the costs of crime will increase and crime will decrease. Murray argued that "crime occurs when the prospective benefits sufficiently outweigh the prospective costs. When the risks associated with committing a crime go down, we expect crime to increase, other things being

²⁷van den Haag, Punishing Criminals, 115.

²⁸James Q. Wilson and Richard J. Herrnstein, Crime and Human Nature: The Definitive Study on the Causes of Crime, (New York: Simon and Schuster, 1985), 403.

equal"²⁹. The costs of crime are determined by criminal justice policy as well as by other aspects of social life. In terms of the criminal justice system, after analyzing United States criminal justice statistics, Murray concluded that the incentives to crime increased between 1960 and 1980, thus, there was an increase in the amount of crime. The incentives to commit crime increased because (1) the probability of arrest decreased, (2) the probability of imprisonment decreased, and, (3) more attention was being paid to the rights of accused persons which "made crime less risky for poor people who were inclined to commit crimes if they thought they could get away with them"³⁰. These changes in the incentive structure made crime less costly in the late 1960s and 1970s than in the 1950s, therefore, crime increased.

The second Conservative policy option is selective incapacitation. Selective incapacitation involves identifying and imprisoning for extended periods of time high risk offenders. The decision to selectively incapacitate an offender would not be based on the crime the offender committed. Rather, the decision would be based on the personal characteristics of the offender - age, race,

²⁹Charles Murray, Losing Ground: American Social Policy, 1950-1980, (New York: Basic Books, 1984), 168.

³⁰Murray, Losing Ground, 170.

previous criminal involvement, or previous substance abuse.

Both deterrence and selective incapacitation involve judgments of the offender (as opposed to Classical sentencing policy which focuses almost exclusively on the offence committed or Positivist sentencing policy which is based on the treatment needs of the offender). For Conservative criminologists the need for social order requires that harsher penalties be meted out to offenders who need it the most. Van den Haag clearly recognizes that this means marginalized populations will fair the worst:

Obviously, the poor and powerless are more tempted to take what is not theirs, or to rebel, than the powerful and wealthy, who need not take what they already have....

van den Haag continued

...So because the temptation to break the law is unequally distributed, because of different personalities and different living conditions, the laws - and the punishments for violating them - must weigh or fall more heavily on some persons and groups. Those less favored by nature or society are more tempted to violate the laws and therefore suffer punishment for doing so more often³¹.

For Conservative criminologists, there exists in all humans a tension between 'the good' and 'the bad.' 'The bad' must continually be restrained, controlled or disciplined. When internal restraints no longer control 'the bad' it is the government's duty to intervene to maintain order in society. Conservative criminal justice policy, then, is based on

³¹van den Haag, Punishing Criminals, 45-46.

deterrence, or the fear of punishment. Offenders who are unable to be deterred are subject to confinement for extended periods of time.

IV(vi). Summary

Conservative criminologists posit that in all humans there exists a tension between 'the good' and 'the bad' and that crime occurs when 'the bad' is insufficiently repressed, controlled or disciplined by the individual or through social institutions (i.e. family, school, church). The overriding concern of Conservatives is the maintenance of social order. In the language of criminal justice policy, this concern for order translates into maintaining certainty and severity of punishment in order to deter criminal behaviour (control 'the bad') and/or incapacitate persistent offenders who have shown through repeated criminal conduct their inability to be deterred. The Conservative crime control corresponds to Ronald Reagan's and some of his administration's comments on crime and crime control (see Chapter 2 and Chapter 5).

Conservatives have two policy options regarding parole; (1) retain parole as a mechanism for the calibrated integration of those inmates who pose the least threat to the social order, or, (2) abolish parole as part of a

determinant sentencing structure that stresses certainty and severity of punishment as part of a deterrent and/or incapacitation strategy.

It is important to recognize that these models represent 'ideal types'. It should be recognized that there are variations within the models and that different scholars emphasize different aspects of the models.

V. LIMITATIONS

The methodology used in this analysis corresponds to what Carney refers to as "theoretically oriented" content analysis³². Carney says this type of analysis is characterized by the following features. The recording unit is a theme (the three criminology models). The content unit is lengthy (testimony or submissions). Counting is done manually. Sampling is purposive. The aim of the analysis is to make inferences from the content of the sample. The form of comparison used to assess the data is indirect (the submissions are not compared directly, rather, the content of the submissions are abstracted and categorized and then the categorizations are compared) and theoretical. Theoretically oriented content has limitations built into

³²Carney, Content Analysis, 159.

each of the components listed above. However, with proper research design, these limitations can be minimized and theoretically oriented content analysis can produce meaningful, valid conclusions. Measures used to minimize these built-in limitations are discussed below.

In any content analysis the questions that are asked are crucial to the success of the analysis.

A good content analysis is one that is as objective as the constraints of question and text upon it allow it to be. It is the question that counts, not the count itself³³.

The key is to pose a question in such a way that the answer can be factually documented from the sources and the analysis can be replicated. Assuming that the categorization scheme used in this analysis is valid (discussed below), the questions posed in this analysis can be answered, and the analysis can be replicated. The universe of data was selected specifically because policy was being debated. Actors involved in policy debates always make implicit or explicit references to the justification(s) for or against the policy. Thus, the first question asked is answerable and can be factually documented from the selected data. Once the first question is answered the remaining questions can also be answered.

³³Carney, Content Analysis, 48.

The sample that was selected speaks to all aspects of the research questions. The committee hearings deal with matters of policy, therefore, justifications for or against parole will be provided. The hearings bring together individuals and groups of diverse background and the sample was stratified to reflect this diversity. The sample allows comparisons to be made across countries at times that are theoretically relevant.

The sample has the added benefit of being drawn from the context of a debate. In any analysis of text, there exists the problem of quantifying language. In the context of a debate, the problems of language ambiguity, disingenuousness and subtlety are moderated by the necessity of the author to make her/his point.

It may be argued that the sample excluded a population of documents that are relevant to the understanding of justifications for or against parole: the vast amount of publications and statistics originating from the parole bureaucracy. But not looking specifically at these documents does not necessarily limit this analysis. First, the key variables to be understood are the justifications for or against a particular policy, and not the relative merits of any particular policy per se. While the operationalization of a particular policy is of importance

2

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No 2)

in its own right, it is not the focus of this analysis. Second, the stratified sample includes the category 'practitioner' thus specific policy justifications used by members of the parole bureaucracy will be included in the sample. Omitting the vast amount of day-to-day bureaucratic paperwork will not limit the validity of this analysis.

The three models used in this analysis represent 'ideal types' based on inductive and deductive reasoning. They represent a composite picture of what, for example, the 'ideal Conservative' might say. There are two important issues regarding the models that may limit the validity of this analysis. The first limitation involves the content of the models: Do the models present an accurate, although idealized, picture of reality? The second limitation involves the reliability of the models.

The first limitation has been overcome. The models are based on the work of a reputable social scientists. Indicators of the models are similar to those used by other social scientists producing similar models³⁴. Exemplars of each model were carefully selected; the authors cited in the description of each model are generally considered in the

³⁴See also: LaMar T. Empey, American Delinquency: Its Meaning and Construction, (Homewood, Illinois: The Dorsey Press, 1978).

literature as representatives of the model.

The second limitation is more problematic: Can the sample be reliably categorized according to the models? The problem of replicability is evident here. Measures have been taken to ensure replicability and, therefore, increase the validity of the analysis. First, the models are mutually exclusive. Within the framework utilized, one cannot be a Conservative criminologists and a Classical criminologists. Similarly, each document was categorized into one of the three models or was classified as 'other'. Through careful analysis of the documents, the number of 'other' documents was minimized.

A second measure was taken to ensure replicability and thereby increase the validity of the analysis. At the outset of the analysis, another coder tested the specificity of the models by test-coding a selection of documents. This measure was taken to determine the degree of inter-rater reliability. The test-coder was asked to classify the testimony of ten witnesses drawn from the data set used in this analysis; five of the witnesses appeared before legislative committees in the United States, and five appeared before legislative committee hearings in Canada. The ten witnesses were purposively selected to include a majority of the models used in this analysis.

If there was a high degree of congruency between the test-coder and the original coder, then there is evidence to suggest that there is a high degree of inter-rater reliability which increases the validity and replicability of the analysis. The test for inter-rater reliability indicated that there was an eighty percent congruency rate. Table 3 shows the results of this test.

Table 3.--Inter-Rater Reliability Scores

	Positive	Classical	Conserv.	Other	Total
Original Coder	2	3	3	2	10
Test Coder	2	3	4	1	10

The test-coder and the original coder disagreed on the categorization of two witnesses. In one case, the original coder categorized a witness as 'other' because the witness utilized 'Conservative' and 'Classical' justifications to support parole. The test-coder recognized that both 'Conservative' and 'Classical' justifications were utilized by the witness but the test-coder was of the opinion that the primary justification utilized by this witness was 'Conservative' and the test-coder classified the witness accordingly. In this case, then, the original-coder was more conservative in the categorization of the testimony

than was the case with the test-coder.

In the second case, the original coder classified a witness as 'Classical' whereas the test-coder classified the same witness as 'other'. When asked to support this classification, the test-coder responded that she was aware of the witness' academic publications and this influenced her decision. The test-coder was then asked to re-code the testimony based solely on the documentation provided. The test-coder agreed with the original coder that, based only on the testimony, the witness ought to be classified as 'Classical'.

The high degree of congruency between the test-coder and the original coder suggests that the models used in this analysis have a level of specificity great enough to allow the analysis to be replicated, which increases the validity of the analysis.

VI. SUMMARY

Using the methodology outlined above, the samples of documents drawn from legislative hearings from the United States and Canada were analyzed to provide evidence of a

shift in the nature of the criminal justice policy debates.
The results of this analysis are provided in Chapters 5 and
6.

CHAPTER 5
ANALYSIS OF THE PAROLE DEBATES
IN THE UNITED STATES

I. INTRODUCTION

This chapter provides an analysis of the three sets of documents used to examine the justifications utilized by various sets of actors to support or oppose parole in the United States. The sample of documents was drawn from the following three legislative hearings:

- (1) Hearings leading to the Parole Reorganization Act of 1976
 - hearings before the House of Representatives Subcommittee No.3 of the Committee of the Judiciary
 - hearings before the Senate Subcommittee on Penitentiaries of the Committee of the Judiciary
- (2) Hearings leading to the Senate Criminal Code Reform Act of 1979, and the House of Representatives Criminal Code Revision Act of 1980
 - hearings before the House of Representatives Subcommittee on Criminal Justice of the Committee of the Judiciary
 - hearings before the Senate Criminal Laws and Procedures of the Committee of the Judiciary
- (3) Hearings leading to the passage of the Sentencing Reform Act of 1984
 - hearings before the House of Representatives Subcommittee on Criminal Justice of the Committee of the Judiciary

The sample of documents relating to parole drawn from these three sets of hearings were examined. The evidence

obtained from this analysis corresponds to the claim that there was a shift to the right in the political discourse of the United States, and that this shift was manifest in the field of criminal justice policy.

II. THE PAROLE COMMISSION AND REORGANIZATION ACT OF 1976

The first set of documents that were analyzed were drawn from the hearings leading up to the Parole Commission and Reorganization Act of 1976¹ (PCRA). Section II(i) provides a brief description of the political context out of which the PCRA emerged, and a brief analysis of the major sections of the act. Section II(ii) describes the analysis of the sample of documents drawn from these hearings.

II(i). The Context

The Parole Commission and Reorganization Act of 1976 (PCRA), arose out of an extensive examination of the United States penal system undertaken by the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the House of Representatives. This examination began in the early 1970s and included tours of several federal and

¹PL. 94-233, 94th Congress, H.R.5727.

state penal institutions where interviews were conducted with inmates, wardens, prosecutors, judges and defense attorneys.

According to the House report on the PCRA², it became obvious to members of the Subcommittee that there was "universal dissatisfaction with the parole process." The Report maintained that this dissatisfaction was voiced equally between the three major participants in the parole process:

Wardens claimed that [the parole process] was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of the sentencing process³.

It was these types of concerns that led the House Subcommittee to characterize the parole process as "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map"⁴.

The Subcommittee began hearings on legislation to reorganize the United States federal parole system on February 29, 1972. Hearings continued throughout 1973 and

²Congress, House, Committee of the Judiciary, Parole Reorganization Act of 1975, 94th Cong., 1st sess., H. Rept. 94-184.

³Congress, Parole Reorganization Act of 1975, 2.

⁴Congress, Parole Reorganization Act of 1975, 3.

1974, but due to the schedule of the House Judiciary Committee, legislation could not be reported until 1975. The Parole Commission and Reorganization Act became law on March 15, 1976.

The legislation had two major functions. First, it reconstituted the United States Parole Board as the United States Parole Commission, an independent agency within the Department of Justice, organized into five regional divisions. Second, and more importantly, the legislation provided procedural due process safeguards for inmates and parolees. Among the new procedural and due process safeguards were the following: (1) the legislation specified definite periods of time for which inmates were eligible for parole, (2) it provided that proper notice be given to inmates regarding the time and place of their parole hearing, and (3) inmates were provided the right to have an advocate present during a parole hearing or a revocation hearing. Additionally, the legislation shifted the burden of proof to the Parole Commission to show cause as to why an inmate should not be granted parole.

The procedural and due process safeguards enacted in the PCRA were, for the most part, codifications of administrative changes made by the United States Board of Parole after Maurice Sigler was named to the Chair in 1972.

As will be shown in his testimony, the previous Chair, George Reed, was much more inclined to view the parole system as a rehabilitation tool and was suspicious about measures that would provide inmates with more rights. Mr. Sigler recognized the validity of many of the complaints made to the Subcommittee and, by proactively acting on these complaints, changed the stated function of the parole system from one of rehabilitation to one of "sentence equalization." Thus, the PCRA was not so much a legislative watershed as it was a codification of newly adopted Parole Commission policy.

II(ii). Analysis of the Sample

Hearings on the PCRA began on February 29, 1972. The House of Representatives Subcommittee on the Courts, Civil Liberties, and the Administration of Justice heard nineteen days of testimony, the Senate Subcommittee on National Penitentiaries heard three days of testimony. A total of 52 witnesses appeared before both Subcommittees.

The sample for the PCRA hearings included the testimony and written submissions of twenty-one witnesses. Table 4 shows the breakdown of these witnesses according to the four models used in this analysis:

Table 4.--Results of the PCRA Hearings

Positive	Classical	Conserv.	Other	Total
6	13	1	1	21

The debate was dominated by Positivists and Classicists. The debate between the Positivists and Classicists concerning the justification for parole reflected the treatment/rights debate underway in the criminological literature at the time.

From the early 1900s to the late 1960s, Positivist thought was dominant in the criminological literature and in corrections practice. Rehabilitation of the offender was the stated goal of the American correctional system and was the underlying assumption of many pieces of criminal justice legislation.

Beginning in the late 1960s the rehabilitative ideal was challenged by Classicists. Classicists argued that (1) treatment or rehabilitation lacked empirical verification and was, therefore, ineffective, and (2) criminal justice policy based on a treatment model of corrections was fundamentally unjust because, in the name of rehabilitation, it bestowed upon correctional practitioners

unbridled discretion to intervene in, and impinge on, the liberty of offenders. This argument between the Positivists and the Classicists dominated the hearings on the PCRA.

All the Positivists in the sample argued for the retention of parole. The justification used to support the retention of parole was, for these witnesses, that parole was an effective rehabilitation tool in a correctional system guided by the rehabilitative ethos.

Arguing for the retention of parole as a rehabilitative tool, George Reed, then Chair of the United States Board of Parole said:

In conclusion, I believe that basic to every decision of the Parole Board is a philosophy of releasing inmates on parole at the psychologically 'right time' to best assure their eventual complete rehabilitation.

Parole boards...are not regulatory boards...regulating products, public services, labor, or interstate commerce, but [a] board attempting to evaluate personality modification, if any, toward rehabilitation of the individual⁵.

The representative from American Psychiatric Hospitals, Inc. dismissed the Classical argument that treatment was

⁵Congress, House, Committee on the Judiciary, Subcommittee No. 3, H.R. 13118, Identical and Related Bills to Improve and Revise the Procedures and Structures of the Federal and State Parole Systems, 92d Cong., 2nd sess., Feb. 29, March 1, 2, 3, 20, 22, 23, 27, 29 and May 3, 1972, 385.

ineffective by saying that the "parole system and the value of long range follow-up are already established procedures in the prison system"⁶. Rather than eliminate the rehabilitative elements of the parole system, this witness argued for enhancing the power of criminal justice practitioners to use parole as a treatment tool:

I would strongly urge that consideration be given to establishing an indefinite period of parole status for those parolees considered by professional staff of the institution to have a higher potential for recidivism. This would enable the parole board to keep a closer surveillance over high-risk cases, which would not only be a protection to the general public, but more importantly, would help ensure the continued adjustment of the parolee⁷.

Others argued that parole as a rehabilitation tool may have been ineffectual in the past but rehabilitation should not be discarded. Don Gottfredson, representing the National Council on Crime and Delinquency, said that some programs have failed but this should not discourage researchers from searching for programs that can be effective:

our ignorance of demonstrably effective paroling procedures, prison programs, and community supervision methods argues for less their abandonment than for a concerted, adequately funded, effort to determine what procedures work, for what offenders⁸.

He also urged the Subcommittee to increase funding to

⁶Congress, Senate, Committee of the Judiciary, Subcommittee on Penitentiaries, S.2383, S.2462, S.2955, S.3185, S.3674, To Amend Parole Legislation, 92d Cong., 2nd sess., July 25, 26, and 27 1972, 90.

⁷Congress, To Amend Parole Legislation, 90.

⁸Congress, H.R. 13118, 224.

agencies actively involved in constructing innovative treatment modalities:

I am making a plea that research in this area has been inadequately funded and inadequately supported....So I make a plea that there are methods available for [the rehabilitation of offenders]....[B]ut they are not being put to use⁹.

A policy administrator from a state corrections department claimed that the efficacy of parole was not a question of more research but, rather, "the major problem confronting our parole office...is a shortage of office personnel"¹⁰. Federal parole officers, in fact parole officers in general, had such great caseloads that they were unable to provide their clients with adequate support and, therefore, were not able to address the treatment needs of inmates.

Another witness was less optimistic of the possibility that correctional personnel could effectively treat all offenders. But this did not mean that rehabilitation should be abandoned. The flip side of rehabilitation was incapacitation or preventative detention for particularly incorrigible inmates:

Prescribing periods of confinement for specific types of crime may not always be advisable. With few exceptions, such as a particularly brutal crime or a

⁹Congress, H.R. 13118, 226.

¹⁰Congress, H.R. 13118, 106.

known repeat offender, I believe an indefinite sentence would be preferable with the release or parole left to the judgement of the professionals at the institution itself¹¹.

This witness went on to say:

we have been overzealous in that we have led people to believe that if given proper rehabilitation specialists we can correct any person, we can readjust his personality. We can, in many instances. There are some, in my judgement, however, that cannot be corrected....It is just a fact that we have to accept and the problem is separating and isolating these individuals from the first offenders who can be rehabilitated¹².

For this witness, then, rehabilitation was successful - but not for every offender. Those offenders who were wholly unable to be rehabilitated should, therefore, be incarcerated for extended periods of time.

Many of the witnesses that fell within the Positivist model believed that the enhancement of rights afforded inmates by the bill would be detrimental to the rehabilitation efforts of correctional personnel. One section of the proposed bill was particularly troublesome to some as it cut to the heart of the rehabilitation justification for parole. Section 4205 of a draft version of the bill stated that an inmate had a right to parole after serving one-third of her/his sentence; the onus was on the Board of Parole to show cause why the inmate should

¹¹Congress, To Amend Parole Legislation, 90.

¹²Congress, H.R. 13118, 91.

not be granted parole. This section reversed the burden of proof from previous practice. George Reed, the chair of the United States Board of Parole questioned the rationale of this section:

To superimpose a presumption in favour of the prisoner being paroled within the guidelines of section 4205, on top of a provision that the inmate become eligible under section 4204 at the earliest possible time, is without doubt providing the inmate with more statutory rights, without commensurate responsibility to show evidence of meaningful rehabilitation, than has ever before been proposed in the field of parole¹³.

Thus, the Positivists claimed that rehabilitation does work and any doubts about the rehabilitative efficacy of the system would be removed if adequate funding for research and personnel was available. They questioned the rationale for increasing the rights of inmates, claiming this would only infringe upon their discretion to make informed release decisions based on the rehabilitative needs of inmates.

The Positivist claim that parole could be used as a rehabilitation tool was hotly contested by the Classical witnesses appearing before the House and Senate committees. Robert Kastenmeir, the chair of the House committee, testifying before the Senate committee, said that parole, as a rehabilitation tool, was nothing more than "some hodge-podge of mystical plumbing of the depth's of men's

¹³Congress, H.R. 13118, 382.

souls"¹⁴. Leonard Orland of the University of Connecticut Law School was more direct in his attack of the rehabilitation assumption underlying parole:

The real problem, it seems to me, is the continued use of the medical model. I believe there are significant numbers of people in prisons who are not sick in the medical sense and to keep them there until they are cured of a disease they are not suffering from, it seems to me can be foolhardy, can be blind¹⁵.

If rehabilitation was empirically indefensible, then the wide limits of discretion granted parole decision-makers on the assumption that they release inmates when 'cured' lost its basis of legitimacy. The arbitrary nature of the release decision-making process was attacked by every Classical witness in the sample. A representative from the American Civil Liberties Union made the following argument:

It is clear that as it now operates, parole is dysfunctional as well as arbitrary and capricious. Instead of promoting rehabilitation, it promotes connivance, favor seeking and manipulation¹⁶.

James Goodell, the chair of the Committee on the Study of Incarceration out of which the classic modern statement of Classicism would emerge four years later¹⁷, said that the parole process was "virtually a lawless system". Mr. Goodell continued:

¹⁴Congress, To Amend Parole Legislation, 17.

¹⁵Congress, H.R. 13118, 82.

¹⁶Congress, H.R. 13118, 343.

¹⁷Andrew von Hirsch, Doing Justice: The Choice of Punishments, (New York: Hill and Wang, 1976).

parole discretion is inherently susceptible to abuse. Grant or denial of parole hearings becomes a technique for controlling behaviors of prisoners in institutions. And institutions' need for control is by no means coextensive with society's need for a fair system of criminal justice¹⁸.

Raymond Harlan, a former inmate, said his dealings with the Parole Board were characterized by a "veil of secrecy" and that the Parole Board "operated above the law"¹⁹. Another inmate said "the grace and discretion framework for administration of parole authority invites, encourages and infuses arbitrariness and capriciousness into the parole system"²⁰. In their brief to the House committee, the Trailblazer Jaycees of Levinworth Prison said "The present parole system is one of the greatest travesties of justice ever pressed upon our society"²¹, and the parole board "flaunts the law" when making parole decisions and revocation decisions. The group went on to assert that the Parole Board is abusing their discretion, and in doing so are holding hundreds, perhaps thousands of prisoners illegally²².

Even though all the Classicists argued that the parole system as it was then constituted was based on the

¹⁸Congress, H.R. 13118, 602.

¹⁹Congress, H.R. 13118, 267.

²⁰Congress, To Amend Parole Legislation, 60.

²¹Congress, To Amend Parole Legislation, 197.

²²Congress, To Amend Parole Legislation, 199.

untenable notion of rehabilitation, only two Classical witnesses put forth the suggestion that it be abolished. Sanford Rosen, of the American Civil Liberties Union, said the Parole Board has become "much more totalistic in [its] approach to treatment of the individual and his character and personality"²³ and this approach can no longer be justified:

I am no longer confident that parole or contingent release are appropriate measures for our society. Introduction of due process may control the unlimited discretion exercised by parole boards. And surely we should try that approach. However, it is by no means clear that this approach will be sufficient.

The distortions in our penal system are so egregious that the Congress might well consider eliminating parole²⁴.

Similarly, James Goodell said the parole system was "a total failure" and

that no matter how much money you spend on the Parole Board and the parole system, it is still going to be a failure because it attempts to do something that cannot be done. I would save some money in this instance by eliminating the parole process as it operates today²⁵.

Both Mr. Rosen and Mr. Goodell, however, were not steadfast in there opposition to parole. Both said they would accept the retention of the system if due process safeguards were legislated and discretion was curbed.

²³Congress, H.R. 13118, 351.

²⁴Congress, H.R. 13118, 343.

²⁵Congress, H.R. 13118, p597-98.

The remaining Classicists opted to retain parole. These witnesses said that parole, rather than being a mechanism for releasing rehabilitated inmates, had evolved into a structured release system for the bulk of inmates in the federal system. Fred Cohen, a Professor of Criminal Justice at State University of New York, recognized this function:

Certainly, on the question of whether or not the rule of law should be brought to parole, we must view the process not as it was formerly was viewed - as some episodic grant bestowed by a benevolent sovereign, but as a process that is built into the system and on a regular basis involves the processing and reprocessing of thousands, upon thousands of persons²⁶.

The "process that is built into the system" referred to by Professor Cohen was "sentence equalization".

Representative Kastenmeir clearly noted the "sentence equalization" function of the Parole Board:

But we must recognize the mechanism [parole] for what it really is...differed sentencing....Viewing it in this light...my conclusion is that we must introduce into the parole system due process. Not because due process completely corrects what are the very likely faulty premises involved in the parole process, but because due process opens up the doors...and that opening up cannot but help to cut down the parole process discretion; it cannot help it from committing - usually unwittingly - the abuse which it now perpetrates²⁷.

If "sentence equalization" was the rationale upon which the implementation of parole was actually justified, then

²⁶Congress, H.R. 13118, p236-37.

²⁷Congress, To Amend Parole Legislation, 17.

parole decision-makers should show greater concern for the facts used in the decision-making process. Classicists urged the committees to legislate procedural requirements for parole hearings and parole revocation hearings. These hearings should be complete with counsel and full disclosure of information used by the Parole Board. Additionally, written reasons must be given for parole denials and there must be some mechanism for reviewing parole denials and revocations. These procedural safeguards, argued Classicists, would introduce due process to the parole process and ensure equity and fairness.

II(iii). Summary

The analysis of the sample of the PCRA documents shows that, in the early 1970s, the debate in the United States regarding parole was largely between Positivists and Classicists, with Classicists being dominant numerically. For the most part, the debate was between 'treatment' advocates and 'rights' advocates.

The PCRA results will serve as a point of reference for analyses of debates in the late 1970s and early 1980s. If the 'rise of the right' was manifest in the area of criminal justice policy, then one would expect that the parameters of debate would shift from one between

Positivists and Classicists to one between Classicists and Conservatives, with Conservatives being dominant numerically.

III. THE CRIMINAL CODE REFORM (CCRA) HEARINGS

The second set of documents that were analyzed were drawn from the hearings leading up to Senate bill S.1722, Criminal Code Reform Act of 1979, and House bill H.6915, The Criminal Code Revision Act of 1980. Both of these pieces of legislation were reported but not voted on. Section III(i) provides a brief description of the context out of which S.1722 and H.6915 emerged, and a brief description of the major sections of the proposed acts. Section III(ii) describes the analysis of the sample of documents drawn from these hearings.

III(i). The Context

The first attempt to codify the criminal laws began in 1966 when Congress appointed Jerry Brown to head the National Commission on Reform of the Criminal Laws (Brown Commission). The Brown Commission produced a report which led to the introduction in the early 1970s of Senate bill S.1, an omnibus criminal law reform act that recodified the criminal law. Several hearings were held to discuss S.1 but

no further action was taken.

In 1977 Senators Edward Kennedy and John L. McClellan introduced S.1723, a revised version of S.1 and a precursor to S.1722. Like its predecessor, S.1723 was an omnibus bill that sought to codify the federal criminal law. Part of this codification exercise involved the sentencing process. At the time, there was no general sentencing law in the United States which left the sentencing system "riddled with irrationality and inconsistency"²⁸. The existing law specified maximum penalties for offences or sets of offences which were "usually prescribed with little regard for the seriousness of the offense as compared to similar offenses"²⁹. Additionally, the existing law contained several specialized statutes for categories of offenders such as young offenders, nonviolent drug addicts, "dangerous special offenders", and "dangerous special drug offenders". These specialized statutes contained sentencing provisions applicable only to the category of offenders for which they dealt. Thus, according to the Senate committee, criminal sentencing legislation was "in

²⁸Congress, Senate, Committee on the Judiciary, Criminal Code Reform Act of 1979, 96th Cong., 2d sess., S. Rept. 96-553, January 17, 1980, 2.

²⁹Congress, Criminal Code Reform Act of 1979, 914.

desperate need of reform"³⁰. S.1723 was the basis for S.1722.

S.1722 contained a separate section on sentencing. This section attempted to provide purposes and principles for sentencing, grade offences according to their relative seriousness, and provide guidelines for judicial determinations of sentence length. In addition, S.1722 addressed the issue of parole release. If, as was proposed in S.1722, and H.6915 the House companion bill, the United States federal criminal justice system was to move towards a system of determinate sentences, where offences were graded according to their relative seriousness and ranges of punishments were to be allocated to each offence, what function, if any, should parole release play?

The Senate bill abolished parole. The Senate bill contained provisions for advisory sentencing guidelines. The sentencing guidelines were not to be strictly applied. Rather, the sentencing guidelines were to provide "a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, as compared to similarly situated offenders..."³¹. Within such a

³⁰Congress, Criminal Code Reform Act of 1979, 912.

³¹Congress, Criminal Code Reform Act of 1979, 924.

sentencing framework, the Senate could find no place for parole. They wrote in their report:

The Parole Commission has argued that it should be given the function of determining the appropriate length of a term of imprisonment pursuant to guidelines after the sentencing judge has decided that a particular defendant should serve a term of imprisonment. It bases this belief that a small collegial body will better be able to achieve the goal of elimination of unwarranted sentencing disparity. The Committee strongly disagrees with the view of the Parole Commission. Such a proposal is entirely at odds with the whole concept of the proposed guidelines system, and harks back to a thoroughly discredited philosophy and procedure³².

Under the Senate bill, then, sentencing guidelines would be established and parole would be abolished.

The drafters of the House bill, which was reported on September 25, 1980³³, opted to retain parole, at least in the immediate future. The House Subcommittee wrote in their report that the PCRA codifications brought a substantial amount of due process to the parole system. They argued that parole served as a legitimate, equitable, and fair means of releasing inmates. As a releasing mechanism, the Parole Commission was able to perform a 'safety net' or 'sentence equalization' function to mitigate excessively harsh sentences. Because sentencing

³²Congress, Criminal Code Reform Act of 1979, 925.

³³Congress, House, Committee on the Judiciary, Criminal Code Revision Act of 1980, 96th Cong., 2d sess., H. Rept. 96-1396, September 25, 1980.

guidelines "may not work as intended or may have unforeseen or undesirable consequences"³⁴, the Committee concluded that "until adequate experience and evidence has been developed under the new sentencing structure established by the proposed code, the parole release should be retained"³⁵.

A sample for the present study was drawn from the hearings on S.1722 and H.6915.

III(ii). Analysis of the Sample

A total of 49 witnesses addressed the issue of parole before the House and Senate subcommittees between 1977 and 1979. Nineteen witnesses were included in the sample. Table 5 shows the breakdown of these witnesses according to the four models used in this analysis.

Table 5.--Results of the CCRA Hearings

Positive	Classical	Conserv.	Other	Total
0	11	4	4	19

Compared to the debate on the PCRA, there was a significant

³⁴Congress, Criminal Code Revision Act of 1980, 433.

³⁵Congress, Criminal Code Revision Act of 1980, 924.

shift in the parameters of the debate on S.1722 and H.6915. Noticeably absent from the latter debates were representatives from the Positivist school. No witness argued that sentences should be indefinite to accommodate institutional rehabilitation. No witness argued that parole should be retained solely for the purpose of rehabilitation.

Only one witness provided tempered support for the concept of rehabilitation. Cecil McCall, then chair of the United States Parole Commission, supported the retention of parole. He said:

the bill would encourage the abandonment of the search for demonstrably successful rehabilitative programs. While it's true that progressive techniques of institutional training are uncertain in their ultimate effectiveness, even the proponents of [the House bill] agree that continued research and development may well change our perception of those programs in 5 or 10 years³⁶.

Mr. McCall's appeal to retain the concept of rehabilitation, albeit in a limited form, was reminiscent of Positive argumentation during the PCRA hearings: rehabilitation can work, effective methods have just not been found. Nevertheless, this witness did not rely upon rehabilitation solely, or even primarily, as his

³⁶Congress, House, Committee of the Judiciary, Subcommittee on Criminal Justice, Legislation to Revise and Recodify the Criminal Laws, Part 3, 95th Cong., 1st and 2d sess., Sept. 15, 1977; Feb. 21,22,28; Mar. 1,6,8,14,20, 21; Apr. 4,5,6,10,11,12,13,17,18,19,20 and 24, 1978, 2233.

justification for parole. Mr. McCall also argued the Classical line that parole should be retained as a method of "sentence equalization":

one valid function of review by a paroling authority is to provide an objective (and national) view of the offense to balance that of the individual judge³⁷.

Moreover, Mr. McCall claimed that parole was an effective disciplining mechanism, useful as a lever for maintaining control and order in institutions - parole can be held out as an incentive to inmates for controlling 'the bad' inherent in their human nature. Thus, in his attempt to retain parole, Mr. McCall used Positive, Classical and Conservative arguments. As such, Mr. McCall was classified as "other".

Interestingly, the three remaining "other" witnesses were Norman Carlson, Director of the Federal Bureau of Prisons, Ronald Gainer, Acting Deputy Attorney General, and Roman Hruska, former member of the Brown Commission. All three of these senior bureaucrats were intimately involved in either the legislative reform process or the operation of the parole process but because of, in Hruska's case the generality of his testimony, and in Mr. Carlson's and Mr. Gainer's case, the mixture of Positivist and Conservative thought, the three were classified as "other".

³⁷Congress, Legislation to Revise and Recodify the Criminal Laws, Part 3, 226.

The bulk of the debate on S.1722 and H.6915 was between the Classicists and the Conservatives. The Classical arguments concerning parole were similar to the Classical arguments during the debates on PCRA. All the Classicists desired to bring to the administration of justice equality of treatment, due process and procedural fairness. There was, however, an internal debate among Classicists as to how best to bring these features to the sentence administration process. Three of the Classicists opted to abolish parole release, eight opted to retain parole.

Classicists who opted to abolish parole did so on the belief that sentencing guidelines, alone, could bring justice, equality and due process to the sentence administration process. Harold Tyler, of the Advisory Council on Corrections, for example, commented on the ability of sentencing guidelines to curb sentence disparity:

What this new proposal does, however, is to allow us for the first time to be in a position to eradicate unreasonable disparity which has no basis on the record. Such disparity does not comport with our notions of fairness and due process of the law, and it does not serve the public image of justice for sentencing³⁸.

³⁸Congress, Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, S.1437 and S.31, S.45, S.181, S.204, S.260, S.888, S.979, and S.1221, 95th Cong., 1st sess., June 7,8,9 1977, 8960.

Accepting that guidelines could bring justice to the sentencing process left little room for Mr. Tyler to retain parole as a "sentence equalization" mechanism:

I would like to say, with the utmost bluntness and candor, that I am one of those who thinks that the day of the parole boards and the parole commissions is coming to an end³⁹.

Senator Gary Hart said, in the early stages of the debate, that a proper sentencing structure should apply "a general definition of justice under which like cases are treated alike and unlike cases would be treated proportionately to their differences"⁴⁰. If these criteria were met, if the sentencing system was structured along the lines of a pure just deserts model, then parole release as a "sentence equalization" mechanism would no longer be necessary.

Classicists who opted to retain parole were less optimistic that sentencing guidelines could reduce sentence disparity and bring justice to the sentence administration process. There was a 'weak' version and a 'strong' version of this argument.

Those espousing the 'weak' version of this argument

³⁹Congress, S. 1437, 8961.

⁴⁰Congress, S. 1437, 8587.

would, in principle, favour parole abolition. 'Weak' version proponents favoured the thrust of the Senate legislation which would abolish parole, but in the context of the debate, these witnesses argued for the retention of the Parole Commission until sentencing guidelines had proven their effectiveness in practice. Thus, they urged the committees before whom they testified to report the House bill favorably. The criticisms they had of the bills were phrased in technical language and were offered as amendments rather than as substantial revisions that questioned the basic assumptions of the House bill. Thus, 'weak' version proponents of parole retention took a 'wait and see' attitude regarding the ultimate fate of the parole system.

Arguing the 'weak' version, Franklin Zimring said that the motives of the drafters of the sentencing guidelines were "laudable". Mr. Zimring continued:

The Sentencing Commission is, in my view, a promising but unproven idea for reading principle into criminal sentencing and reducing disparity in the Federal Criminal Justice System⁴¹.

Mr. Zimring opted to retain the Parole Commission as a "safety net" to "provide some assurances against sentencing

⁴¹Congress. House, Committee of the Judiciary, Sub-committee on Criminal Justice, Legislation to Revise and Recodify the Criminal Laws, Part 2. 95th Cong., 1st and 2d sess., Sept. 15, 1977; Feb. 21, 22, 28; Mar. 1, 6, 8, 14, 20, 21,; Apr. 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20 and 24, 1978, 1376.

disparity and unduly lengthy sentences". Mr. Zimring said:

A few years of experience with the operation of sentencing guidelines should tell us whether this residual parole authority was only needed as a transitional bridge or is a desirable part of a fully mature system⁴².

If there were incentives structured into the guidelines to ensure that judges would adhere to them, Mr. Zimring believed that parole would no longer be necessary.

In his testimony before the House judiciary committee, Michael Trony held similar views on the Senate version of the bill and the utility of parole:

I believe the House would be well advised to focus its primary attention on [the Senate bill], to adopt as its own the bill's major sentencing provisions and, to the extent that the committee's view on appropriate sentencing reforms differ from those of the Senate, to cast them as modifications to [the Senate bill] and not as a substantially new statutory scheme⁴³.

Like Mr. Zimring, Mr. Trony took exception to the Senate provision to abolish parole. Rather than totally eliminating the parole process, he argued for a gradual phaseout of the Parole Commission:

If the guidelines are not enforced, and if the parole release authority of the U.S. Parole Commission ceases

⁴²Congress, Legislation to Revise and Recodify the Criminal Laws, Part 2, 1317.

⁴³Congress, Legislation to Revise and Recodify the Criminal Laws, Part 2, 1354.

to exist, there will be no subsequent recourse for a criminal defendant who receives an outrageously long sentence⁴⁴.

Andrew von Hirsch hailed the Senate bill as "a great stride towards a sensible sentencing system"⁴⁵ and urged the House committee to report it favorably. But arguing the 'weak' version of parole retention, Mr. von Hirsch continued:

If one wishes to phase out parole, therefore, one must create some alternative mechanism to keep durations of confinement within reasonable bounds.

What troubles me about the Subcommittee's bill is that it authorizes the near-eclipse of the parole board without reducing the permitted duration of confinement⁴⁶.

The three 'weak' version Classicists that opted to retain parole did so not out of some philosophically motivated position - quite the opposite. These witnesses were all, in theory, opposed to parole. They opted to take a 'wait and see' attitude towards sentencing guidelines. Parole should be retained to act as a "safety net" against long sentences and undue sentence disparity likely to occur during the nascent stages of the operation of the Sentencing Commission. Thus, 'weak' version parole retentionists accepted the underlying assumptions of the

⁴⁴Congress, Legislation to Revise and Recodify the Criminal Laws, Part 2, 1363.

⁴⁵Congress, S. 1437, 8978.

⁴⁶Congress, S. 1437, 8983-84.

Senate bill. Once the Sentencing Commission ironed out the bugs in its guidelines, parole would be redundant.

The 'strong' version of the Classical argument to retain parole was motivated by a fundamental distrust for sentencing guidelines per se. These witnesses would not offer their support and proposed major modifications that cut to the core of the bills. Like the 'weak' version Classicists, they favoured, in theory, the abolition of parole but argued to retain parole not on a 'wait and see' basis, but indefinitely. For example, Marilyn Kay Harris, of the National Moratorium on Prison Construction (NMPC) said

NMPC favors in principle the abolition of parole, but believes that parole abolition should not be attempted in isolation from other major criminal justice system changes. In the context of the bill as it now stands, elimination of parole would simply serve to further increase terms of incarceration and insure that disparities would not be corrected. However, we believe that the parole process is fatally flawed conceptually, based as it is on prediction of future individual conduct. Parole has often served to increase, rather than decrease, arbitrary and inequitable treatment of prisoners. Thus a few recommendations regarding parole are offered here assuming that parole will not be abolished, although such patching will not overcome some major flaws of the parole system⁴⁷.

For the NMPC, the sentencing guidelines offered in S.1722 did not go far enough to ensure justice in sentencing, therefore parole must be retained to ensure equity.

⁴⁷Congress, S. 1437, 9127.

In a similar vein, Alvin Bronstein of the American Civil Liberties Union, offered the following comments:

We have generally felt that parole was a concept that is no longer viable in our present society, present system, but actually would work better, with more satisfaction to us, than [the Senate bill], for the very reason that the Parole Commission is there to correct excessive sentences⁴⁸.

Judge Morris Lasker concurred with Mr. Bronstein:

I am concerned that, to the extent that [the Senate bill] reduces the Parole Commission's activities to merely ministerial duties, at the same time authorizing the sentencing commission to prescribe periods of parole ineligibility up to nine-tenths of the sentence without significantly diminishing the length of sentences presently authorized, the result will be to lengthen substantially the average period of imprisonment actually served⁴⁹.

'Strong' version Classical parole retentionists urged the House and Senate committees not to report the bills favorably. They were skeptical about the ability of sentencing guidelines to reduce sentence disparity and bring due process and fairness to the sentence administration process. Out of this skepticism, 'strong version' parole retentionists opted to retain parole indefinitely as a "sentence equalization" measure.

⁴⁸Congress, Legislation to Revise and Recodify the Criminal Laws, Part 2, 9127.

⁴⁹Congress, S. 1437, 8968-69.

The common ground between the 'weak' and 'strong' version parole retentionists was their fear that sentencing guidelines would exacerbate already overcrowded institutions and increase average lengths of sentences. What separated the 'weak' and 'strong' Classicists was the extent to which this fear was manifested.

For the eleven Classicists in the sample the following pattern emerged:

Table 6.--Comparison of Classical Position

	Classical	
	Strong Version	Weak Version
Retain	5	3
Abolish	3	

Five were adamantly opposed to the proposed guideline system and argued to retain parole indefinitely as a check on judicial discretion and as a mechanism of "sentence equalization"; three opted to retain parole until the Sentencing Commission and its guidelines were fully operational; and three opted to abolish parole outright and go with the guideline system as proposed in the Senate bill.

There were four Conservatives in the sample. All four opted to abolish parole. All four argued that the primary purpose of the criminal justice system was deterrence or incapacitation and deterrence. All four argued that parole impinged on the deterrent value of a sentence. Then Attorney General, Griffen Bell said

I think it would be a deterrent to crime if a person knew that his sentence was going to be fair but that he would have to serve the sentence⁵⁰.

Because "It is important from the standpoint of deterrence that the public know what the law is"⁵¹, argued Attorney General Bell, parole added a degree of uncertainty to the penalties for offences and, therefore, removed some of the deterrent value of a sentence. At the outset of the hearings, Senator Lloyd Bentsen stressed the merits of certainty of punishment and incapacitation. Senator Bentsen said that "the primary purpose of imprisonment should be detention of the guilty and protection of the public" and that "generally, inmates should not be released" from prison before their terms expire⁵². Finally, Earnest van den Haag, who claimed that "the seeds of crime are in everyone of us", argued for deterrence and incapacitation:

⁵⁰Congress, S. 1437, 8596.

⁵¹Congress, S. 1437, 8597.

⁵²Congress, S. 1437, 8581.

more severe effective sentences, if they do reduce the crime rate by reducing the number of crimes committed by those actually incapacitated, would still cost less than release would cost if it leads to more crime.

If the punishment of offenders does deter others...then the result of more severe and certain punishments would be to keep a greater proportion of offender behind bars; but also to reduce the total number of offenders⁵³.

On parole Mr. van den Haag said:

The abolition of parole and the appropriate mandatory flat sentence of career criminals alone are likely to reduce the crime rate by half, merely by incapacitation, quite apart from deterrent effects. Mandatory sentences and the abolition of parole for all offenders, by incapacitation and deterrence, would decrease the crime rate much further⁵⁴.

For these Conservative witnesses, parole should be abolished because it reduces the deterrent value of a sentence. Additionally, parole reduces the length of sentences for certain offenders who, say Conservatives, need to be incarcerated for extended periods for incapacitative purposes -in order to prevent them from committing crimes in the future.

III(iii). Summary

When the total sample is compared on the question of parole retention or abolition there appears to be a certain degree of non-partisan support for parole abolition, as

⁵³Congress, S. 1437, 8916.

⁵⁴Congress, S. 1437, 8923.

Table 7 indicates:

Table 7.-- Results of the CCRA Hearings
Retain Parole v. Abolish Parole

	Classical		Conservative	Other	Total
	Strong	Weak			
Retain	5	3	0	1	9
Abolish	3		4	3	10
Total	11		4	4	19

Just over half of the entire sample favoured outright abolition of parole. The justifications for abolishing parole varied depending on which school a particular witness represented, nevertheless, there was a degree of consensus between the two schools represented in the debate and the "other" category. An overwhelming majority of the witnesses (13 to 6) favoured at least one of the bills. Only the five 'strong' version Classicists and the Chair of the U.S. Parole Commission did not support at least one of the bills. Again, majority support for the bill across categories suggests that, in the late 1970s, there was some degree of consensus between Classicists and Conservatives regarding the fate of parole and the sentence administration process although the roots of this consensus were philosophically divergent.

Compared to the PCRA hearings in the early 1970s, there was a significant shift in the parameters of debate during the hearings on S.1722 and H.6915. The debate moved from one between the Positivists and the Classicists in the early 1970s, to one between the Classicists and the Conservatives in the late 1970s. The debate in the late 1970s was between those who wanted sentencing disparity reduced so that equality and justice would be brought to the sentence administration process, and those who wanted deterrence and incapacitation to be the primary purposes of sentencing.

IV. SENTENCING REFORM ACT OF 1984

Neither the House nor the Senate criminal code reform bill was passed in the late 1970s. When Congress reconvened in 1980, the Senate and the House each introduced separate legislation to recodify the criminal law and sentencing process. In April of 1984, the Senate passed the Sentencing Reform Act of 1984 (SRA). Throughout the 1980s, the House was working on its own piece of sentencing legislation, however, the House bill was reported but not voted on. In October of 1984, the House passed the Senate version of the sentencing legislation.

The third set of documents that were analyzed were

drawn from the hearings leading up to the passage of the Sentencing Reform Act of 1984. Section IV(i) provides a brief description of the context out of which SRA emerged, and a brief description of the major sections of the act. Section IV(ii) describes the analysis of the sample of documents drawn from these hearings.

IV(i). The Context

The Senate bill, reported on September 14, 1984⁵⁵, abolished parole. The Senate bill contained provisions for sentencing guidelines to be created by the newly formed United States Sentencing Commission. The bill ranked each criminal offence according to its severity. Maximum penalties were specified for each offence; these maxima were not altered from the existing statute law. When deciding on an appropriate sentence, the Senate bill required a judge to consider "the history and character of the offender, the nature of the offense, and the purposes of sentencing"⁵⁶. When deciding a sentence judges were to remain within the guideline ranges unless there existed in a particular case aggravating or mitigating circumstances

⁵⁵Congress, Senate, Committee on the Judiciary, Sentencing Reform Act of 1983, 98th Cong., 1st sess., S. Rept. 98-223, Sept. 14, 1983.

⁵⁶Congress, Sentencing Reform Act of 1983, 48.

"not adequately considered in the formation of the guidelines"⁵⁷. Within this guideline system, the Senate committee believed that "no useful purpose would be served" by continuing parole⁵⁸.

The House bill, reported on September 13 1984⁵⁹, replaced parole with a period of 'supervised release' as part of an advisory sentencing guideline system. The core goals of the House guidelines were "fairness and certainty". To this end, the advisory sentencing guidelines focused on "the nature and the harm done" by the offence and "the defendant's level of culpability". The House sentencing system was purely advisory. Judges were free to sentence outside of the guideline range for a particular offender if written reasons were provided. Additionally, judges were instructed to "impose the least severe appropriate measure" when considering a sentence.

Inmates would be eligible for supervised release after serving a minimum of 80% of the lower limit of the appropriate sentencing guideline used to determine the

⁵⁷Congress, Sentencing Reform Act of 1983, 48-9.

⁵⁸Congress, Sentencing Reform Act of 1983, 53.

⁵⁹Congress, House, Committee on the Judiciary, Sentencing Revision Act of 1984, 98th Cong., 2d sess., H. Rept. 98-1017, Sept 13 1984.

initial sentence. The House bill would have created the Board of Imprisonment to administer supervised release.

The transformation of parole into supervised release in conjunction with advisory sentencing guidelines indicates the House's historic mistrust of sentencing guidelines. The justification used by the House to support the retention of early release in a limited form was that of 'sentence equalization'. The House was concerned that sentence ranges for specific offenses would be too broad, thus providing the judiciary with excessive amounts of discretion to fix a specific sentence within a specified sentencing range. In their Report, the House wrote

the Judicial Conference may wish to promulgate initial broad guidelines, or broad guidelines for certain offenses due to the need for preserving flexibility concerning the offense. If so, the Board, in the interim or as otherwise necessary, can take over the disparity reducing function of the current Parole Commission⁶⁰.

Additionally, the House was concerned that the combination of sentencing guidelines plus parole abolition would lead to increased prison populations. Reconstituting parole as supervised release would maintain the 'safety net' then provided by the Parole Commission.

⁶⁰Congress, Sentencing Revision Act of 1984, 112.

IV(ii). Analysis of the Sample

A total of thirteen witnesses appearing before the House Subcommittee during the debate leading up to the passage of the SRA were included in the sample. The Senate Subcommittee did not hold hearings on the sentencing sections of their omnibus criminal code reform bill, therefore, no witnesses were available from the Senate hearings. Table 8 shows the breakdown of these witnesses according to the four models used in this analysis:

Table 8.--Results of the SRA Hearings

Positive	Classical	Conserv.	Other	Total
1	6	3	3	13

Compared to the debates during the CCRA hearings in the late 1970s, there does appear to be a shift in the parameters of the debate. The CCRA hearings were dominated by Classicists (11 of 19); Conservatives (4 of 19) were clearly in the minority. In the SRA hearings there were more Classical witnesses than witnesses from the other categories, but there was an increase in the proportion of Conservatives. Additionally, there was one Positivist witness.

The Positivist witness justified retaining parole as a rehabilitation measure. Hallem Williams, of the National Association of Blacks in Criminal Justice, supported the notion of rehabilitation as an underlying philosophy for the criminal justice system. Reminiscent of Positivists during the early 1970s, Mr. Williams argued that "the notion of rehabilitation and programmatic thrust within the institution have to be maintained, have in fact to be tried, because we contend that rehabilitation is not a failed concept in this country, it is one that has not been tried"⁶¹. In terms of parole, Mr. Williams agreed that the parole system has been "characterized by a questionable exercise of discretion" but should be retained because it "suggests to an incarcerated offender that society still holds out hope for him or her to function as a productive member of the community"⁶².

The remaining witnesses in the sample drawn from the House subcommittee were either Classicists or Conservatives. Although there was a shift in the parameters of the debate in the 1980s, the shift was not as pronounced as expected. It was expected that Conservative

⁶¹Congress, House, Committee of the Judiciary, Subcommittee on Criminal Justice, Federal Sentencing Revision, Part 1, 98th Cong., 2d sess., Feb. 22; March 21; April 4, 12; May 3, 9, 10, and June 7 1984, 719.

⁶²Congress, Federal Sentencing Revision, Part 1, 716.

witnesses would dominate the hearings; that because there was a shift to the right in the political discourse of the United States during this period, this shift would manifest itself as an increase in the number of Conservative witnesses in the parole debates. This, however, was not the case.

Only three of the 13 witnesses in the sample of the House committee hearings were Conservatives. These witnesses were arguing for a criminal justice system based on the principles of deterrence and/or incapacitation. John Rose, then Assistant Attorney General, stated that "if appropriate sentences were adopted along the lines [of the Senate bill], with appropriate maximum sentences, I think we will see a much greater deterrent impact"⁶³. Mr. Rose continued his testimony on the relationship between certainty of punishment and deterrence:

If people have a clear knowledge of what a sentence means, what it, in fact, says, they are going to be a lot more confident about the effectiveness of our criminal justice system, and also the penalties of the system will be much more effective as a deterrent⁶⁴.

⁶³Congress, House, Committee of the Judiciary, Subcommittee on Criminal Justice, Federal Criminal Law Revision, Part 1, 97th Cong., 1st and 2d sess., Oct. 28, 29; Nov. 9, 10, 17, 18; Dec. 8, 14 1981; Mar. 17, 25, 31; Apr. 1, 22, 29; May 5, 12, 13; June 24 and December 9, 1982, 60.

⁶⁴Congress, Federal Criminal Law Revision, Part 1, 60.

Ronald Godwin, a representative from the Moral Majority, Inc., was more fervent in his insistence on deterrence. He said:

The American people are painfully aware that our crime-ridden streets are not the product of the law's inadequate scope but, rather, the failure of judges to adequately enforce it through stiff penalties⁶⁵.

In addition, Mr. Godwin emphasized the value of incapacitation:

I just simply know this, that while the person is in jail he can't rape my wife or my daughter and he can't perpetrate a violent crime upon society. And that is my primary concern⁶⁶.

The twin concepts of deterrence and incapacitation would orient the criminal justice system towards the protection of society and the maintenance of order, an orientation that his corporation and its supporters believed to be lacking:

One of the phrases we hear most often is the phrase 'liberal, lazy judges'. And our people want to know what can be done to protect them from crime, not what can be done to rehabilitate the criminal or to lessen the hardening effect of our penal institutions upon the criminal⁶⁷.

The Assistant Attorney General and the representative from the Moral Majority, Inc., favoured the abolition of parole. The justifications these Conservatives used to

⁶⁵Congress, Federal Criminal Law Revision, Part 1, 800.

⁶⁶Congress, Federal Criminal Law Revision, Part 1, 809.

⁶⁷Congress, Federal Criminal Law Revision, Part 1, 809.

support their position was that the existence of parole creates one more incentive for crime and works against controlling or disciplining 'the bad' in individuals. Thus, the Assistant Attorney General stated that parole "eliminates a great deal of deterrent impact" that a sentence might otherwise obtain. The abolition of parole combined with a strict application of sentencing guidelines would "result in a much more effective criminal justice system from the standpoint of deterrence"⁶⁸. When asked whether eliminating parole would lead to an increase in prison populations, the Assistant Attorney General made the following comment:

Obviously, there has to be the will in society to build more prisons to house the people committed.

It is our view that the society and the administration is certainly going to keep track of trends in prison population and try to keep up with adequate facilities and build prisons⁶⁹.

Mr. Godwin made similar comments. He said that the failure of the House bill to abolish parole "reflects a fatalism toward violent crime and perversion to which we strongly object"⁷⁰. Further on in his testimony, Mr. Godwin made the following remarks:

I really can't imagine what the street person's reaction can be except one of glee when he hears that penalties for violent crimes have been reduced and that

⁶⁸Congress, Federal Criminal Law Revision, Part 1, 64.

⁶⁹Congress, Federal Criminal Law Revision, Part 1, 64.

⁷⁰Congress, Federal Criminal Law Revision, Part 1, 799.

there are still parole possibilities and plea bargaining⁷¹.

For both the Assistant Attorney General and Mr. Godwin, the existence of parole reduced the disincentives for crime that punishment might otherwise result in; knowing that one will not spend one's entire sentence in prison does not discourage individuals from controlling 'the bad' that lurks within them. For the Assistant Attorney General and Mr. Godwin, parole must be eliminated for the protection of society and to maintain order in society.

The remaining Conservative, George Johnson from the Washington State Sentencing Commission, argued that parole should be maintained in order to protect society. This witness claimed that parole boards should be charged with releasing 'good risks' and detaining 'poor risks':

Mention has been made by previous speakers of persons who are being released from prison who pose a more definite risk to society upon release than they did when they entered. I see this as being a vital role for parole boards to make those types of decisions of post-release⁷².

'Risk' was not explicitly defined by Mr. Johnson, however, from his testimony it can be deduced that 'risk' was not related to the rehabilitation of the offender, where one is

⁷¹Congress, Federal Criminal Law Revision, Part 1, 808.

⁷²Congress, House, Committee of the Judiciary, Subcommittee on Criminal Justice, Federal Sentencing Revision, Part 2, 98th Cong., 2d sess., Feb. 21, 29; Mar. 21; Apr. 4, 12, 1984, 1326.

at risk of committing a criminal act if that person has not been cured of a criminogenic element. Rather, Mr. Johnson maintained that 'risk' is reduced through control:

I respectfully submit that supervision provides a logical deterrent to future criminal behaviour, although not always an absolute deterrent.

Abolishing parole or some form of supervision after the term of confinement is simply not consistent with ensuring public safety. All people, offenders included, alter their behavior when they know they are being monitored. Parole supervision holds them accountable for their actions⁷³.

Parole, then, was not a mechanism to assist in the rehabilitation of offenders. Rather parole was justified by Mr. Johnson as a mechanism of control, a mechanism to discipline and suppress 'the bad' in offenders.

The remaining six witnesses in the sample were Classicists. Five of the six Classical witnesses opted to retain parole. These witnesses had concerns similar to 'strong version' Classicists in the CCRA hearings: parole must be maintained as a check on judicial sentencing disparity and as a "sentence equalization" measure. These witnesses did not hold much faith in the ability of sentencing guidelines to bring justice to the sentence administration process. They rejected the Senate bill that would abolish parole and remove virtually all sentencing discretion from the judiciary. They favoured advisory

⁷³Congress, Federal Sentencing Revision, Part 2, 1329.

guidelines that allowed the judiciary to maintain some discretion.

This may appear to be a contradiction of the underlying assumptions of Classicism. The goal of Classicism is to bring justice, equality and fairness to the sentencing administration process. In the 1970s, Classicists opposed the seemingly unfettered discretion of parole boards. In the mid-1970s, one half of the Classicists in the sample called for sentencing guidelines to control judicial discretion and either immediate or phased elimination of parole. But by the 1980s, five of the six Classical witnesses opted to retain some judicial discretion and parole.

This shift in the position of the Classicists does not contradict their underlying assumptions. Two new elements entered the debate in the 1980s: (1) the issue of prosecutorial discretion, and, (2) increased emphasis on the political nature of criminal justice policy. These two new elements, elements that were almost entirely absent from earlier debates, were mentioned by almost all of the Classicists during the debates in the 1980s. The emergence of these two elements appears to have forced Classicists to re-evaluate the utility of strict sentencing guidelines aimed at eliminating judicial discretion and parole.

During the hearings in the 1970s, prosecutorial discretion was virtually a non-issue. By the 1980s, Classicists became more concerned with prosecutorial discretion than with judicial discretion. If the United States federal criminal justice system was going to move towards a strict sentencing guideline system, as the Senate bill proposed (and a majority of Classicists in the 1970s agreed with), sentencing disparity would not be eliminated, said Classicists in the 1980s, because discretion would simply be shifted to prosecutors. Under a strict sentencing guideline system previous criminal history and offence severity determine the sentence range into which an offender will fall. Under such a system the type and number of charges laid against an offender will greatly affect the offender's sentence. The type and number of charges laid against an offender is a decision of the prosecutor, and to a lesser extent the police. Thus, according to Classicists, "when you have a very strict sentencing guidelines system which almost eliminates discretion of the judges, you are only shifting it to prosecutors"⁷⁴.

⁷⁴Congress, Federal Criminal Law Revision, Part 1, 322.

Classicists had serious concerns with this 'new' problem of prosecutorial discretion. Edward Marek, who represented the Federal Public and Community Defenders, made the following analysis of strict sentencing guidelines:

we are superimposing this system of guidelines when prosecutors have virtually unlimited discretion as to whom to charge with crime and when to charge....This will effectively transfer discretion in the sentencing area that now resides with independent judges to partisan prosecutors⁷⁵.

If guidelines must be adopted, Mr. Marek said his group would prefer "purely advisory guidelines...over the mandatory, structured guidelines of the Senate bill"⁷⁶.

Other Classical witnesses opposed structured guidelines. Douglas MacDonald of the Vera Institute argued that sentencing guidelines would not reduce disparity:

So I submit that we will still get disparities, even in a system of guidelines and constrained judicial discretion. You'll still get disparities because cases will still be plea bargained. Plea bargains require discretion. Take it away from judges but prosecutors will continue to have it⁷⁷.

For Mr. MacDonald, the solution to this problem was "to begin thinking about some serious rationalization and structuring of prosecutorial discretion in plea

⁷⁵Congress, Federal Criminal Law Revision, Part 1, 673.

⁷⁶Congress, Federal Criminal Law Revision, Part 1, 677.

⁷⁷Congress, Federal Sentencing Revision, Part 1, 74.

bargaining"⁷⁸. Another witness clearly stated the

Classical objection to strict sentencing guidelines:

We talk about curbing the power of a nonadvocate, the judge, taking his discretion away and substituting guidelines and, at the same time, we are giving more power, much more power, awesome power, to a person who already has awesome power, the prosecutor, with no check -no checks. That, I submit, is dangerous, extremely dangerous⁷⁹.

For these Classicists, it was not judicial discretion that was their main source of concern, rather, it was prosecutorial discretion that needed to be curbed. Thus, Classicists abandoned their belief in strict sentencing guidelines in favour of advisory guidelines.

But under advisory guidelines, where judges retain a certain amount of discretion, parole was necessary to provide a check on long sentences. Mr. MacDonald used this reasoning to argue for parole retention:

I think the dangers of getting rid of the parole board are substantial....What you will be doing is pushing the discretion closer to the front end, the charging end, to police and prosecution⁸⁰.

Similarly, Ms. Harris, of Temple University, opted to retain parole to provide a "safety valve" to "ameliorate the incredible overcrowding and harsh conditions" in

⁷⁸Congress, Federal Sentencing Revision, Part 1, 76.

⁷⁹Congress, Federal Sentencing Revision, Part 2, 893.

⁸⁰Congress, Federal Sentencing Revision, Part 1, 76.

federal prisons⁸¹.

The second new element that emerged during the SRA hearings was an increased emphasis on the political nature of criminal justice policy. During the 1970s, the debates regarding parole were mainly technical in nature: what is the best method of curtailing discretion of the parole board and the judiciary? Underlying these technical questions were political questions regarding the proper scope of state power, however, these larger political questions remained muted, or surfaced only in fragmentary form. But by the 1980s, politics was pushed to the foreground, especially in terms of the Classical response to the United States Justice Department-sponsored sentencing bill that was being debated in the Senate.

The Classicists viewed the Senate bill, coming out of the Republican-dominated Senate and backed by President Reagan, as a New Right response to the 'get-tough-on-crime' lobby. On the political nature of the 1980s debate, John Shattuck of the American Civil Liberties Union made the following comment:

enactment of a new federal criminal code has been fused symbolically by the Reagan administration to the public's legitimate fear over the increase in violent crime. In our view, this political distortion of the debate about violent crime has laid the foundation in a

⁸¹Congress, Federal Sentencing Revision, Part 1, 741.

somewhat different direction from that of previous Congresses⁸².

Another witness also recognized the political nature of the debate:

The legislation that has sailed through the Senate, I think, casts a very serious pall over the proceedings you are engaging in your effort to reach some kind of serious criminal justice reform....But the pall that is cast on the opportunity is the incredible attack on the criminal justice system that the Senate has launched⁸³.

Ms. Harris said that much of this "knee-jerk hardline-ism" was coming from "people who are campaigning, particularly the more right-wing people running" who "want to raise the issue of crime to try to somehow paint their opponents as being soft on crime"⁸⁴.

Within this political climate parole ought to be maintained, argued these Classicists, as a sentence equalization mechanism. Classicists recognized that if there was a move towards a strict guideline system it would be virtually impossible under the political conditions of the day to lower maximum sentences to compensate for the abolition of parole. Ms. Harris argued

I do not think that [the parole] system is without flaws. I think it needs quite a bit of improvement.

⁸²Congress, Federal Criminal Law Revision, Part 1, 313.

⁸³Congress, Federal Sentencing Revision, Part 2, 1178.

⁸⁴Congress, Federal Sentencing Revision, Part 1, 738.

However...I think right now it is dangerous to talk about eliminating parole systems⁸⁵.

Douglas MacDonald was more explicit in his fear:

There are other reasons for keeping parole. Are legislators willing to stand up and say, 'These new guidelines that we have, they seem shorter than the sentences that we used to have, but that's because people didn't really do all the time we thought they were doing, and we want to keep the status quo which means shorter real sentences.' It's quite a difficult public relations issue for legislators. A lot of legislators may decide that this is too tough to take because they have to sell crime control to their constituents⁸⁶.

Given the political climate, parole abolition was viewed by these witnesses as a mechanism for the right-wing elements of the state to implement 'get-tough-on-crime' reforms. Thus, despite their philosophical objections to parole, these witnesses argued for retention.

The extent to which politics entered the debate in the 1980s is highlighted in the testimony of Norm Maleng, the only Classical witness to opt for parole abolition. Mr. Maleng proposed that the federal criminal justice system move to a strict just deserts model of sentencing similar to that adopted in his home state of Washington.

⁸⁵Congress, Federal Sentencing Revision, Part 1, 741.

⁸⁶Congress, Federal Sentencing Revision, Part 1, 79.

During his testimony, Mr. Maleng was continually interrupted by the Chairperson of the House committee, Representative Conyers, who questioned Mr. Maleng's motivation. Mr. Conyers cautioned Mr. Maleng that "most people who shared [his] view think that it reflects a tough-on-crime position." Mr. Maleng replied:

I know. I think that is one of the difficulties with the debate, Mr. Chairman. It has been presented, like other things, as a tough-on-crime measure....

...we are in a period of time when everybody wants to be tough on crime. I do not think that is the essential thing with sentencing reform. It is not a tough-on-crime measure, or it should not be viewed that way⁸⁷.

Mr. Maleng's assurances were to no avail. Mr. Conyers continued to accuse him, and his just desert model, of being "tough-on-crime". This exchange demonstrates the degree to which Classicists lost faith in sentencing guidelines. What was originally a Classical policy option was now being rejected for fear that it had been co-opted by the right.

The two new elements that entered the debate in the 1980s - prosecutorial discretion and an increased emphasis

⁸⁷Congress, House, Committee of the Judiciary, Subcommittee on Criminal Justice, Federal Criminal Law Revision, Part 2, 97th Cong., 1st and 2d sess., Oct. 28, 29; Nov. 9, 10, 17, 18; Dec. 8, 14 1981; Feb. 5, 25; Mar. 17, 25, 31; Apr. 1, 22, 29; May 5, 12, 13; June 24 and December 9, 1982, 989.

on the political nature of criminal justice policy - forced the Classical witnesses to re-evaluate the utility of strict sentencing guidelines and the abolition of parole. The emergence of these two elements led these Classicists away from strict curtailment of judicial discretion and toward advisory guidelines which allowed much more judicial discretion.

V. DISCUSSION AND ANALYSIS

The first question to be addressed in this analysis is as follows:

What have been the justifications used to support or oppose parole at the federal level in the United States at crucial points in time between 1970 and 1988?

Analyzing samples of testimony and submissions to the hearings on the Parole Commission and Reorganization Act of 1976, the House and Senate criminal code reform bills of the late 1970s, and the Sentencing Reform Act of 1984 provide evidence to answer this question.

Table 9 shows the results of the analyses of these samples.

Table 9.--Results of the Three Sets of Legislative
Committee Hearings on Parole in the United States

	Positive	Classical	Conserv.	Other	Total
<u>PCRA</u> 72-76	6	13	1	1	21
<u>CCRA</u> 77-80	0	11	4	4	19
<u>SRA</u> 80-84	1	6	3	3	13

Parole was justified, at various times, by all three dominant models of criminological thought used in this analysis. The Positivist model was used only to support the retention of parole, the Classical and the Conservative models were used to support parole retention and parole abolition.

The table also provides a response to the second question addressed in this analysis:

How have these justifications changed over time?
It was suggested the shift to the right in the political discourse of the United States would manifest itself in the area of criminal justice policy as an increase, throughout the period examined, in the number of Conservative justifications utilized in the parole debates. This was only partially observed.

During the early 1970s, the debate surrounding the parole process was between the Positivists and the Classicists, with the Classicists being numerically dominant. The numerical dominance of the Classicists was reflected in the legislation. The PCRA was a 'rights' oriented piece of legislation. The PCRA, and the administrative changes undertaken internally by the United States Parole Board before the legislation was enacted, reflected a change in the manner in which parole was viewed by academics, practitioners, non-governmental organization's and politicians. Parole was viewed less as a rehabilitation tool and more as a mechanism to equalize sentences and curb the arbitrariness of the sentencing process.

During the late 1970s, there was a shift in the parameters of the debate. In the late 1970s, the debate surrounding parole was between the Classicists and the Conservatives. This debate, which was numerically dominated by the Classicists, centered on the 'inmates' rights'/'public protection' division. Legislation was not produced by this debate.

The pattern that emerged in the late 1970s continued into the early 1980s. Again, the debate was between the Classicists and the Conservatives, with the Classicists

being dominant numerically. However, the proportion of Conservative witnesses increased as compared to the mid-1970s hearings.

It was suggested that Conservative witnesses would be numerically dominant in the sample drawn from the parole debates in the 1980s. The fact that Classical justifications were dominant during this period does not suggest that the shift to the right in the United States was not felt in the area of criminal justice policy. Rather, the fact that Classicists outnumbered Conservative witnesses may have been because there was a shift to the right in the United States Senate and executive.

The SRA originated in the Republican-dominated Senate. Originally, the SRA was part of a larger criminal code reform package. The Senate held only five days of hearings on the entire criminal code reform package. Only one of those days was reserved for sentencing and related matters during which only two witnesses discussed parole. These witnesses were not randomly selected for inclusion in the sample. Therefore, all the witnesses sampled were from the House hearings.

During the period under examination, the House was controlled by the Democrats. The Senate-backed SRA was

viewed by the House as a 'get-tough-on-crime' package. Unlike hearings on the parole process in the 1970s, the House Subcommittee was engaged in an overtly political struggle with the Senate. Reference to the political nature of the 1980s debate was made in Section IV(ii).

The Chair of the House Subcommittee, Representative Conyers, also recognized the political nature of the debate. Representative Conyers made this point several times throughout the 1980s hearings:

What about the environment in which this subject's being discussed? Originally, many liberals and conservatives were agreeing on the appropriateness of guidelines. Now, from the few states that we've seen operate, you almost always get incremental increase in the number of years imposed for the violation of crimes⁸⁸.

The Senate has already acted upon a rather severe guideline proposal.

There is perhaps a tendency now to support that. We are not really in a totally neutral position here. We already have half the Congress spoken on this....They would abolish parole. So it is not like we are sitting around in a totally neutral position⁸⁹.

Representative Conyers recognized that criminal justice policy had become more politicized in the 1980s than it was during the 1970s. It is likely that, in an attempt to come up with an alternative to the Senate bill, the partisanship of the Chair of the Subcommittee was reflected in the

⁸⁸Congress, Federal Criminal Law Revision, Part 1, 78.

⁸⁹Congress, Federal Sentencing Revision, Part 2, 896.

witnesses given standing before the subcommittee. Ten witnesses in the sample drawn from the House subcommittee hearings offered an opinion on the Senate bill. Nine rejected it. Of those who offered an opinion, only the Assistant Attorney General supported the Senate bill. The selection of witnesses given standing before the Subcommittee suggests that the Subcommittee was attempting to stop passage of the Senate bill.

The extent to which the SRA became overtly politicized and became a vehicle for the New Right, and the extent to which this politicization was recognized by the House Subcommittee can be seen in their handling of the Senate bill. When the Senate passed the SRA and sent it to the House for consideration, the bill was pronounced "dead on arrival" by a member of the House Judiciary Committee.

The executive was clearly annoyed with the House tactics. The following passage was extracted from an address given by President Reagan shortly after the House made its intentions known:

The Senate is completing its work on the most sweeping anticrime bill in more than a decade. Our legislation provides a long-overdue protection to law-abiding Americans and it would help put an end to an era of

coddling criminals. The security of the people should take precedence over partisan politics, so I ask the House to stop dragging its feet and act promptly⁹⁰.

In a news conference a few days later, President Reagan remarked that the "liberal approach to coddling criminals didn't work and never will". President Reagan continued

Nothing in our Constitution gives dangerous criminals the right to prey on innocent, law-abiding Americans.

I would hope members of the House would remember this and bring up our bill for consideration without further delay⁹¹.

President Reagan's concerns about the handling of the Senate bill were echoed by his Attorney General, William French Smith. In an open letter to House majority leader Thomas O'Neill, the Attorney General said the handling of the bill by the House was "a tragedy as far as law enforcement is concerned, a travesty of the democratic process, and a disservice to the American public". The Attorney General continued

Unfortunately the House has been prevented from voting on these reforms, which I believe would receive the bipartisan support of a majority of the House. Instead, it seems that every form of legislative ledgerdom is being used to consider only well-named, but inadequate legislation. The crime problem is too

⁹⁰"President's News Conference on Foreign and Domestic Issues" (extract), New York Times, 23 Feb. 1984, A12.

⁹¹"Reagan Presses House to Pass His Crime Bill", Washington Post, 19 Feb. 1984, A12.

serious to deserve this kind of superficial and partisan treatment⁹².

The comments by President Reagan and his Attorney General are indicative of the overtly political nature of the bill and the adversarial position taken by the House. The overt politicization of the bill is reflected in the partisan selection of witnesses appearing before the House subcommittee responsible for the bill, and by the comments made by the Chair of the Subcommittee and testimony offered by witnesses during hearings on the House version of the sentencing and parole legislation.

The fact that the House eventually passed the SRA does not signal a fundamental shift in the philosophy of members of the House. Rather, the passage of the SRA was the result of purely political maneuvering on the part of Republican members of the House. The passage of the bill was the result of an 'end-run' by Republican Representative Daniel Lundgren of California. Representative Lundgren was a supporter of the Senate bill. He and seven other Republicans on the House Judiciary committee wrote a dissenting opinion to the House version of the sentencing bill. Lundgren and his colleagues felt that the House sentencing bill focussed too much attention on the rights

⁹²"House Leadership Hit by Attorney General for Crime-Bill Stance", Washington Post, 25 Sept. 1985, A3.

of offenders. This concern was motivated by an apprehension that "procedural rights granted to individual offenders, meant to insure their fair treatment, have begun to subordinate society's right to fair treatment"⁹³. The House bill, they claimed, was loaded with "timid half-measures" and "charts...a course for sentencing reform aimed perilously towards the shoals of failure"⁹⁴. The dissenters called the House attempt to combine sentencing guidelines with supervised release a mere "pastiche".

On September 25, 1984, Representative Lundgren introduced a motion to attach the SRA to a 'must pass' appropriations bill needed to maintain operating funds for the fiscal year beginning in October of 1984. The motion was initially defeated by the Democratic-controlled House. The Republican defeat on the vote was viewed by Republican Representatives as a victory. The 1984 general election was only a few months away and some Republicans thought the vote would give them the upper hand on the 'get-tough-on-crime' issue. However, the same motion was re-introduced a few hours later and this time it carried. Thus, the passage of the bill was less the result of a philosophical shift within the House than political manoeuvring on the

⁹³Congress, Sentencing Revision Act of 1984, 252.

⁹⁴Congress, Sentencing Revision Act of 1984, 252.

part of some Republican representatives.

The analysis of the United States sample of documents indicated that the justifications supporting or not supporting parole changed between 1970 and 1984. Throughout this time, there was an increase in the proportion of Conservative justifications utilized in the parole debates but at no point did Conservative justifications dominate the hearings. This does not mean that the 'rise of the right' was not felt in the field of criminal justice policy. The fact that Classical justifications for parole were dominant during the early 1980s was likely a direct result of the right-wing Reagan administration's attempt to force through Congress a piece of legislation that was viewed by the House of Representatives as a 'get-tough-on-crime' measure.

CHAPTER 6
ANALYSIS OF THE PAROLE DEBATES
IN CANADA

I. INTRODUCTION

This chapter provides an analysis of the three sets of documents used to examine the justifications utilized by various sets of actors to support or oppose parole in Canada. The sample of documents were drawn from the following three legislative initiatives:

- (1) Hearings before the Standing Senate Committee on Legal and Constitutional Affairs (Goldenberg Committee)
- (2) Hearings before the House of Commons Sub-Committee on the Penitentiary System in Canada (MacGuigan Committee)
- (3) Hearings before the House of Commons Standing Committee on Legal and Justice Affairs (Daubney Committee)

The sample of documents relating to parole drawn from these three sets of hearings were examined to the justifications used to support or oppose parole. The data was used to assess whether the change in the nature of the debates surrounding parole are more consistent with Ratner and McMullan's assertion that there has been a 'rise of the right' in Canada, or whether they are more consistent with Taylor's assertion that there has not been a 'rise of the right' in Canada.

II. THE GOLDENBERG COMMITTEE

The first documents that were analyzed were taken from the hearings of the Standing Senate Committee on Legal and Constitutional Affairs. Section II(i) provides a description of the political context out of which these hearings were emerged. Section II(ii) describes the analysis of the sample of documents drawn from these hearings.

II(i). The Context

The Standing Senate Committee on Legal and Constitutional Affairs, under the Chair of H. Carl Goldenberg (Goldenberg Committee), began public hearings on December 15, 1971. Twenty-six public hearings were conducted during which 24 witnesses and groups of witnesses provided oral testimony. The Goldenberg Committee published its report, Parole in Canada¹, in 1974.

The original mandate of the Goldenberg Committee was broad:

¹Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs (hereafter referred to as the Goldenberg Committee), Parole in Canada: Report of the Standing Committee on Legal and Constitutional Affairs, (Ottawa: Information Canada, 1974).

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada.

This mandate was broadened in 1973 to include an examination of "all manner of releases from correctional institutions prior to termination of sentence."

The broad mandate reflects the ambivalence of the Senate to the creation of the committee. Senator Laird introduced a motion in the Senate to initiate the inquiry by saying "Many Canadians feel the parole system is too lenient" and

We cannot go along with a system just because it exists. We can no longer be complacent about such things. We have to find out whether the criticism is justified, and whether the present system does or does not work².

Other Senators also felt there was public dissatisfaction with the parole system. Senator Hastings said all segments of the correctional system "are coming under great scrutiny and questioning by society" and there is "great dissatisfaction" with the operation of parole³. Senator Carter said that the "increasing tendency to lawlessness" has resulted in "mounting criticism of our penal system...in the public mind"⁴.

²Canada, Parliament, Senate, Debates, 28th Parl., 3rd sess., vol. II, 1297.

³Senate, Debates, 1355.

⁴Senate, Debates, 1365.

Although many members of the Senate felt that the penitentiary and parole systems were not performing adequately in the eyes of the Canadian public, they were ambivalent towards the creation of the inquiry. Senator MacDonald made the following comment:

I do not hold a strong view on whether or not this motion should be agreed to. Actually, I am mildly in favour of it, because I can see that it would serve a very useful purpose in bringing to light any weaknesses in the system⁵.

Senator Hastings said he was "wondering why parole has been chosen as the subject to be investigated" but he supported the motion "if for no other reason than to provide a platform or a vehicle for all those interested in the corrections process to make representations and suggestions with respect to reforms"⁶.

Senator Carter said that the Oiumet Committee had two years earlier completed an exhaustive inquiry into the penal system and recommendations regarding the parole system were being implemented, therefore, another inquiry was not warranted. Others wanted the inquiry to be expanded to include an examination of the criminal law, and still others wanted the examination to focus exclusively on

⁵Senate, Debates, 1351.

⁶Senate, Debates, 1355.

the penitentiary system. Thus, there did not appear to be a specific aspect or defect in the parole system that gave rise to the inquiry, rather most Senators supported the motion to provide venting for parole practitioners and education to the public.

The Goldenberg Report stated that "the parole system's basic purpose is the protection of all members of society from seriously harmful and dangerous conduct" and that "parole measures must deter, aid in the social reintegration of offenders, and provide for varying degrees of control" over parolees. Additionally, the Goldenberg Committee wrote that the parole system must be premised on "the principle of fairness" even though "few submissions to this Committee made reference to this concept"⁷. The Committee recommended that statutory remission, earned remission and mandatory supervision be abolished and replaced by an entitlement to "minimum parole" for the last third of an offender's sentence. "Discretionary parole" would be available after one third of an offender's sentence (or seven years, whichever is the lesser) and would be available to offenders if their release would not contradict "the principle of protection of society and the concept of parole as one step in the correctional

⁷Goldenberg Committee, Parole in Canada, 37.

process"⁸.

The Goldenberg Committee hearings provided the first set of Canadian data used in this analysis.

II(ii). Analysis of the Sample

A total of 24 witnesses or group witnesses appeared before the Senate Committee on Legal and Constitutional Affairs between December 15, 1971 and June 14, 1973. The sample used in this analysis included 40 percent, or ten of these witnesses. Table 10 shows the breakdown of the sample according to the models used in this analysis:

Table 10.--Results of the Goldenberg Committee Hearings

Positive	Classical	Conserv.	Other	Total
2	0	5	3	10

The existence of parole was not an issue during these hearings; all of the witnesses included in the sample supported parole. The debate during these hearings concerned whether the parole system should be used primarily for the rehabilitation of offenders or for the protection of the public. All of the witnesses in the

⁸Goldenberg Committee, Parole in Canada, 78.

sample agreed that rehabilitation and protection were, and should be, the central goals of the parole system. What separated the witnesses, however, was (1) the relative importance each of these core goals should be accorded, and, (2) their conception of rehabilitation. It was on these two questions that distinctions were drawn between the Positivists and Conservatives.

Conservatives stressed the 'protection' side of the rehabilitation-protection equation. Positivists stressed rehabilitation. For Conservatives, protection was provided by surveillance and control, for Positivists rehabilitation was provided through assistance and counselling.

On the second question, the Conservatives and the Positivists had qualitatively different conceptions of 'rehabilitation'. Both Conservatives and Positivists said that 'rehabilitation' should be a criterion for parole release, however, both had different criteria for what 'rehabilitation' meant. The Conservatives equated 'rehabilitation' with 'risk'; inmates who posed the least risk to society were said to have been rehabilitated sufficiently to return to society. Parole was justified as a control mechanism, an instrument to maintain parolees at a low risk level through supervision and surveillance. Positivists held a much more treatment oriented view of

parole and rehabilitation; parole was justified as a correctional tool to be utilized as a means of delivering services aimed at affecting behavioural change in the parolee. This debate can be seen in the testimony of the witnesses.

Five of the ten witnesses appearing before the Goldenberg Committee were classified as 'Conservative'. All of these witnesses stressed protection of society over rehabilitation of the offender. Three of the six witnesses represented police forces or police officers.

The three witnesses representing police forces and police officers expressed concerns about a generalized sense of disorder in society. They linked this disorder to the growth in crime during the 1960s. For example, Royal Canadian Mounted Police Commissioner Higgit provided the following analysis of the growth of crime in the 1960s:

I feel there is a different attitude towards social responsibility. The conditions in our country have changed. There is more money available. Mobility and communications have changed. People can commit crimes and in less than two hours be literally thousands of miles away. I feel this is part of the problem. The opportunities to commit crimes are greater than they used to be⁹.

Commissioner Higgit went on to say that "when the police

⁹Goldenberg Committee, Proceedings of the Senate Committee on Legal and Constitutional Affairs, 28th Parl., 4th sess., issue 3:12.

force endeavors to enforce our highway laws, when we become more aggressive in our enforcement there is tremendous public reaction"¹⁰. Commissioner Higgit expressed many of the concerns found in Conservative United States academic writing: decreasing social responsibility, increasing affluence, greater demand for individual rights. These, and other factors, have led to an increase in the opportunities for crime and decreased the effectiveness of law enforcement.

The witnesses representing police forces and police officers claimed that parole reduced the deterrent value of a sentence. Mr. Marcil, from the Montreal Policeman's Brotherhood, said

We live in a society, sir, that has no more deterrent for anything. There is nothing. The death penalty is gone. It is very easy, no matter what type of crime he has committed, to get parole. But if a person commits a crime against society and he knows that on his first offence he will serve half his sentence, and if he is a repeater, even though the death penalty is now gone, I think that would be a deterrent¹¹.

In his brief, Mr. Raike, from the Ontario Association of Chiefs of Police, said "present parole practices have diluted, if not abrogated, the effectiveness of other segments of the criminal justice system, particularly the

¹⁰Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 3:12.

¹¹Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 11:15.

courts and law enforcement agencies"¹². Mr Raike continued

present parole practices have demonstrated an unreasonable and inequitable concern for the offender; with the unavoidable effect of producing an accompanying apparent decrease in concern for the rest of society in general, the potential victims of future crimes in particular¹³.

Based on these concerns, Raike concluded that the parole system "undermines the deterrent effect of the total sentence".

These witnesses did not call for the abolition of parole, rather, they claimed that the parole board was taking "too many unnecessary risks and too many unnecessary chances" and that "all opportunities for regaining freedom as quickly as possible" are afforded potentially violent offenders¹⁴. All three witnesses urged the Committee to consider proposing recommendations to provide for more police input into the decision to parole. They also urged the Committee to recommend that parole boards increase the number of field workers in order to provide more control of parolees.

¹²Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 9:23.

¹³Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 9:23.

¹⁴Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 11:7.

The remaining two Conservative witnesses in the sample also justified parole as a protection measure. Professor Grygier, from the University of Ottawa, outlined research he was undertaking on risk prediction and parole decision-making. Professor Grygier endeavoured to determine the degree to which offenders ought to be restrained - not paroled - in order to prevent further crime. He said that parole decisions "are concerned with the danger presented by the offender" where "danger" was measured by the probability of recidivism and the severity of the offence¹⁵. Among the findings presented by Professor Grygier were sixteen "risk predictors". Eleven of the sixteen risk predictors referred to the status of the offender or his/her previous criminal history. For example, among these eleven risk predictors were the following: "no aliases on RCMP record", "not more than two previous convictions", "worked at least three consecutive months at any time", and "over 31 at the time of release". Offenders possessing these attributes were considered by Professor Grygier to be "good risks" for parole. For Professor Grygier, therefore, the parole system should contribute to the protection of society by releasing inmates who pose the least risk to society, where risk is

¹⁵Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 5:7.

not determined by one's participation in treatment or rehabilitative programming, but, primarily, one's status or previous criminal history. Thus, Professor Grygier utilized a Conservative selective incapacitation justification to support the retention of parole.

The remaining Conservative witness in the sample was T.G. Street, the Chair of the National Parole Board. In the testimony of Mr. Street, the rehabilitation-protection dichotomy was most pronounced. Mr. Street opened his remarks by saying "The dual purpose of parole is the protection of society and the rehabilitation of inmates"¹⁶. Throughout his opening remarks, Mr. Street continued to stress the "dual purpose of parole": imprisonment should be used "only if no other form of treatment or control is available"; "...I suppose that there should be more treatment and control in the community..."; inmates should come out under supervision where "they can be helped with their problems and can be controlled so that they cannot easily return to crime"; "the only way the public can be properly protected is by the rehabilitation of inmates coming out of prison, or at least having them under

¹⁶Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:6.

control"¹⁷. During his opening remarks Mr. Street attempted to balance these two "dual purposes", using the language of Conservatism and Positivism and never appearing to favour one at the expense of the other. But Mr. Street also did not indicate what he meant by the terms "rehabilitation" and "protection".

During questioning, Mr. Street's justification for parole emerged: protection of society was paramount and his conception of rehabilitation was fundamentally different from that used by Positivists. A common theme runs through these two statements: homo duplex. Criminals are 'bad' not 'sick'. Rehabilitation, as used by Mr. Street, did not mean to 'cure' in the psychological sense, or as the Chair of the United State Parole Board said, to release inmates at the "psychologically right time". Mr. Street referred to rehabilitation as a "change in attitudes" of the inmate. Mr. Street testified that releasing inmates on parole "is a matter of assessing everything a man does and everything about him in prison, to try to determine whether he seems to have changed his attitude. There is no exact science about it; it is a

¹⁷Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:6.

matter of assessing people"¹⁸. At another point, he said:

We are looking for an indication of a change in attitude. We know what he was like before; we can tell by his previous record what he was like. In all these reports we are looking for an indication of a change of attitude¹⁹.

Releasing inmates when they have "changed their attitudes" and when it is the "psychologically right time" are not identical. Mr. Street speaks of releasing inmates when there is evidence that they have "changed their attitudes" yet, according to Mr. Carbine, the Chief of Case Preparation for the National Parole Board, "the majority of inmates would not come under the purview of a psychiatrist" and do not have a psychiatric or psychological assessment in their file.

What all inmates have in their file, and what appeared to play a considerable role in the decision to parole, was a classification officer's report. The writers of this report endeavoured to "ascertain the essential attitudes of the offender." The classification report was a "social history" of the offender; it included the inmate's family background, the inmate's background, the inmate's criminal career, and any work experience. Further, Mr. Carbine said

¹⁸Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:13.

¹⁹Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:13.

the report "will include the sort of things he has done in the institution, what he has learned, if his attitude has changed, if he has taken a trade...." Additionally, parole decision-makers examine police reports to estimate the gravity of the offence committed. The police report also contains information about "the man's reputation which is an important factor in why the crime was committed"²⁰.

The parole release criteria referred to by Mr. Street and Mr. Carbine focussed on the status of the offender and previous criminal history, and were comparable to the risk predictors proposed by Professor Grygier. Additionally, Mr. Street stressed the necessity for attitudinal change, but in the absence of psychiatric or psychological examinations for the majority of the inmate population, a "change in attitude" was measured by the ability of the inmate to control or suppress 'the bad' while in the institution. No mention was made of specific treatment programs or that an inmate's parole release was contingent upon participation in a specified rehabilitation effort.

Because release on parole was not contingent upon treatment in the Positivist sense, Mr. Street did not use rehabilitation as his primary justification for parole.

²⁰Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 3:6.

When asked whether or not the purpose of parole was to rehabilitate, Mr. Street replied:

Yes it is, but we are also concerned with the protection of the public. If there has to be a choice between the welfare of the individual and the protection of the public, then, in our view, the protection of the public comes first²¹.

Mr. Street stressed the "dual purposes" of rehabilitation and protection in his opening remarks, however, during questioning he clearly came out in favour of the 'protection' side of the equation.

Two slightly different versions of Conservative criminological thought were evident in the Goldenberg Committee hearings. The police contingent emphasized the Conservative deterrent argument: law enforcement and penalties were too lenient to provide effective control and discipline, parole further added to this leniency. Professor Grygier and Mr. Street held a position linked to the Conservative selective incapacitation model of crime control: the decision to parole should be based on risk, where risk is determined by previous criminal history and attributes of the offender - attributes not necessarily linked to the treatment of the offender - such as age, employment prospects and a generalized 'attitudinal change'.

²¹Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 1:14.

There were two Positivists in the sample. These witnesses represented the John Howard Society and the Elizabeth Fry Society; both are non-governmental agencies specializing in providing services to criminal offenders. These witnesses stressed rehabilitation over control and surveillance. Unlike Conservative witnesses who defined rehabilitation as the ability of inmates to control 'the bad', these witnesses held a much more deterministic view of human nature. For these witnesses, rehabilitation meant that parolees must address the antecedent variables contributing to their criminality. Parole, then, was justified by rehabilitation in the Positivistic sense.

Mr. Kirkpatrick, from the John Howard Society, said that the "function of parole is to release a man at the time appropriate to his training program, his attitudes, his hopes, his abilities, his readiness for restoration to the community"²². The language that the representative of the John Howard Society used to justify parole was very similar to Mr. Street's; however, Mr. Kirkpatrick also argued that what the society was striving for was a criminal justice system "where punishment will be of less emphasis, and control will be less emphasized than

²²Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 3:10.

treatment, training and restoration to society"²³. Within such a criminal justice system, parole should be available to inmates as their treatment progresses. Although Mr. Kirkpatrick and Mr. Street shared some of the same vocabulary, the meaning attached to these words differed markedly. The John Howard Society clearly fell within the Positivist category. They wrote in their brief:

In every human being there are problems hidden under layers of protective covering to shield him from his fellows and these layers have to be peeled away to reveal these problems if effective intervention is to come from the parole supervisor. Thus a Pandora's Box of emotional responses to life situations awaits release. If the control function of supervision is emphasized the result is repression of the very problems which are the cause of the reactive behaviour of the parolee. The philosophy of the social work or treatment approach is to release these emotions and to deal with them constructively. Parole supervision must be interpreted primarily as restorative and secondarily as control if lasting values are to be achieved for the community²⁴.

Representatives from the Elizabeth Fry Society also justified parole using the concept of rehabilitation, informed by Positivist assumptions. Ms. Freedman testified that "a great percentage of women in penitentiaries have some sort of addiction problem" which contributed to their criminality and "to get at the basis of why they need dependency on some sort of chemical is an important

²³Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 13:20.

²⁴Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 4th sess., issue 13:29.

matter"²⁵. Ms. Parry said that substance addiction "is a reflection of the basic insecurity" felt by women in conflict with the law. Parole supervision was essential, particularly for women, said Ms. Harlam, because "a woman will more frequently be prepared to talk out her anxieties and fears, and the kinds of pressures which can lead her into further crime"²⁶.

In their brief, the Elizabeth Fry Society justified parole as "an essential step in the integrated rehabilitation programme which should begin as soon as an individual is sentenced to a term of imprisonment"²⁷. Thus, the Society pressed the Committee to eliminate the requirement that parole eligibility be set at one-third of the length of the total sentence in favour of immediate parole eligibility leaving the actual release date to the Parole Board.

The Elizabeth Fry Society and the John Howard Society espoused a version of rehabilitation that was clearly located within the Positivist school: behaviour is

²⁵Goldenberg Committee, Minutes of the Proceedings, 29th Parl., 1st sess., issue 3:13.

²⁶Goldenberg Committee, Minutes of the Proceedings, 29th Parl., 1st sess., issue 3:7.

²⁷Goldenberg Committee, Minutes of the Proceedings, 29th Parl., 1st sess., issue 3:21.

determined by psychological and social forces; humans are malleable; criminal behaviour can be 'cured' if the defective antecedent variable(s) are isolated and treated.

II(iii). Summary

During the Goldenberg Committee hearings there was a common territory between the Conservatives and the Positivists; no Positivist said that every inmate could be rehabilitated and, therefore, every inmate should receive parole, and, no Conservative witness said that every inmate posed a threat to society and, therefore, parole should be abolished. The existence of parole was not an issue. The debate between the Conservatives and the Positivists centred around (1) whether rehabilitation or protection should be the primary justification for parole, and, (2) how 'rehabilitation' was defined. Conservatives favoured the protection side of the rehabilitation-protection equation and defined rehabilitation in terms of risk factors associated with unchangeable attributes of the offenders (for example age, status and previous criminal history). Positivists claimed parole was an effective rehabilitation measure, where rehabilitation was defined in terms of treating the antecedent variables that contributed to the criminality of an offender (for example substance abuse, and/or emotional/psychological difficulties). Thus,

although the witnesses utilized similar language, the meanings attached to the concepts, and the underlying assumptions that informed these meanings, were qualitatively different.

Noticeably absent from the Goldenberg Committee hearings was representation from the Classical school. Classicists dominated the PCRA hearings, but, during the same time period in Canada, the opposite occurred. Inmates' rights were only a minor issue during the Goldenberg Committee hearings.

Those witnesses who did comment on the rights of inmates discounted the idea that due process safeguards should be brought to the parole system. A representative from the Salvation Army said that inmates should have representation during a parole hearing but added that "Of course, it was not our thought that the inmate should have legal representation"²⁸. This witness suggested that a member of the clergy or a friend accompany an inmate to the hearings because the inmate "might have a lot..going for him but might be nervous and reticent to speak" and "just having someone standing along side him to give him support

²⁸Goldenberg Committee, Minutes of the Proceedings, 29th Parl., 1st sess., issue 7:13.

would make all the difference"²⁹. Mr. Street said that a parole decision was not "a legal matter or a judicial decision" therefore there was not "any useful purpose in allowing lawyers to attend parole hearings"³⁰. Mr. Street went on to say

But even though I am very conscious of our very awesome responsibilities and powers in regard to this man's life and liberty, I do not think it involves legal matters. Whether he is released on parole or not is a matter of whether it appears that he is safe to be released. Can he be released? Can he be controlled in the community? Is he a suitable risk, and so on? None of these is a legal matter. We do not allow or encourage lawyers to attend a hearing³¹.

None of the witnesses appearing before the Goldenberg Committee justified parole as a "sentence equalization" measure. None claimed that the parole board was capricious and arbitrary in its decision-making procedure. None offered a new decision-making protocol that afforded inmates due process or provided a check on the powers of the Parole Board.

The Goldenberg Committee results will serve as a point of reference for analyses of the Canadian debates in the late 1970s and early 1980s.

²⁹Goldenberg Committee, Minutes of the Proceedings, 29th Parl., 1st sess., issue 7:13.

³⁰Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:11.

³¹Goldenberg Committee, Minutes of the Proceedings, 28th Parl., 3rd sess., issue 12:34.

III. THE MacGUIGAN SUB-COMMITTEE HEARINGS

The second set of documents that were analyzed were taken from the hearings of the Sub-committee on the Penitentiary System (MacGuigan Sub-committee), of the House of Commons Standing Committee on Legal and Justice Affairs. Section III(i) provides a description of the political context out of which these hearings emerged. Section III(ii) describes the analysis of the sample of documents drawn from these hearings.

III(i). The Context

The mid-1970s was one of the most turbulent periods in the history of the Canadian penitentiary system. Between 1932 and 1974 there were 65 major incidents in federal penitentiaries. In 1975 and 1976 there were 69 major incidents, including 35 hostage takings involving 94 hostages and the death of one penitentiary officer. During one week in the fall of 1976 three major incidents occurred resulting in over \$2 million of damage to three institutions.

The Sub-committee on the Penitentiary System was born out of this period of crisis. On October 21, 1976 a motion

that the House of Commons Standing Committee on Justice and Legal Affairs inquire into the penitentiary system was passed by the House of Commons. The matter was referred to the Sub-committee on the Penitentiary System on October 26, 1976. The Sub-committee's mandate was to examine the system of maximum security institutions maintained by the Canadian Penitentiary Service and "any other matter that the Sub-committee may consider relevant to the proper administration of such institutions...."³². It was through this catch-all phrase that the issue of parole was brought into the discussions of the Sub-committee.

The Sub-committee held 72 formal hearings with 407 witnesses. The Sub-committee also toured 24 institutions and interviewed over 2000 inmates and penitentiary staff. The Sub-committee tabled its report, Report to Parliament by the Sub-committee on the Penitentiary System in Canada³³, on May 30, 1977. Just over two pages of this 202 page report were devoted to the issue parole.

In the preface of its report, the Sub-committee claimed

³²Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, Sub-Committee on the Penitentiary System in Canada (hereafter referred to as the MacGuigan Committee), Report to Parliament by the Sub-Committee on the on the Penitentiary System in Canada, (Ottawa: Minister of Supply and Services, 1977), 6.

³³MacGuigan Committee, Report to Parliament.

that the problems of the Canadian penitentiary system, the problems that surfaced as a series of major incidents in the mid-1970s, could be summed up in a single word: "we believe the word 'discipline' says it all"³⁴. They defined "discipline" in the following manner:

Discipline is essentially an order imposed on behaviour for a purpose. It may be externally imposed, but internally imposed self-discipline is ultimately more important³⁵.

Penitentiary staff need the "discipline of authority" to "faithfully execute the direction received from above". Inmates need the "discipline of behavioural rules" and the "situational discipline of work and humanizing discipline of social life". The general public "accepts the discipline of the law" but must "discipline itself with respect to its expectations of the correctional process"³⁶. Thus, "the restoration of discipline" was the basic objective of the recommendations of the Sub-committee.

The report of the Sub-committee did not challenge the legitimacy of parole. It did not directly confront the purposes of parole and, therefore, did not provide an explicit justification for parole. The closest statement to a justification was when the Sub-committee wrote:

³⁴MacGuigan Committee, Report to Parliament, 1.

³⁵MacGuigan Committee, Report to Parliament, 1.

³⁶MacGuigan Committee, Report to Parliament, 1-2.

Parole is granted by the National Parole Board to those inmates whom it considers fit to serve out the remainder of their sentences under supervision in the community³⁷.

The two pages devoted to parole focussed on the parole process: the parole hearing, the parole decision-making process and parole revocation procedures. On these aspects, the Sub-committee was concerned about the seemingly arbitrary nature of parole decision-making and the lack of procedural safeguards afforded inmates.

The Sub-committee quoted the following passage from Chief Justice Bora Laskin's dissenting decision in Mitchell v. The Queen³⁸:

The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string. What standards the [Parole Act] indicates are, on the Board's contentions, for it to apply according to its appreciation and without accountability to the courts. Its word must be taken that it is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke parole. All this is said to be expressed or found in the Parole Act³⁹.

The Sub-committee wrote that the inability of inmates to question the validity of the information used to arrive at a parole grant decision or revocation decision was "a

³⁷MacGuigan Committee, Report to Parliament, 150.

³⁸124 C.C.C. (2d), 245.

³⁹MacGuigan Committee, Report to Parliament, 150.

violation of the principles of fundamental justice". They accepted that the National Parole Board must have "sufficient discretion" to carry out its duties but they felt "there must, in the interests of simple justice, be some restrictions placed on that discretion"⁴⁰.

Other than suggesting that the National Parole Board make it possible to "minimize the inmates' dissatisfaction by instituting a procedure making the reasons for the Board's decisions publicly available" and providing inmates with written reasons for a parole decision directly to inmates, the Sub-committee offered no concrete recommendations to curb the discretionary powers of the Board. The only official recommendation made by the Sub-committee was that an official review be instituted to examine the parole system.

The Sub-committee's concern for the arbitrary nature of decision-making and the lack of due process afforded inmates does not suggest that they were using Classical justifications for parole. The concern of the Sub-committee was the parole process and not the legitimacy of parole itself. They did not provide a Classical justification for parole. In the United States, parole was

⁴⁰MacGuigan Committee, Report to Parliament, 151.

criticized for the same reasons mentioned by the MacGuigan Sub-committee, but, in the United States these criticisms were supported by a "sentence equalization" justification for parole and/or a justification that recognized parole as a means of reducing the number of offenders in institutions.

The MacGuigan Sub-committee appeared to accept the justification for parole that was evident in the analysis of the Goldenberg Committee hearings: parole as a measure to protect society, and, as a measure to rehabilitate offenders. But this was not the case. The MacGuigan Sub-committee discredited the notion of rehabilitation and dropped it entirely as a purpose of the criminal justice system. The Sub-committee wrote in its report:

We do not recommend imprisonment for the purpose of rehabilitation. Even the concept is objectionable on several grounds. It implies that penal institutions are capable of adjusting an individual as if he were an imperfectly-operating mechanism, and, through acting externally on him, can make him over into a better person. In addition, it is misleading to judges, offers a false sense of security to the public, is the source of confusion to correctional service personnel as to their role, and is a false promise to inmates and their families⁴¹.

In place of the Positivist notion of rehabilitation that was discredited, the Sub-committee offered the following:

We prefer to approach the problem with a new term - 'personal reformation' - which emphasizes the personal

⁴¹MacGuigan Committee, Report to Parliament, 37.

responsibility of the prisoners interested⁴².

What the Sub-committee was left with was a parole system justified by 'protection of society' and the vague notion of 'personal reformation' (unrelated to the Positive concept of rehabilitation). This is quite different from the classical justification of parole as a "sentence equalization" measure or as a mechanism for reducing the number of offenders in institutions.

III(ii). Analysis of the Sample

During the MacGuigan Sub-committee hearings, only eight witnesses talked at length on the purposes and principles of parole. Rather than take a 40 percent random sample, the decision was made to include all eight witness in the sample used in this analysis. Table 11 shows the breakdown of the sample according to the models used in this analysis:

Table 11.--Results of the MacGuigan Sub-committee Hearings

Positive	Classical	Conserv.	Other	Total
1	4	1	2	8

⁴²MacGuigan Committee, Report to Parliament, 37.

3

of/de

3

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

The concern for curbing the arbitrary powers of the National Parole Board and the need to enhance the procedural rights of inmates was addressed by seven of the eight witnesses in the sample, however, only four of these witnesses justified parole using a Classical argument. The Positivist witness was the only witness not to address the issue of procedural rights for inmates and parolees. Alfred Andrew Hayden, of the Inmate Committee of the Regional Reception Centre in Ontario, justified parole as a rehabilitation tool. He said that the ideal preparation for parole would be "when an inmate enters the penitentiary he should be told exactly what he can do to work toward a parole and what is required of him"⁴³. He clearly linked parole to the Positivist notion of rehabilitation:

The question of the standards required for parole, not only for newcomers but for other people, I really look in the area of remedial type of applications. If a chap comes in for a particular offence, what program should he attend? What remedial action he should take, what psychiatric service he should seek, etc., to make a parole more available to him. In other words, to try to cure the problem, or at least get to grips with the problem, rather than just being on your best behaviour and manoeuvring with the system, so to speak⁴⁴.

"[B]eing polite to people and doing your work properly" should have no bearing on a parole decision because "you do not really get to grips with the underlying problem that

⁴³MacGuigan Committee, Minutes of Proceedings and Evidence, 30th Parl., 2nd sess., issue 22:38.

⁴⁴MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 22:38.

caused the offender to come into jail in the first place"⁴⁵. Additionally, this witness argued to remove the minimum date for parole eligibility because he "really [did] not feel as if you can apply for a parole at one-third of your time. I might not be ready until three-quarters of my time. I may never be ready for parole"⁴⁶. For this witness, the criminal justice system must uncover and "cure" the root causes of criminality; parole was a mechanism that facilitated this process. This witness did not address the issue of procedural rights for inmates, nor question the authority of the National Parole Board.

The remaining witnesses in the sample addressed the issue of inmates' rights, however, not all were classified as Classicists. William Outerbridge, the Chair of the National Parole Board, conceded that many of the concerns about the excessive power of the Board were valid:

In principle, [the Chief Justice Bora Laskin's] comments were absolutely correct because we do have more unfettered power than any trial court in the country at the present time. And I am not particularly comfortable with the amount of power that is there⁴⁷.

He said that his organization was trying to produce

⁴⁵MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 22:32.

⁴⁶MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 22:40.

⁴⁷MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:18.

decision-making guidelines that would "reduce the appearance of absolute power to a degree"⁴⁸. He said that there should be an appeal procedure but that the review of parole should be done internally, rather than through the criminal or administrative court system. Finally, Mr. Outerbridge said that he had "no problems" with having lawyers present during hearings "so long as the ground rules are laid out"⁴⁹.

Although Mr. Outerbridge addressed many Classical concerns, he did not justify parole using a Classical argument, instead, he relied on the same Conservative argument used by his predecessor, Mr. T.G. Street, during the Goldenberg Committee hearings. Mr. Outerbridge said

I do not see the sole function of the parole system as being to rehabilitate. I see the issue of deterrence, I see the issue of restraint, and many other factors, surveillance, being a part of parole⁵⁰.

He also said that the protection of society should play a key role in the decision to parole:

If we are talking about a person with a repeated pattern of property offences, sort of an habitual series of offences that are non-violent but at the same time have taken the savings of people or have resulted in fraud, or break and entry, and so on, yes, we are

⁴⁸MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:29.

⁴⁹MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:18.

⁵⁰MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:32.

going to deny parole; because that man, on the basis of his past track record, has suggested that that is going to happen again, and we feel that our responsibility is not only to protect the public from dangerous and violent people but also from non-violent repetitors (sic)⁵¹.

Mr. Outerbridge did not make the link between institutional programming, rehabilitation and parole release:

staff can sometimes get very close to them [inmates] and begin to feel that the crucial determinant of their future behaviour is what they are doing in the institution. Very often this is the most inappropriate place to assess what a man is going to be like on the street. Part of the problem we have in attempting to get all the information available is to try to give a weight that can give us some indication as to whether he will be a danger on the street - which is our major concern⁵².

Mr. Outerbridge justified parole as a protection and deterrence measure. Parole release was not contingent upon an inmate's rehabilitation, nor was it justified as a method of "sentence equalization" even though Mr. Outerbridge sought to bring to the parole process a limited amount of procedural due process safeguards.

The remaining four witnesses used Classical arguments to justify parole. All of these witnesses seriously questioned the unbridled power of the National Parole Board. Mr. Mandel, of the Ontario Law Union, said that to

⁵¹MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:39.

⁵²MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 37:15.

allow the Board to have "unfettered discretion over years of the lives of prisoners or anybody without hearings, and consequently allow this kind of structure without judicial review, is totally unacceptable in a civilized society" and "Canada compares very unfavourably with the United States in this regard"⁵³. Mr. Mandel was concerned that the arbitrary nature of parole adds indeterminacy to the sentences of offenders and that the denial of parole was "an amendment to some extent of the sentence of the court"⁵⁴. This, he said, resulted in inequality of sentences between offenders.

Mr. Symes, of the Inmate Committee of Saskatchewan Penitentiary, voiced concerns similar to Mr. Mandel.

The omnipotent Parole Board. They are into everything but our ablutions....They seem to be sitting up on Mount Olympus - in Ottawa it is now, not in Greece - and are completely out of touch with those of us who are in penitentiaries. When a man goes up for parole...a couple of men run up from Saskatoon and tell you you are going to do two or three more years in the penitentiary. The judge could not do it and yet we will have one or two of their minions, not the Parole Board itself, come up and tell the man 'You are spending more years behind bars. We say so.' This type of thing cannot help but breed tension throughout the penitentiary system, and it does, believe me⁵⁵.

⁵³MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 24:121.

⁵⁴MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 24:120.

⁵⁵MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 18:34.

For Mr. Mandel and Mr. Symes the parole system was fundamentally unjust because it altered the original sentence of the court and, therefore, created sentence inequalities amongst offenders. Both of these witnesses fell short of calling for the abolition of parole, rather they sought guidelines that would further structure the parole decision-making system. Additionally, Mr. Mandel argued that once an inmate has been released on parole, the inmate should have his/ her parole revoked only if he/she committed another criminal offence.

Mr. Coflin, of the John Howard Society of Saskatchewan, said that rehabilitation was a "false promise". At several points in his testimony he stated that he could no longer support the Positivist conception of rehabilitation:

I do not believe in the concept of rehabilitation as it has been employed in our nation and perhaps in the Western World over the last 25 years or over the last 250 years for that matter⁵⁶.

At another point he said:

In a sense I am saying I do not know that prisoners require rehabilitation or are rehabilitative in the first place⁵⁷.

Based on the assumption that rehabilitation was no longer a viable option for the criminal justice system, Mr. Coflin

⁵⁶MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 17:79.

⁵⁷MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 17:87.

could not support the parole system as it was then constituted:

there are serious questions about the validity of the type of release procedures we have in Canada, the principles on which they are based, and the methodology used, particularly with the...discretionary type of decision-making that goes on in the system. The principles involved are, in my opinion, unworkable⁵⁸.

He suggested that criminal justice practitioners "stop pretending that [they] can understand what somebody is going to do in six months" and replace the current parole system with one that "eliminates the discretionary nature of decision-making"⁵⁹.

Ms. Claire Culhane also strongly criticized the powers of the National Parole Board. Arguing from this perspective, Ms. Culhane called for the abolition of the parole system. Ms. Culhane said that the parole system was "an evil in itself" and that it was "beyond control". She said that "Any system that is set up without a basis of appeal needs to be seriously considered"⁶⁰. Like her Classical counterparts in the United States, Ms. Culhane clearly linked the parole system with the sentencing

⁵⁸MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 17:85.

⁵⁹MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 17:86.

⁶⁰MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 28:61.

system:

I think if you eliminate parole, as has been suggested many times, and decrease the sentence or make the sentence dependent upon the person's behaviour, you have a clean issue. When you have parole you have another empire, parole is not accountable to anybody⁶¹.

Ms. Culhane also stated that she supports a "form of sentencing...that could be a cleaner, more precise issue, which would then eliminate the need for parole"⁶². Ms. Culhane urged the Sub-committee to recommend that Canada move towards a 'just desserts' system of sentencing. Under such a system, where penalties are "dependent upon one's behaviour", parole would no longer be necessary.

III(iii). Summary

The matter of inmates' rights was a contested issue during the MacGuigan Sub-committee hearings. Seven of the eight witnesses included in the sample questioned the unbridled and discretionary power of the National Parole Board. The analysis of the sample indicates that Classicists dominated the MacGuigan Sub-committee hearings. Compared to the Goldenberg Committee hearings, there was a shift in the parameters of debate.

⁶¹MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 28:61.

⁶²MacGuigan Committee, Minutes, 30th Parl., 2nd sess., issue 28:62.

IV. THE DAUBNEY COMMITTEE

The third set of documents that were analyzed were taken from the hearings of the House of Commons Standing Committee on Justice and Solicitor General. Section IV(i) provides a description of the political context out of which these hearings emerged. Section IV(ii) describes the analysis of the sample of documents drawn from these hearings.

IV(i). The Context

On November 3, 1987, under the Chair of Member of Parliament David Daubney, the Standing Committee on Justice and Solicitor General (Daubney Committee) was given the mandate to review the sentencing, conditional release and correctional processes in Canada. Under its terms of reference, the Daubney Committee was to consider the following issues: (1) the purposes and principles of sentencing and the related matters of sentencing disparity and maximum and minimum penalties, (2) the objectives of conditional release and its utility within a sentencing system based on sentencing guidelines, and, (3) the delivery of services and correctional programs to inmates by the National Parole Board and the Correctional Service

of Canada.

Two events, in particular, gave rise to the Daubney Committee and helped to focus its work. The first was the inquest into the death of Celia Ruygrok. Ms. Ruygrok, a night supervisor at a community residential centre in Ottawa, was murdered by a resident of the centre. The resident was on parole at the time. The Coroner's Inquest into the death of Ms. Ruygrok proposed several recommendations which were, for the most part, adopted by a Solicitor General Task Force established as a result of the inquest.

The second event that gave rise to the Daubney Committee was the publication of Sentencing Reform: A Canadian Approach, the report of the Canadian Sentencing Commission. The Canadian Sentencing Commission was an independent commission established in May of 1984. The Commission had a mandate to examine and make recommendations concerning criminal sentencing "with respect to specific offences in light of the relative seriousness of these offences in relation to other offences carrying the same penalty, and in relation to other

criminal offences"⁶³. The Commission was also instructed to make recommendations on the utility of adopting sentencing guidelines. The Commission was the first of its kind in Canada to examine specifically the purposes and principles of sentencing.

The work of the Canadian Sentencing Commission framed the substantive issues to be addressed by the Daubney Committee. The Commission proposed that sentencing guidelines be adopted to structure the nature and length of criminal sanctions. In the creation and implementation of these guidelines, priority should be given to the following principle:

The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence⁶⁴.

Within this framework the Commission felt that sentences would be "more predictable, fair and understandable." The Commission also proposed that full parole be abolished, except in the case of life sentences. The Sentencing Commission wrote:

⁶³Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach. The Report of the Canadian Sentencing Commission, (Ottawa: Minister of Supply and Services, 1986), 7.

⁶⁴Canadian Sentencing Commission, Sentencing Reform, xxv.

Given that the severity of the sanction imposed on an offender under the Commission's proposals is to be proportionate to the gravity of the offence and the degree of responsibility of the offender, it would be inconsistent to effectively alter the sentence for different reasons. As well, there are other considerations that make the existence of discretionary early release (parole) problematic⁶⁵.

"Other considerations" included the uncertainty that parole added to the sentencing process, the belief that parole tended to equalize sentences which would no longer be necessary under a proportionate sentencing system, and the belief that parole "serves none of its stated purposes under the current system" and would not serve "any rational purpose" in the context of the Commission's sentencing scheme. The Commission proposed that inmates be eligible for earned remission credits which may reduce up to one-quarter of the custodial portion of a sentence.

The work of the Daubney Committee was set out in the context of the Sentencing Commission's call for the abolition of parole. The Daubney Committee began hearing witnesses on October 27, 1987 and concluded on June 30, 1988. Over 190 witnesses or groups of witnesses appeared before the Committee, and over 200 written submissions were received. In August of 1988 the Daubney Commission

⁶⁵Canadian Sentencing Commission, Sentencing Reform, xxxiii.

published its report, Taking Responsibility⁶⁶. The 300 page report contained 97 recommendations, three recommendations were specifically directed to the conditional release system.

The Daubney Committee recommended that parole be retained. They wrote in their report:

the Committee believes that public protection will be enhanced by preparing inmates for release into society while they are still incarcerated and then providing them with the requisite degree of supervision and assistance once they are released into the community⁶⁷.

The Committee maintained that "risk assessment" must be the "core value" for parole decision-making and that decision-making criteria based on this "core value" must be placed in law. Additionally, the Daubney Committee recommended that offenders convicted of a violent offence should not be eligible for parole until one-half of their sentence of imprisonment has been served.

⁶⁶Canada, Parliament, House of Commons, Standing Committee on Justice and Solicitor General (hereafter referred to as the Daubney Committee), Taking Responsibility, (Ottawa: Minister of Supply and Services, 1988).

⁶⁷Daubney Committee, Taking Responsibility, 187.

IV(ii). Analysis of the Sample

Of the more than 190 witnesses appearing before the Daubney Committee, 37 witnesses testified on parole. Of these, 40% or 15 were included in the sample used in this analysis. Table 12 shows the breakdown of the sample according to the four models used in this analysis:

Table 12.--Results of the Daubney Committee Hearings

Positive	Classical	Conserv.	Other	Total
5	1	5	4	15

The only Classical witness to appear before the Daubney Committee was Ken Pease. Mr. Pease, a British neuropsychiatrist on contract with the Correctional Service of Canada, testified that, in principle, he was in favour of sentencing guidelines, however, he would not recommend that parole be abolished immediately. He said:

Because [sentencing reform] is uncertain, the only high-gearred method of controlling prison population available is executive release, of which the numerically most important is parole. Therefore, to abolish parole, at least in advance of understanding the impact on incarcerated populations of sentencing reform, would be to paint oneself into a corner. It seems to me that a system to protect itself has to retain those methods of control of incarcerated population at least until the effects of sentencing reforms are well known⁶⁸.

⁶⁸Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 37:6.

The position of Mr. Pease was identical to that of the weak-version Classicals in the sample drawn from the criminal code reform hearings in the United States during the late 1970s. In principle, Mr. Pease would favour the abolition of parole, but in the context of a sentencing guideline system that was untried, the prudent course of action would be to retain parole as a check on institution populations.

The bulk of the debate during the Daubney Committee hearings was between the Positivists and the Conservatives. The parameters of debate were similar to those evidenced during the Goldenberg Committee hearings: all of the witnesses felt that parole should be retained, but what separated the witnesses - in particular what separated the Conservatives from the Positivists - was whether parole should be justified primarily as a protection measure or as a rehabilitation measure. In the middle of this debate was the National Parole Board. Conservatives attacked the Board for being too lenient, not providing adequate supervision to parolees and basing release decisions on inadequate information. Positivists, on the other hand, felt the Board was being too restrictive in its application of its releasing authority and was not attuned to the rehabilitation needs of inmates. Like the Goldenberg Committee hearings, the debate was not centred around the

existence of parole - whether or not parole should be retained or abolished - but on the proper role parole should play within a criminal justice system that seeks balance protection and rehabilitation.

All of the Positivist witnesses opted to retain parole. In the protection-rehabilitation debate, the Positivists argued that the rehabilitation of the offender ought to take precedence over the protection of society. They stressed the value of parole as a rehabilitation tool that must be available to an inmate at a particular stage during his/her treatment process. Ken Wager, of the Association des services de réhabilitation sociale du Québec, said that while a judge "is in the best position to determine the sentence... who can predict what will happen to an inmate two, five, or ten years after the sentence?" Mr. Wager went on to say

How can he take into account the profound changes that may occur in an inmate's life after his conviction? How will a judge be able to make the necessary decisions when the moment comes for rehabilitation to take a priority over any punitive considerations?⁶⁹

Ms. Vallée, also of the Association, stressed that it was important for "experts in the social and behavioural problems" to participate in the "individualization of

⁶⁹Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 53:25.

sentences...based on the individual and his behaviour"⁷⁰.

Dr. Justin Ciale, of the Department of Criminology, Ottawa University, had similar concerns:

But at one point some organism must decide whether he is fit to be released again. I do not think you can decide that at the beginning of the process. That is all I am saying: that the issue of proportionality cannot be decided at the beginning, because people change as they go through the system⁷¹.

For Mr. Ciale and Ms. Vallée, sentences should be meted out according to the harm done by the act but the decision to release an inmate from an institution should be based on that inmate's treatment progress. Paul Gendreau of the Canadian Psychiatric Association clearly stated this philosophy:

You can have a just and fair sentencing policy, and yet have a vibrant, forceful rehabilitative agenda after the sentence is passed⁷².

Mr. Gendreau said that some offenders can be "rehabilitated successfully" and it was unfortunate that the Sentencing Commission had to "trash the rehabilitative notion."

Within a sentencing framework that recognized the treatment needs of inmates, the Positivists felt parole was

⁷⁰Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 53:18.

⁷¹Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 33:20.

⁷²Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 32:22.

an essential rehabilitation tool. For example, Ken Wager made the following comments:

Our present parole system is not without flaws. But the system does seem to be valid and effective as a means of promoting the rehabilitation of offenders as members of society⁷³.

Claude Pariseau of the Comité consultif extérieur of Ste-Anne-Des-Plaines said that parole was part of "a continuum of activities enabling the inmate to become aware of his or her own strengths and limitations" and that inmates must "work manually, psychologically, socially, and emotionally" to earn their release and "hope a process of change will result"⁷⁴.

The Positivists recognized that the criminal justice system must protect the public. They claimed that the public is best protected when the treatment needs of offenders are attended to. Thus, in the protection-rehabilitation debate, rehabilitation must take precedence. Conservatives, on the other hand, felt that protection and risk to society must come first.

All of the Conservative witnesses opted to retain parole as a mechanism to protect society. These witnesses

⁷³Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 53:24.

⁷⁴Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 53:49.

felt that the parole board was in the best position to asses which inmates pose the greatest risk to society. High risk inmates, they say, must be incapacitated for the protection of society. Inge Clausen, of Citizens United for Safety and Justice, said that the purposes of sentencing are "punishment and removing people from society so they cannot commit the same crimes against innocent people" and that "if there is no punishment, there is no deterrent"⁷⁵. For Ms. Clausen, parole programs "usurp the court's sentencing authority" and "unduly lessen the effectiveness of the sentence" and, therefore, parole makes "a mockery of the justice system"⁷⁶. But Ms. Clausen did not call for the abolition of parole. She recommended that (1) repeat violent offenders receive indeterminate sentences because "we feel there are some criminals who should never walk our streets again"⁷⁷, (2) the seriousness of an inmate's crime must have a greater bearing on the Board's decision to release an inmate on parole, and, (3) pictures of the scene of a violent crime should be included in an inmates' parole file to provide a "fairer method of review" for violent offenders.

⁷⁵Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 40:44.

⁷⁶Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 40:38.

⁷⁷Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 40:39.

Sharon Rosenfeldt of Mothers Against Abduction and Murder had concerns similar to those of Ms. Clausen. Ms. Rosenfeldt felt that there should be a two-tiered system of justice: one for non-violent offenders and one for violent offenders. She felt that non-violent offenders should be eligible for parole, violent offenders should not be eligible for parole. This two-tiered system of justice would "reduce sentence disparity, establish truth in sentencing and meet the needs of victims and society as a whole"⁷⁸.

The representative from the Criminal Trial Lawyers' Association of Alberta, Mona Duckett, also stressed the importance of using parole as a protection measure. Ms. Duckett made the following observations:

We submit that the major purpose of the correctional system is to protect the public...At least this protection of the public should be effected through supervision and control of the inmate during the period of his reintegration into our community, thereby reducing the risks to the community by this person⁷⁹.

She went on to say:

It is during this potentially dangerous period, when the inmate leaves the institution, that we would submit to you conditional release can be used to protect the

⁷⁸Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 50:66-67.

⁷⁹Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 50:154.

community⁸⁰.

In the United States, lawyers' organizations and rights advocates strongly criticized the overly punitive aspects of parole. These groups claimed that parole encouraged sentence disparity because the decision to release an inmate on parole was related to factors not necessarily related to the original offence. Ms. Duckett and the Criminal Trial Lawyers' Association of Alberta did not hold this view:

Two individuals who receive like terms for like offences may respond very differently to a period of incarceration. It is our submission to you that a prisoner who has demonstrated a positive attitude and taken steps toward reform and rehabilitation, and there is no reason to believe that person would be a danger, could properly be returned to the community to become a productive member sooner than another individual receiving a similar sentence who is not demonstrating those positive changes⁸¹.

Ms. Duckett did insist on certain procedural safeguards - the right to full disclosure of information, public parole hearings, the right to counsel and a more independent review process. She felt, however, that these procedural safeguards could be implemented within a parole system hinged on the protection of society.

The remaining two Conservative witnesses were the Chair

⁸⁰Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 50:154.

⁸¹Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 50:156.

of the National Parole Board, Ole Ingstrup, and the Solicitor General, James Kelleher. Mr. Ingstrup made his first appearance before the Committee on October 27, 1987. Mr. Ingstrup focussed on the role of the conditional release system and the decision-making process used by the Board. On the role of conditional release, Mr. Ingstrup said:

I believe parole and conditional release in one form or another is an important part of any criminal justice system. I believe it is a very primitive way of expressing the philosophy, but I believe society is better protected if the inevitable transition back to society from institutions is managed, is controlled, is supported and is conducted in a way that gives us a possibility to bring people back into the institutions if we see signs of deterioration in their behaviour.

Therefore, conditional release is an important strategy, an important method in our attempts to reduce crime in our society⁸².

Mr. Ingstrup also said:

we are interested in ensuring that these people have gone through the programs that are likely to reduce their risk to society. If I may be cynical for a little while, we are basically not interested in any other programs than those that are likely to reduce the offender's risk to society upon release⁸³.

Parole, then, was a method to reduce crime through the control and supervision of inmates. The protection function Mr. Ingstrup assigned to parole was evident when he discussed decision-making criteria. In his written

⁸²Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 30:23.

⁸³Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 30:39.

submission, Mr. Ingstrup provided his interpretation of the three release criteria contained in Section 10 of the Parole Act (see Chapter 3). Mr. Ingstrup interpreted Section 10 in the following manner:

This reading of the Act leads to risk assessment as the central activity of the Board and reminds the members of the importance of considering whether that risk could be reduced by further incarceration or whether the risk, on the contrary, would be reduced through appropriate parole, likely to facilitate the inmate's reintegration as a law-abiding citizen⁸⁴.

The parole system, according to Mr. Ingstrup, should be used to protect society by selectively releasing and controlling through direct supervision those inmates who pose the least risk to society and detaining those inmates who pose the greatest risk to society. The perceived risk posed by the inmate was the critical issue in the parole decision-making process.

Solicitor General Kelleher concurred with Mr. Ingstrup that "public safety" should be the "driving force in the delivery of conditional release programs"⁸⁵, however, Mr. Kelleher was in a position to be much more persuasive about the issue. The Solicitor General testified before the Daubney Committee on the afternoon June 15, 1988. During

⁸⁴Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 30A:9.

⁸⁵Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:6.

the morning of that day Mr. Kelleher held a news conference to announce Cabinet-approved legislative changes to the Parole Act and the Penitentiary Act. The underlying principle of these reforms, said Mr. Kelleher, was to "state clearly that risk to the public was to be the sole consideration in any conditional release decision"⁸⁶. The Solicitor General proposed that full parole eligibility be moved from one-third to one-half of a sentence for all incarcerated federal offenders, that earned remission be abolished, and that day parole eligibility be limited to six months prior to full parole eligibility. As a result of these changes, the Solicitor General proclaimed that some "high risk inmates may still be retained in custody to serve each and every day of their sentence"⁸⁷.

The purpose of these reforms was twofold. The first was to ensure that "sentences were administered in a way that does not undermine the court"⁸⁸. That is, sentence length and the time inmates actually serve in institutions would be more closely linked. The second purpose of the reforms was "to better differentiate between those inmates

⁸⁶Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:5.

⁸⁷Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:7.

⁸⁸Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:6.

who are and are not a risk to society" and that "risk to society should be the only consideration in deciding whether to grant conditional release to an offender"⁸⁹.

Mr. Kelleher said the overall objective of the reforms was to

redefine parole in such a way that the perspective becomes forward looking with public safety the driving force in the delivery of conditional release programs⁹⁰.

Thus, the reforms that Mr. Kelleher proposed would structurally alter the parole system in Canada in an effort to tighten-up the system and lengthen the time all inmates serve before becoming eligible for any type of conditional release.

IV(iii). Summary

The debate during the Daubney Committee hearings was almost exclusively between the Positivists and the Conservatives. Like the debate during the Goldenberg Committee hearings fifteen years earlier, the existence of parole was not an issue; all of the witnesses in the Daubney Committee sample favoured retaining parole. The debate concerned the proper focus of the parole system.

⁸⁹Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:7.

⁹⁰Daubney Committee, Minutes, 33rd Parl., 2nd sess., issue 62:9.

Conservatives argued that parole should be primarily justified as a protection measure; parole should be used as a mechanism to filter out those inmates least likely to commit a criminal offence. Inmates determined to be a high risk for re-offending should not be granted parole. This justification for parole is based on a selective incapacitation model of corrections.

Positivists justified parole using a rehabilitation or treatment model of corrections. The decision to grant an inmate a parole should be based on the treatment needs of that inmate. The focus of parole should be on the inmates' needs rather than their risk to society.

Compared to the MacGuigan Sub-committee hearings, the analysis of the Daubney Committee hearings indicates that there was a shift away from inmates' rights issues and back to the rehabilitation-protection debate evidenced in the Goldenberg Committee hearings.

V. DISCUSSION AND ANALYSIS

The first question to be addressed in this analysis is as follows:

What have been the justifications used to support or oppose parole at the federal level in Canada at crucial points in time between 1970 and 1988?

Analyzing samples of testimony and submissions drawn from the hearings before the Goldenberg Committee, the MacGuigan Sub-committee and the Daubney Committee provides evidence to answer this question.

Table 13 shows the results of the analyses of these samples.

Table 13.-- Results of the Three Sets of Legislative Committee Hearings on Parole Canada

	Positive	Classical	Conserv.	Other	Total
Goldenberg	2	0	5	3	10
MacGuigan	1	4	1	2	8
Daubney	5	1	5	4	15

Parole has been justified, at various times, by all four of the dominant models of criminological thought used in this analysis. For two of the three sets of hearings the debate was primarily between the Positivists and the Conservatives. The Classicists were numerically dominant in the sample drawn from the MacGuigan Sub-committee hearings. Other than the MacGuigan Sub-committee hearings, the Classical model of criminological thought was used infrequently.

Table 13 also provides a response to the second question addressed in this analysis:

How have these justifications changed over time?

It was suggested that if there was a shift to the right in the political discourse in Canada, this shift would manifest itself in the area of criminal justice policy as an increase, throughout the period examined, in the number of Conservative justifications used to support or oppose parole. This has been only partially observed.

Conservative justifications for parole dominated the early 1970s set of hearings. With the rise of Classical arguments in the mid-1970s, Conservative justifications declined. Conservative justifications did increase in the late 1980s during the Daubney Committee hearings, but Conservatives were not numerically dominant. Therefore, there was an increase in the number of Conservative justifications for parole in the 1980s but Conservatives did not dominate the committee hearings.

When the sample of witnesses drawn from the Goldenberg Committee hearings and the Daubney Committee hearings are compared, there is no evidence to suggest that there was a change in the parameters of the debate over parole. The lack of evidence of a change in the parameters of the parole debate is consistent with Taylor's claim that a shift to the right similar in kind to that witnessed in the United States did not occur in Canada. Two points provide

evidence that indicates that a shift to the right in Canada was not evidenced in the parole debates. First, the debates in the early 1970s were almost identical to the debates in the late 1980s. Second, the debates in the early 1970s and in the late 1980s were debates of 'degree' rather than 'kind'.

On the first point, when the Positivist position during the Goldenberg Committee hearings are compared to the Positivist position during the Daubney Committee hearings, there was not a great deal of movement. During both sets of hearings, Positivists claimed that rehabilitation 'works' and that parole was an effective rehabilitation measure. In the choice between the rehabilitation needs of an inmate and the welfare of society, the rehabilitation needs of the offender should take precedence. Similarly, there was very little movement in the position of the Conservatives. In 1972 the Chair of the NPB said that public protection was the overriding concern of the Board and was the main factor in deciding which inmates should be granted early release. In 1988, the Chair of the NPB said that risk to society was the primary criterion for granting a parole. Thus, there was not a change in the parameters of the parole debate which is consistent with the claim that a shift to the right similar in kind to that witnessed in the United States did not occur in Canada.

A second point that is consistent with Taylor's argument that a shift to the right in Canada was not evident, can be seen by examining the reactions of the participants in the parole debates when attempts were made to alter the traditional Positivist/Conservative parameters of debate. For the most part, the debates between the Positivists and Conservatives were technical in nature, matters of 'degree' rather than 'kind.' That is, there was a common ground between the two positions; parole should be retained because it provides an element of safety to the public. Positivists argued that parole as a rehabilitation method was the best way to achieve this goal, and Conservatives argued that parole as a protection measure was the best method to achieve this goal. Thus, the debate was one of 'degree' - which side of the equation should be emphasized the most? - and not one of 'kind' - should this framework exist at all?

Two attempts were made to alter the parameters of debate. The first, the report of the Canadian Sentencing Commission, was met with indifference, the second, the reform proposals of Solicitor General Kelleher, was met with opposition. The report of the Canadian Sentencing Commission, loosely based on the just desserts philosophy of proportionate sentencing, could have legitimized a

Classical approach to sentencing and parole. Similarly, with modifications to the offence gradation scale, the Sentencing Commission's model could have been used to legitimize a Conservative deterrence/selective incapacitation approach similar to the Conservative argument in the United States in the early 1980s. However, for either of these scenarios to materialize, the de-legitimation of the existing sentencing and parole framework would have been necessary, the debate would have to be pushed beyond the terrain of 'degree' to the terrain of 'kind'. This did not occur. None of the witnesses in the sample drawn from the Daubney Committee hearings supported the Sentencing Commission's report and called for the complete abolition of parole. Only Mr. Pease, offered limited support for the model. The remainder of the witnesses in the sample remained within the traditional framework of discussion.

The second example that attempted to alter the traditional framework of the parole debate was when Solicitor General Kelleher announced his reform proposals. Unlike the Sentencing Commission's proposals which were based on a model that was 'foreign' to the Canadian criminal justice system, Mr. Kelleher's proposals did not introduce a new model. What Mr. Kelleher's proposals did, however, was shift the rehabilitation-protection

framework clearly in favour of protection. These proposals were viewed as a threat to the existing parole framework, and for the first time in the three legislative committee hearings examined in this analysis, the debate became overtly political. On the CBC radio show "Morningside," Christopher Waddell called the proposals "political grandstanding" in response to pressures from the police, victims of crime groups and "right-wing Tory backbenchers." An editorial in the Ottawa Citizen said the move was "election gimmickry, and counter-productive gimmickry at that"⁹¹. Liberal Party justice critic John Nunziata said the Solicitor General was reacting to the "right-wing element of his party" and was motivated by "political considerations"⁹². New Democratic Party Member of Parliament Svend Robinson concluded that Mr. Kelleher was "highjacked by the right-wing of the Tory caucus"⁹³.

The Solicitor General's proposals would have made parole more difficult for inmates to receive but the principles on which they were based - risk assessment and the protection of the public - were clearly not foreign to

⁹¹Ottawa Citizen. "Parole reform is a 'partisan' project", June 15 1988, A8.

⁹²CHEZ FM Radio. "Parole Reforms", June 15 1988.

⁹³Toronto Star. "Parole order to get under Kelleher plan", June 16 1988, A30.

the Canadian debate. But by increasing the period of time inmates must be incarcerated before they become eligible for full parole or day parole, the Solicitor General was clearly favouring the 'protection' side of the debate which was therefore viewed as threatening. In August of 1988, just one month after the Cabinet-approved reforms were proposed, Mr. Kelleher announced that he was no longer considering changing parole eligibility dates. He said that consultation since June had led him to reconsider⁹⁴. In contrast to the public attention his June proposals received, the announcement to withdraw the proposals garnered very little publicity, either pro or con. As an editorial in the Calgary Sun asked

What happened? Did everyone doze off or something? Solicitor General James Kelleher announced a significant softening in the rules on parole. And there wasn't a peep of protest⁹⁵.

Both the recommendations of Solicitor General James Kelleher and the Sentencing Commission's reform proposals were perceived as a break with the tradition of parole in Canada as evidenced in the Goldenberg, MacGuigan and Daubney Committee hearings. The fact that the former was reacted to with hostility and the latter with indifference suggests that, in the area of parole, there was not a break with the

⁹⁴Ottawa Citizen. "Kelleher pulls back on tough new plan governing parole", August 4 1988, 1.

⁹⁵Calgary Sun. "Credibility on Parole", August 15 1988, 10.

past in the 1980s. There was not a rise in the number of Conservative justifications for parole, Conservative justifications existed in the early 1970s, and, in fact, were dominant in the sample drawn from the Goldenberg Committee hearings. Thus, the parameters of debate on parole did not shift in the 1980s; the Conservative justification for parole that seemed to fall from sight in the mid-1970s came back in a form, language and substance that were almost identical to that which existed in the early 1970s.

CHAPTER SEVEN
COMPARISON OF THE PAROLE DEBATES IN
THE UNITED STATES AND CANADA

I. INTRODUCTION

Section II of this chapter provides a comparative analysis of the justifications utilized to support or oppose parole in the United States and Canada between 1970 and 1988. Section III links the examination of the parole documents to the question of the 'rise of the right' in the United States and Canada.

II. COMPARISON OF THE PAROLE DEBATES IN THE UNITED STATES AND CANADA

The first substantive research question addressed in this analysis was as follows:

What have been the philosophical justification used by various sets of actors to support or oppose parole at the federal level in Canada and the United States at crucial points in time between 1970 and 1988?

Table 14 provides the results of the examination of the United States and Canadian data:

Table 14.--Comparison of the Parole Hearings in the
United States and Canada

	Pos.	Class.	Conserv.	Other	Total
Golden. 1972	2 (20.0%)	0 (0.0%)	5 (50.0%)	3 (30.0%)	10 (100%)
<u>PCRA</u> 72-76	6 (28.5%)	13 (61.9%)	1 (4.8%)	1 (4.8%)	21 (100%)
Mac. 1976	1 (12.5%)	4 (50.0%)	1 (12.5%)	2 (25.0%)	8 (100%)
CCRA 77-80	0 (0.0%)	11 (60.0%)	4 (21.0%)	4 (21.0%)	19 (100%)
Daubney 1988	5 (33.3%)	1 (6.7%)	5 (33.3%)	4 (26.7%)	15 (100%)
<u>SRA</u> 80-84	1 (7.7%)	6 (46.2%)	3 (23.0%)	3 (23.1%)	13 (100%)

In both countries, all three models of criminological thought were used to justify parole. In both countries, the Positivist model was used only to support the retention of parole. The Classical and the Conservative models were used to support the retention of parole and its abolition.

The second substantive research question addressed in this analysis was:

How have these justifications changed over time?

Section V of Chapter 5 discussed this question with respect to the United States data, Section V of Chapter 6 discussed

this question with respect to the Canadian data. In the United States the parole debate in the early 1970s was between the Positivists and the Classicists. The parameters of debate shifted in the mid-1970s. During this period the parole debate was between the Classicists and the Conservatives. In the early 1980s, the parameters of the debate remained as they were in the mid-1970s, however, there was an increase in the proportion of Conservative witnesses in the sample. Thus, the parole debates in the United States during the 1970s and early 1980s were characterized by three distinct phases: (1) a 'treatment'/'rights' debate in the early 1970s, (2) a period where 'rights' were clearly the dominant factor in the debate, and, (3) a 'rights'/'punishment' debate in the early 1980s. In the United States, then, the parole debate shifted from a debate within the two liberal criminological models to a debate between the Classicists and the Conservatives. This pattern did not emerge in Canada.

In Canada, Conservative justifications for parole were dominant in the sample drawn from the Goldenberg Committee hearings in the early 1970s; during this period the parole debate was between the Positivists and the Conservatives. During the mid-1970s there was an increase in the number of Classical witnesses. In the 1980s, the parole debate returned to the pattern evidenced in the early 1970s; the

debate during the Daubney Committee hearings was between the Positivists and the Conservatives, each model was represented equally in the sample.

In comparison to the United States, the parole debates in Canada were characterized by their relative continuity. Apart from the MacGuigan Committee hearings during which Classical justifications dominated, the debate was between those who justified parole as a 'treatment' measure and those who justified parole as a 'protection' measure. In terms of the language used and the issues discussed, the Goldenberg hearings and the Daubney Committee hearings were virtually identical. Unlike the United States, the existence of parole was never an issue in Canada. In addition, there was virtually no movement within the positions of the Conservatives or the Positivists. Conservatives in the early 1970s argued that 'public protection' ought to be the primary function of parole; in the early 1980s, Conservatives argued that 'risk to the public' ought to be the overriding concern. Similarly, in the early 1970s and in the early 1980s, Positivists claimed that rehabilitations 'works' and that parole must be used as part of an inmate's treatment programme.

In the United States the parole debates during the 1970s and 1980s were characterized by movement; there were three

distinct phases in the debate. In Canada, the parole debates were characterized by continuity, the debate in the early 1970s was virtually identical to the debate in the early 1980s.

III. THE RISE OF THE RIGHT IN THE UNITED STATES AND CANADA

This section will address the question of the 'rise of the right' in the United States and Canada. The data examined in this analysis provide evidence to support the claim that, in the United States, the 'rise of the right' was manifest in the field of criminal justice policy. The data also provide evidence to support Taylor's claim that, rather than a 'rise of the right', there was not a challenge to the dominant ideological relations in Canada and, in fact, there may have been in Canada "a generalized strengthening of these forms of politics"¹.

III(i). The 'Rise of the Right' in the United States

It was suggested in Chapter 1 that the shift to the right in the United States would be manifest in the area of

¹Ian Taylor, "Theorizing the Crisis," in State Control: Criminal Justice Politics in Canada, eds. R.S. Ratner and John L. McMullan, (Vancouver: University of British Columbia Press, 1987), 199.

criminal justice policy as an increase in the number of Conservative justifications supporting or opposing parole. In Section V of Chapter 5 it was noted that even though Conservatives were not dominant in the hearings leading up to the passage of the Sentencing Reform Act (SRA), the rise of the right in the United States may have been felt in the area of criminal justice policy. It was suggested that the (Democrat-dominated) House of Representatives was attempting to thwart passage of the (Republican-dominated) Senate bill, a bill that was supported by the Reagan executive administration. The House Democrats made this effort because they viewed the bill as a 'get-tough-on-crime' piece of legislation. The fact that the Conservatives did not dominate the early 1980s hearings was likely due to the partisan selection of the Democrat-controlled House of Representatives Subcommittee on Criminal Justice from which all but one of the witnesses were drawn.

The three distinct phases on the parole debate in the United States can be seen as the deconstruction of the liberal hegemony and the reconstruction of a New Right hegemony. The Parole Commission Reorganization Act (PCRA) signified the collapse of the Positivist claim that parole was a rehabilitation measure. The lack of support for the rehabilitation model was evident in the anti-rehabilitation

testimony by most of the witnesses drawn from the PCRA sample. This anti-rehabilitation sentiment was captured in the legislation with its emphasis on procedural safeguards and, more importantly, the section that placed the onus on the parole board to show cause as to why an inmate ought not be paroled. The collapse of the rehabilitation model did not mean that the New Right had uninhibited access to the parole policy making arena. Rather, parole became a contestable issue, an issue that was, as shown in this analysis, fought between the Classicists and the Conservatives.

The debate between the Classicists and the Conservatives in the mid-1970s was, for the most part, a technical debate over the efficacy of sentencing guidelines. With the emergence of the Reagan administration and the New Right in the 1980s, crime became an overtly political issue. The debate surrounding parole was no longer one of what can be done for inmates (the Positivist claim of rehabilitating inmates or the Classical aim of protecting the rights of inmates) but one of what can be done to inmates (the Conservative aim to punish). The passage of the SRA, with the abolition of parole and the move to sentencing guidelines, can be seen as an effort by the Reagan administration to reorient the criminal justice system away from providing assistance to inmates (or at least, as some

Classicists claimed, "doing less harm"²) and towards punishing inmates for the purpose of deterrence and incapacitation. In terms of the models utilized in this analysis, the passage of the SRA can be seen to represent a Conservative crime control strategy as opposed to the more liberal Positivist and Classical models.

The reorientation of the criminal justice system can be seen as one strand in the New Right conservative reconstruction of everyday life. The comments made by Ronald Reagan and his Attorney General, and the other Conservative witnesses appearing before the House of Representatives Subcommittee on Criminal Justice were precisely the types of populist appeals that were being made by members of the New Right commenting on other social policy fields. In terms of parole, the New right attack was waged against the New Class - "liberal lazy judges" and those who "coddle criminals" - and individual offenders. The Reagan administration was straightforward in its appeal to increase the use of the repressive apparatus of the state because, after all, the security of "law-abiding Americans" was at stake. Thus, in the United States, the passage of the SRA can be seen to signify the end result of the (successful) attempt of the New Right to reconstruct

²David Fogel, We are Living Proof: The Justice Model for Corrections, (Anderson Publishing Company, 1975).

the state's declared relationship to civil society in one particular policy field.

III(ii). The 'Rise of the Right' in Canada?

On a theoretical level, the first research question to that was set out in Chapter 1 was as follows:

Is there evidence of a shift to the right in Canada similar in kind to that witnessed in the United States?

In Chapter 1 it was suggested that if there was a 'rise of the right' in Canada one would expect that there would be an increase in the number of Conservative justifications utilized in the parole debates during the 1980s. A rise in the number of Conservative justifications would be consistent with Ratner and McMullan's claim of the emergence of the 'exceptional state' in Canada during the 1980s. The data examined in this analysis are not consistent with Ratner and McMullan's claim. In the sample of documents drawn from legislative committee hearings between 1970 and 1980 there was not a rise in the number of Conservative justifications supporting or opposing parole. Conservative justifications were dominant in the early 1970s sample and the mid-1980s sample. The fact the Conservative justifications were dominant in the Goldenberg Hearings and the Daubney Committee hearings is more consistent with Taylor's claim that there was not a

"serious challenge... to bourgeois politics" in Canada in the 1980s.

The debates between the Positivists and the Conservatives during the Goldenberg and Daubney Committee hearings were virtually identical. The fact that there was very little movement in the parole debate, either between the dominant models of criminological thought or within them, is consistent with Taylor's assertion that there was not "a fundamental and visible reconstruction of the state's declared relationship to civil society". Nor was this reconstruction necessary. Because parole, historically, had been justified, in part, as a protection measure, in the wake of heightened tensions about the economy, it was not necessary for the state to seek an alternate justification for this arm of the state's repressive apparatus.

Ratner and McMullan argued that the emergence of the 'exceptional state' in Canada was not dependent upon "the marshalling and cultivation of popular sentiments" as they claim, and this analysis has shown, was the case in the United States. With the exception of certain high profile incidents, crime has not been viewed as a highly-charged political issue. Rather, Ratner and McMullan argued that the 'exceptional state' in Canada has come about

administratively, by "brazen executive fiat", and through the "magnification of the state". This claim is not consistent with the evidence obtained in this analysis. For example, Solicitor General James Kelleher's parole reform proposals were an attempt to alter the administrative structure of parole in order to increase the portion of a sentence an inmate must serve before becoming eligible for parole, and to deny parole for certain violent offenders. Mr. Kelleher's proposals did not introduce a new parole philosophy; the proposals remained within the traditional rehabilitation/protection parameters, although decidedly skewed in favour of the 'protection' side of the equation. Additionally, Mr. Kelleher's proposals were announced only weeks before the Daubney Committee was due to release its report on the parole and other related matters. It would appear that this is the type of political action that Ratner and McMullan are referring to, however, the negative reaction to, and subsequent withdrawal of Mr. Kelleher's proposals may suggest that there was not the will in Canada to push the parole debate beyond the accustomed parameters. Rather than administratively magnifying the state's power, the withdrawal of the Solicitor General's proposals and the subsequent reiteration of the rehabilitation/protection framework in the Daubney Report published three months later may have served to strengthen bourgeois politics in

Canada.

The second theoretical question set out in Chapter 1 was as follows:

If there is not evidence of a shift to the right in Canada similar in kind to that witnessed in the United States, then "What factors may account for this difference?"

Taylor's explanation as to why the New Right was not manifest in Canada as it was in the United States rests on the assumption that due to Canada's relatively weak national labour movement, Canada has not developed a social democracy similar to some European countries or the New Deal liberal-welfarism of the United States. Within the field of criminal justice policy, evidence consistent with Taylor's argument may be found by comparing the Canadian and American parole hearings of the early 1970s and the political economies of the two countries.

Paternoster and Bynum³ claim that in the United States, the post-war economy created the material base for the rehabilitation model. When the economy was expanding funds were available for the expensive programs pursued by behavioural scientists. When this material base disappeared in the 1970s, they claim, the commitment to

³R. Paternoster and T. Bynum, "The Justice Model as Ideology: A Critical Look at the Impetus for Sentencing Reform," Contemporary Crises, 6 (1982).

rehabilitation quickly disappeared. In terms of this analysis, the decline of the rehabilitation model of corrections is consistent with the decline in the number of Positivist witnesses over the period examined.

Paternoster and Bynum also argued that apart from not being able to provide sufficient resources to sustain the rehabilitative ideal, the fiscal crisis of the 1970s had an additional impact on the criminal justice system. Post-war economics allowed the state to rule with considerable consent. As long as the economy was expanding sufficiently, the potential volatility of the unemployed and welfare recipients could be checked by welfare payments. But when these funds became scarce the possibility existed for widespread social disorder. This potential was compounded by the increase in unemployment created by the crisis itself. Thus, argued Paternoster and Bynum, by the mid-1970s "it became apparent that a prolonged economic crisis could awaken a previously 'bought off' population and produce large scale social and political instability"⁴; an unambiguous example being the prison riots at Attica federal penitentiary. This sentiment was echoed in a 1979 edition of the financial magazine Business Week,

⁴Paternoster and Bynum, "The Justice Model as Ideology", 8.

Battered by inflation, haunted by fears and depression, and confronted with the prospect of vast redistributions of natural resources, the nations of the world are presented with a challenge to preserve economic and social stability greater than any they have faced since the 1930s⁵.

Thus, the combined effect of the economic crisis of the 1970s was to erode the post-war consensus underpinning the criminal justice system and increase the numbers of persons entering the system.

Within this analysis, the collapse of the rehabilitation model and subsequent struggle between the Classicists and the Conservatives was capped by the passage of the SRA, which may be seen as a significant event in the emergence of the 'exceptional state' in the United States. The SRA provides a new ideology for the American criminal justice system, an ideology based on coercion rather than consent.

It has been shown that in Canada a quite different pattern emerged. As Taylor argues, Canada has never been a true social democracy where "the state is directly involved at the behest of labour in the intimate organization of both the economy and civil society". In terms of criminal justice policy, it may be suggested that the "longstanding

⁵Paternoster and Bynum, "The Justice Model as Ideology", 8.

conservative political culture" of Canada is reflected in the criminal justice system by the fact that the rehabilitation model was never fully embraced in Canada. The Canadian Sentencing Commission made the following comments:

The attitudes of criminal justice officials towards rehabilitation were more ambivalent in Canada than elsewhere. Actually, the only important Canadian report that included a clear position in favour of rehabilitation was the 1969 Report of the Canadian Committee on Corrections (the Ouimet Report, p.18):

The Committee sees the overall end of the criminal process as the protection of society and believes that this is best achieved by an attempt to rehabilitate offenders...

Ironically, at that time close to a century of experimentation with rehabilitation programs in other countries had produced disappointing results⁶.

In Canada, rehabilitation was never fully adopted as a guiding philosophy of the correctional system. The analysis of the sample of documents drawn from the Goldenberg hearings, hearings that were dominated by Conservatives, is consistent with this claim.

When the economic crisis in Canada became particularly acute in the 1980s the Canadian state did not have to deconstruct a social democratic hegemony for, as Taylor said, this would "imply that the existing ideological

⁶Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, the Report of the Canadian Sentencing Commission, (Ottawa: Minister of Supply and Services, 1987), 36.

relations [were] indeed 'social democratic'". The different set of relations that existed between the state and civil society in Canada and the United States may account for, on a national level, the failure of a New Right in Canada similar in kind to that witnessed in the United States, and, on a policy level, the fundamentally unchanged justifications supporting parole in Canada.

IV. IMPLICATIONS AND FUTURE RESEARCH

This evidence obtained in this analysis suggested that, in the area of criminal justice policy, there was not a 'rise of the right' in Canada similar in kind to that witnessed in the United States. It was argued that the data are consistent with Taylor's argument rather than Ratner and McMullan's. The data do not, however, provide conclusive evidence that there was not, in Canada, a 'rise of the right' similar in kind to that witnessed in the United States. Although the data are consistent with Taylor's claim, there may be other factors that may account for the pattern observed in the Canadian data.

One factor that may limit this analysis concerns the data selection process. It may be the case that the data reflect a hidden bias. That is, the witnesses given standing before the various committees may have been vetted

such that only particular points of view were addressed. Indeed, in this analysis, it was suggested that the House of Representatives sub-committee hearings on the SRA were loaded with witnesses who opposed the bill. Drache and Cameron make this point regarding royal commissions of inquiry. They said that these commissions are explicitly political instruments; their primary purpose is neither to educate the public nor get advice from technical experts. They continued

Since royal commissions are perceived to operate impartially, they are the ideal instrument of brokerage politics. In contrast to the theoretical purpose of producing a consensus through a formal process of fact-finding, the job of a royal commission is to appear to have produced a consensus⁷.

It may be the case that the witnesses appearing before the various committees in Canada were strategically selected to represent a balanced (although philosophically limited) panel of 'experts'. The witness selection process, therefore, could possibly account for pattern in the Canadian data.

Another factor that limits this analysis is the fact that only one specific policy of specific policy field was selected for analysis. It may be the case that the conservative nature of the Canadian state was exclusive to

⁷Daniel Drache, and D. Cameron, The Other Macdonald Report, (Toronto: James Lorimer & Company), 1985:XI.

the criminal justice field. Indeed, throughout the 1960s and 1970s Canada had a fairly extensive social service network that suggests that the broader social relations in Canada may not have been characterized by the conservatism evident in this analysis. By limiting the scope of this analysis to one specific policy, it could very well be that 'shifts to the right' in other policy fields were missed.

This limitation raises two interesting points of speculation. First, if there was a 'rise of the right' in Canada similar in kind to that witnessed in the United States, then the expectation would be that Canada might experience retrenchments in social policy expenditures similar to those that occurred in the United States in the 1980s. In Chapter 2 it was argued that social welfare cut-backs in the United States were justified by ideological appeals based on the twin themes of morality and permissiveness. The Reagan administration used conservative rhetoric first to question the very existence of social welfare institutions, then justify massive cuts in, or elimination of their expenditures. In Canada, there was an absence of this type of legitimation. Up to 1988, massive cuts in social welfare expenditures did not occur, instead there was a general erosion since the mid-1970s⁸. Myles

⁸Allan Moscovitch, "The Welfare State Since 1975", in Studies in Political Economy, 21(2):77-94.

mid-1970s⁸. Myles stated the Canadian situation quite clearly:

dismantling the welfare state has not occurred: the [fiscal] crisis has been solved through other more traditional means....Dismantling the welfare state may not be necessary but, given the opportunity, conservatives will do it anyway for ideological reasons. I am sure that many conservatives would like to do so, but the evidence so far indicates a limited capacity to accomplish this task -even when they come to office with enormous electoral majorities⁹.

Thus, there appears to be a different pattern to the cuts in social welfare expenditures in Canada than was the case in the United States which may suggest that, in Canada, there was not a 'rise of the right' similar in kind to that which occurred in the United States.

Second, if it is assumed that in all other respects Canada developed social-democratic relations, complete with extensive social welfare commitments by the state, what factors may account for the relative absence of such commitments in the criminal justice policy field? If there were social-democratic commitments in other social policy fields, why was not rehabilitation fully embraced? Why were Conservative notions of incapacitation and deterrence so prominent during the Goldenberg hearings?

⁸Allan Moscovitch, "The Welfare State Since 1975", in Studies in Political Economy, 21(2):77-94.

⁹John Myles. "Decline of Impasse? The Current State of the Welfare State", in Studies in Political Economy, 26(2):77-78.

Another factor that may account for the patterns that emerged in the data from Canada and the United States concerns the overall expansion of social control mechanisms in society. Cohen refers to this as "newtwidening"¹⁰. Although the net-widening thesis may account for the growth of social control mechanisms in society, it fails to account for the justifications for this growth. It may indeed be the case that the Canadian and United States' criminal justice systems are growing at similar rates but, as in terms of parole policy, the rationales used to justify this growth differed markedly in the early and mid-1970s. This would suggest, then, that different processes were underway in each country which begs the question of why?

Even if Taylor's argument is correct, it does not follow that the Canadian state, in the 1980s, was somehow more benevolent, tolerant or lenient than its American counterpart. This analysis remained at the level of policy and did not penetrate the level of practice. By remaining at the level of policy, crucial questions are left unanswered: Was there a difference in Canadian and American parole grant rates? How have these rates changed over the past twenty years? It may, indeed, be the case that Canadian parole grant rates have declined markedly in the

¹⁰Stanley Cohen, Visions of Social Control: Crime, Punishment and Classification, (Cambridge: Polity Press, 1985).

1980s which could possibly support Ratner and McMullan's argument of a bureaucratically contrived 'exceptional state'. On the contrary, parole grant rates in Canada may have been comparatively low throughout the past twenty years, a conjecture that likely possesses some validity given the perseverance of the 'protection' justification for parole. Answers to these and other important questions on the implementation of parole remain speculation as this analysis was focussed exclusively on the policy level.

One of the more interesting conclusions drawn from the data was the degree to which rehabilitation was embraced in each country. What is interesting about this conclusion is that although Canada never fully adopted the rehabilitation model of corrections, in Canada rehabilitation was not jettisoned in the early 1970s as it was in the United States. Thus the relationship between rehabilitation and the Canadian criminal justice system is a double-edged sword: rehabilitation was never fully adopted nor fully discarded. Taylor's analysis of the sets of ideological relations peculiar to the Canadian state in the late 1970s and early 1980s provide assistance in addressing why rehabilitation was not discarded as it was in the United States. Taylor's analysis cannot, however, provide assistance in determining how 'rehabilitation' entered the discourse of criminal justice practitioners. The time

period used in this analysis did not allow for a complete examination of the growth of the rehabilitative ideal in the United States or Canada.

An historical and comparative analysis that extended the time period back to the turn of the twentieth century would prove to be invaluable in uncovering the interests in Canada and the United States that placed rehabilitation on the criminal justice agenda. Was the push to adopt a (limited) rehabilitation-oriented criminal justice system led by correctional establishment or by parties active outside of the correctional bureaucracy? If the push towards rehabilitation was led by outside parties were these parties able to maintain a degree of autonomy or were they co-opted by the correctional establishment?

An analysis that addresses questions such as these would provide insight into the particular state/civil society relationships that exist in Canada. It may be speculated that the correctional establishment of the Canadian state has played an active role in defining and structuring the correctional environment, thus, parties interested in the treatment of offenders have had to work through the correctional bureaucracy, as opposed to with it or along side of it. Such an analysis would provide possibilities as to why rehabilitation was not fully embraced in Canada and,

on a higher level, what factors have prevented the emergence of social democratic relations in Canada. At this point, answers to these questions remain topics of future research.

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